

**AN ANALYSIS OF THE STATUTORY ALTERNATIVE LABOUR DISPUTE  
RESOLUTION MECHANISMS IN SOUTH AFRICA AND ZIMBABWE. A  
COMPARATIVE PERSPECTIVE.**

**BY**

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**Submitted in fulfillment of the requirements for the degree**

**MASTERS IN LAW**

**In the Faculty of law, North West University  
Under the Promotership of Professor P.F. Iya**

**DECLARATION**

I Hungwe Servious declare that this dissertation submitted in fulfillment of the degree of Masters in Law at the North West University is entirely my own work and that it has not been submitted for a degree at this university or any other. All materials used and quoted herein have to the best of my knowledge been properly acknowledged.

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Signature

.....

Date

## **DEDICATION**

This thesis is dedicated to my late sister ELTAH ZVISINEI HUNGWE. She taught me to persevere and prepared me to face challenges with faith and humility. She was a constant source of inspiration to my life. Although she is not here to give me strength and support I always feel her presence.

## **ACKNOWLEDGEMENTS**

I wish to express my sincere gratitude and personal sentiments to several people whose assistance, encouragement, advice and support were essential in the completion of this study. From the formative stages of this thesis, to the final draft, I owe an immense debt of gratitude to my supervisor, Professor P.F Iya. His sound advice and careful guidance were invaluable in the completion of this study. I must also thank Professor Mbafor for awarding me the bursary to complete my studies. I would like to extend my appreciation to the North West University for its generosity in this regard.

My family members, Noel, Norbert, Maurice, Maureen and Lastone, thank you for the support; I would not have made it without you. To my wonderful parents Simon and Ketiwe, you are mentioned last to emphasize the special nature of the tremendous encouragement, patience and support in this academic struggle.

## **ABSTRACT**

The Purpose of the study was to analyze the statutory alternative labour dispute resolution in South Africa and Zimbabwe. Due to the common law heritage of both countries, the thesis's aim was also to compare the statutory alternative labour dispute resolution in the two given countries. Additionally, current problems facing the two dispute resolution systems were also discussed. Under this title, the study calls attention to the problems that affect the institutions that engage in alternative dispute resolution namely the CCMA and the Ministry of Labour in South Africa and Zimbabwe respectively. Furthermore, the dispute resolution procedures were also discussed. In this regard, conciliation, mediation and arbitration were seen as the best tools to settle labour disputes as they avoid negative consequences of excessive judicialization. Apart from outlining the alternative dispute resolution procedures, the researcher also traced the birth of the first regulatory frameworks that sought to regulate labour relations and hence the chapter on historical perspective. In order to hence the discussion, the review of arbitration awards both in South Africa and Zimbabwe also formed part of the thesis.

Based on the above considerations, it is argued that, to the extent that conflicts may have a negative effect on work places, the state cannot remain indifferent and passive. Therefore, it is recommended that adequate criteria be adopted that help to overcome conflict in a positive way, such that labour relations after the conflict will have improved when compared with the situation before the dispute arose. Presently, the implementation of all the labour dispute resolution systems in both South Africa and Zimbabwe is rather deficient. This is a prevailing regional problem and hence it is contended that countries should work together to harness this problem

## LIST OF ABBREVIATIONS

|        |                                                                                                                      |
|--------|----------------------------------------------------------------------------------------------------------------------|
| CCMA   | Commission for Conciliation Mediation and Arbitration                                                                |
| LRA    | South African Labour Relations Act 66 of 1995                                                                        |
| LA     | Zimbabwean Labour Relations Act 16 of 198                                                                            |
| ICA    | Industrial Conciliation Act of 1924                                                                                  |
| ILO    | International Labour Organization                                                                                    |
| UN     | United Nations                                                                                                       |
| DFPRW  | The ILO Declaration of Fundamental Principles and Rights at Work 1998                                                |
| CFPRW  | Convention no87 concerning the Freedom of Association and the Protection of the Right to Organize 1948               |
| CROBC  | Convention no 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively 1949 |
| COSATU | Congress of South African Trade Unions                                                                               |
| ZCTU   | Zimbabwe Congress of Trade Unions                                                                                    |
| CUSA   | Council of Unions of South Africa                                                                                    |
| AZACTU | Azanian CofedARATION of Trade Unions                                                                                 |
| NEDLAC | National Economic Development and Labour Council                                                                     |
| ICA    | Industrial Conciliation Act of 1924                                                                                  |

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background to the Research

The International Labour Organization cannot afford to remain an uncommitted and disintegrated spectator in a world which presents a serious deficit in labour dispute mechanisms. Time has therefore come now to have a broader understanding and application of the conflict resolution mechanisms for economic development. In any society, democratic or otherwise we can conclude that conflict is never eliminated, indeed conflict is acceptable as an inevitable consequence of the functioning of a complex industrial society.<sup>1</sup> Just as disputes are part of our lives in society, they are also a common phenomenon in the modern day industrial society.<sup>2</sup> This is particularly true during the current socio-economic growth taking place in the world over.

Though conflicts are seen as part of our lives, it is important that they should be properly managed and resolved in order to maintain peaceful and harmonious labour relations in our lives.<sup>3</sup> If left unresolved, conflicts have the potential to destroy relations not only at work places but also in our lives and society in general.<sup>4</sup> Given this background, each and every country has now developed policies, legal instruments and guidelines for best

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<sup>1</sup> Conflict is an inherent part of our lives, and it is inescapable and inevitable. It is important to note that conflicts, grievances and disputes are manifestations or parts of a single process that should not be isolated from each other. For that reason and for the purposes of this study, the terms will be used interchangeably.

<sup>2</sup> In the labour field, they are sometimes referred to as industrial disputes, labour dispute or trade disputes as the case may be.

<sup>3</sup> Mark Anstey, "Mediation in South African Industry: Concepts, Skills, Approaches and Problems" *South Africa Journal of Labour Relations* March 1986 vol 10 Number 1 at 31, it is further stated that, if positively resolved, conflicts may have value in stimulating a search for new solutions maintaining group identity.

<sup>4</sup> Carl Mischke, "Reflections upon entering a new system of dispute resolution" in : John Brand [et al *Labour Dispute Resolution* Kenwyn Juta 1997 at 7 where he states that conflict cannot be eradicated but at it needs to be managed instead.

practices in conflict resolution.<sup>5</sup> To this end, developed and particularly developing countries such as South Africa and Zimbabwe have put in place statutory institutions to regulate labour relations.<sup>6</sup> It is therefore contended that in the absence of strong statutory policies and statutory instruments, there is little chance that the core labour rights and obligations will be observed.

The way people or groups of people resolve a conflict is mostly through courts and alternative dispute resolution mechanisms. Alternative dispute resolution refers to the categories of methods which are normally used to resolve conflicts other than through the courts. These conflict processing options include facilitation, conciliation, mediation and arbitration.<sup>7</sup> Though these processing options have been used, they have not been widely accepted due to the general assumption amongst members of the public that litigation through the courts is the only avenue to solve conflicts. The increasing use of alternative dispute resolution mechanisms is therefore a clear reflection that the courts on their own cannot harmoniously solve conflicts in a way that is appreciated by both parties. Recourse to courts is often complicated, time consuming and the proceeding can be very expensive. This is directly in contrast to the alternative dispute resolution mechanisms

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<sup>5</sup> The South African Labour Relations Act 66 of 1995 (Hereinafter referred to as the LRA) encapsulates the new South African government's aims to reconstruct and democratize the society in the labour relations arena; it therefore introduces new institutions with the intention of settling labour disputes, thereby avoiding strikes and militancy in the industrial sector.

<sup>6</sup> Angela Cheater *Industrial Sociology in the First Decade of Zimbabwean Independence* University of Zimbabwe 1992 at 1. Zimbabwe's efforts to establish a dispute resolution system started since settler occupation with the introduction of the Industrial Conciliation Act 26 of 1947.

<sup>7</sup> Though conciliation and mediation are different from each other, for the purposes of this thesis they will be taken as one process. On strict interpretation of their etymological origins a distinction might be drawn between the two terms, conciliation would be limited to encouraging the parties to discuss their differences and to helping them develop their proposed solutions. Mediation, on the other hand would simply imply a stronger form of intervention and a mediator would be allowed to offer to the parties proposals for settlement. The distinction between the two terms has tended to disappear in industrial relations practice and there is no consistency in their use from one country to another. For the sake of clarity, only the word conciliation would be used through out this study on the understanding that it is interchangeable with mediation.

which are flexible in the rules of procedure as parties are allowed to adopt the procedure which meets their needs. More so, the latter mechanisms are speedier than the courts as the parties do not have to wait for the trial time.<sup>8</sup> As a result of this, parties normally prefer to refer conflicts to the relevant institutions applying mechanisms other than the courts.

## 1.2. Identification of Researchable Areas

In its purest form, conciliation involves parties to a dispute resolving their differences and arriving at a mutually acceptable outcome without any intervention from a third party. However, it has now been a common practice for parties to appoint a neutral third party or conciliator to assist in the resolution of the dispute. The researcher seeks to establish whether the conciliators are independent and qualified enough for the job. This is crucial as it determines the efficiency and suitability of the dispute resolution system. In South Africa, the CCMA has been entrusted to administer the dispute resolution system through conciliation and arbitration while the Ministry of Labour in Zimbabwe has been established to carry out the dispute resolution work.<sup>9</sup> On that basis, the thesis discusses the alternative dispute resolution mechanisms as applied by the two respective institutions. The study further evaluates the efficiency of the institutions by analyzing cases that have gone on review and the legislation which regulate the dispute resolution system.<sup>10</sup>

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<sup>8</sup> See Recommendation 92 Voluntary Conciliation and Arbitration Recommendation, 1951 on Labour Disputes and Freedom of Association, which sets out the international norms for the conciliation process

<sup>9</sup> Section 112-126 provides that Includes the governing body, its members and committees, the director, commissioners and anyone contracted to perform work for the CCMA. See Section 112-126 of the Labour Relations Act 66 of 1995.

<sup>10</sup> Carl Mischke "Reflections upon entering a new system of dispute resolution" *Labour Dispute Resolution* 1997 at 20. Efficiency means more than getting there and but it also means getting there as quickly as possible. It also relates to the manner in which the dispute resolution system, once involved in the matter, then proceeds to deal with a dispute. Efficiency is the holy grail of dispute resolution; disputes should ideally be resolved as quickly and informally as possible with little or no procedural technicalities.

Mediation is also an extension of the conciliation process; conciliators are encouraged to use mediation in the conciliation process.<sup>11</sup> The mediator endeavors through a process of persuasion and discussion to bring the parties to find means of resolving their disputes.<sup>12</sup> In this research, the advantages and disadvantages of mediation will be under scrutiny so as to find out if the procedure has a faster settlement rate. The mediator has no decision making power, the power remains with the parties, this however does not mean that the mediator will not have a personal opinion regarding the outcome of the dispute.<sup>13</sup> The fact that the mediator has absolutely no power to oblige either party to accept an outcome of the mediation process also prompted the researcher to investigate if this would negatively affect the mediation process and whether at the end of the process a resolution of the dispute will be achieved. A matter of concern here is the status of the mediator's responsibility for the outcome of mediation. In this respect, the role of the Commission for Conciliation, Mediation and Arbitration in the mediation/conciliation process will be analyzed so also will be the relevant provisions of the Zimbabwean statutes regulating the process of dispute resolution.

Thirdly, arbitration is yet another means of resolving labour disputes.<sup>14</sup> It is a process used to settle disputes in a non-judicial setting. It also involves the active intervention of

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<sup>11</sup> Most countries distinguish between mediation and conciliation and others have overlapping systems for mediation and conciliation e.g. The Zimbabwean Labour Relations Act 16 of 1985 does not distinguish between conciliation and mediation. Although these two mechanisms are often used interchangeably they are in principle distinct. Section 135(3) of the South African Labour Relations Act 66 of 1995 states that the commissioner must determine a process to attempt to resolve the dispute which may include (a) mediating the dispute (b) conducting a fact finding process (c) making recommendations to the parties.

<sup>12</sup> A mediator is a neutral third party who assists parties in achieving a mutually agreeable outcome.

<sup>13</sup> D du Toit [*et. al*] *Labour Relations Law a Comprehensive Guide* Butterworth 2000 at 555.

<sup>14</sup> The word "arbitration" is derived from the Latin word *arbitrari*, meaning to give judgement or to make a decision. It will be seen that this method of settling disputes is similar to adjudication or judicial settlement. However, whereas in the latter method the judge is a state appointed public official, in the original conception of arbitration the arbitrator was selected by the parties to the dispute.

a neutral third person but differs from mediation and conciliation in that the arbitrator is empowered to make final decisions which the parties accept as binding.<sup>15</sup> Though arbitration can be classified into private and statutory arbitration, this study will focus on statutory arbitration only.<sup>16</sup> Where there is a voluntary agreement for arbitration, it means that two parties to a contract agree to refer existing or future disputes to a third party, whether named or nominated by some professional body as an arbitrator, this is in contrast with statutory arbitration which is governed by statutory instruments created by an Act of parliament.<sup>17</sup>

The purpose of this study is to provide the reader with an overview of the substantive stages involved in the statutory arbitration process. More so, arbitration has been widely used in South Africa and Zimbabwe in solving labour disputes. Despite this, some lawyers have been justifiably alarmed by the high costs and delays associated with arbitration hearings, particularly in the construction industry.<sup>18</sup> Therefore, one of the thesis's aim is to inquire whether the dispute resolution institutions are credible enough to provide a proactive and expeditious dispute resolution system available to all workers.

### **1.3 Statement of Problem and Substantiation**

#### **1.3.1 Efficiency and Weaknesses of ADR**

Given the complex dynamics and challenges discussed above, research and work remain to be done to ensure effective labour dispute resolution, without which economic and social progress is unlikely to be sustainable. Africa needs a new culture of industrial

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<sup>15</sup> Robert Venter *Labour Relations in South Africa* Oxford, Cape Town University 2003 at 16.

<sup>16</sup> See William Gill *The Law of Arbitration* London: Sweet & Maxwell 1975 at 18-23 where he argues that in private arbitration, the arbitration agreement plays a pivotal role as it embodies a description of the disputes to be referred to arbitration while statutory arbitration includes agreements held under statutes or by authority of an Act of parliament.

<sup>17</sup> Casper Lotter and Kenny Mosime *Arbitration at work* Cape Town Juta 1993 at 8-13, it is suggested that arbitration is a form of adjudication and is normally used to resolve dismissal disputes.

<sup>18</sup> David Butler, "A new domestic Arbitration Act of South Africa" *Stellenbosch Law Review* volume 9 no 3 (1998) 256.

relations and credible mechanisms to prevent and resolve disputes so that its road to labour justice may be realized. The issues and concerns that are discussed in the foregoing section demonstrate that there is an urgent need for an effective dispute resolution system in South Africa and Zimbabwe. On these grounds, the researcher intends to address some of the key issues and challenges facing alternative dispute resolution mechanisms.

As mentioned above, the researcher will critically analyze the statutory dispute resolution system in South Africa and Zimbabwe and investigate the problematic areas and in particular the efficiency and weaknesses of the systems in the two countries.<sup>19</sup> The current dispute resolution systems in the two countries constitute a bureaucracy with a rigid hierarchy, slow to respond to both the crises and changes in the labour environment all of which should be reviewed and transformed. On that basis, one can argue that there is really need for this kind of research.

### 1.3.2. Powers and Independence of the Arbitral tribunals

It is widely accepted that the dispute resolution system attempts to strike a healthy balance between their independence and the jurisdiction of the national courts of the country, but at the same time arbitrators are aware of the limitation of arbitral tribunals, more particularly in that they have no powers to enforce their awards. Wider powers for arbitrators in domestic arbitrations than those available under the present Labour Relations Act<sup>20</sup> have been called for by the Association of Arbitrators.<sup>21</sup> A similar

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<sup>19</sup> Workers in Zimbabwe view strikes as an effective method of resolving disputes, judging by the preponderance of strikes in most sectors. The recently long and protracted strike by junior doctors and teachers at the beginning of 2008 is a clear manifestation of the inefficiency of the dispute resolution system.

<sup>20</sup> Section 142 of the South African Labour Relation Act sets out the powers of CCMA commissioners.

<sup>21</sup> See A commentary on the proposed amendments to the Arbitration Act 42 of 1965. Some of the powers advocated for include, power to call witness and power to order security of costs.

amendment has also been effected in Zimbabwe.<sup>22</sup> This research will focus on the enforcement of awards by the national courts and how it affects the independence of the alternative dispute resolution institutions. What must be appreciated is that on one hand dispute resolution mechanisms cannot function effectively without the assistance of the courts. Therefore, court assistance may be required for the enforcement of arbitration agreements, but the danger exists in that the powers of the court relating to intervention in the process can be abused as a tactic ploy to gain time and delays.<sup>23</sup> This research therefore seeks to ensure that a healthy partnership exists between the traditional courts and the arbitral tribunal and this partnership will promote speed, cost efficiency and due process in dispute resolution.<sup>24</sup>

### 1.3.3. Funding

Most commissions, councils and bodies are primarily funded by the state and recent statistics have shown that lack of funding hinders the proper functioning of these bodies.<sup>25</sup> This is particularly true in Zimbabwe where the country is going through an economic depression and cannot afford to fund the dispute resolution institutions adequately. This was acknowledged by the Ministry of Labour (Bulawayo office) which is operating without adequate stationery; so also is the position with the Labour Court.<sup>26</sup> In the case of South Africa, it has been proved that budgetary and staff constraints have delayed the processing of cases.<sup>27</sup> This was also acknowledged by the director of the

<sup>22</sup> Section 7 of the Zimbabwean Arbitration Act 6 of 1996 gives more authority and powers to arbitrators to preside over cases.

<sup>23</sup> South African Law Commission, Arbitration Working Paper 59 of 1995.

<sup>24</sup> Arbitral tribunal refers to a sole arbitrator or a panel of arbitrators.

<sup>25</sup> Though it is extremely difficult to determine the extreme relative costs to the dispute resolution bodies, it is generally accepted that most African governments are reluctant to give these bodies sufficient resources, this hinders the whole process. In its 2005/2006 annual report, the CCMA acknowledged that the R208 576 566 of the government funding received in three batches was insufficient for an expenditure that increases at a rate of more than 100 percent per annum. See *The CCMA: celebrating a decade of troubled shooting* at [www.infor.gov.za/speeches](http://www.infor.gov.za/speeches) 2006/06.

<sup>26</sup> This assertion was made by the Provincial head of the Bulawayo province. [www.herald.co.zw](http://www.herald.co.zw)

<sup>27</sup> Arnold Zack "Using mediation to resolve statutory employment disputes" *South African journal of Labour Relations* volume 26 2002.

CCMA while presenting the CCMA's budget to the parliamentary committee.<sup>28</sup> In her speech, she acknowledged that the CCMA is currently facing challenges of maximizing its resources to cater for the escalating need for its services due to lack of funding. The present researcher will therefore investigate the impact of insufficient funding in the dispute resolution system and provide some guidance as to the criteria which can be used to determine the extent of the funding. Ideally, these bodies should be well funded because they are the hall mark of the whole system.

#### 1.3.4. Qualification of Commissioners and Personnel<sup>29</sup>

The South African Labour Relations Act states the qualifications required for one to be a commissioner and that commissioners should be adequately qualified. On the other hand, the Zimbabwean Labour Act<sup>30</sup> only describes the person as a labour officer without specifically stating the qualification.<sup>31</sup> This scenario has led to many labour officers being incompetent and unable to settle cases within the prescribed time. This is a double peril for the employee because if the employer has a competent legal representative and has knowledge of the law he/she will overpower the other party and the commissioners\ himself due to the incompetence.<sup>32</sup> In light of this, the researcher seeks to come up with suggestions and stringent criteria for the selection of labour officers in Zimbabwe so that employees can have confidence in the dispute resolution system as it has become more complex.<sup>33</sup> It goes without saying that the dispute resolvers should be well-qualified and should have a sound knowledge of a legal framework within which they are functioning.

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<sup>28</sup> Ms Nerine Kahn made the presentation on the 14<sup>th</sup> of March 2006. [www.ccma.org.za](http://www.ccma.org.za)

<sup>29</sup> John Brand and Felicity Steadman, "Dispute Resolution Bodies" *Labour Dispute Resolution* Kenwyn Juta (1997) at 65.

<sup>30</sup> Section 89 of the Zimbabwean Labour Relations Act 16 of 1985.

<sup>31</sup> In terms of section 86(1) of the Zimbabwean Labour Relations Act, assessors of the Labour Court are only required to have knowledge and experience in labour relations.

<sup>32</sup> [www.busrep.co.za](http://www.busrep.co.za):26 July 2005.

<sup>33</sup> The employment relationship has become complex and intricate for an ordinary employee to understand as it now involves different stakeholders including employees, management, unions and other specialist

#### 1.3.5 Consideration of Informality in the system.

Ideally, the system should not be complicated and intricate. The South African and Zimbabwean systems are complicated and protracted.<sup>34</sup> The statutory dispute settlement procedure should not be too complicated for an ordinary worker to understand. Though the Zimbabwean system has been amended, it has still not done enough to reduce the number of stages involved in each mechanism.<sup>35</sup> The processes are becoming more and more adversarial; the current dispute resolution in South Africa places so much emphasis on procedural fairness.<sup>36</sup> The researcher therefore seeks to come up with a less intricate procedure in the labour dispute resolution.

#### 1.3.6. Time Limits.

Time limits set for handling cases at all stages should be revised in order to quicken the resolution of disputes.<sup>37</sup> It is quite appreciable that efforts have been made to cut the dispute resolution process in Zimbabwe but the time frame has not been applied effectively. In South Africa, the CCMA has managed to handle a million cases with approximately 500 cases handled on daily bases.<sup>38</sup> However, the national settlement rate is currently at 60 percent for the year 2005 to 2006 and this has been attributed to the time limits set for the settlement of the disputes in each mechanism. In light of this, time limits in conciliation, mediation, and arbitration need to be examined in order to come up with some suggestions which encourage a faster settlement rate of cases.

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<sup>34</sup> Section 93(1) of the Zimbabwe Labour Relations Act 16 of 1985 empowers the labour officer to conciliate disputes within thirty days and this results in the piling of cases as one case can take the whole month to be resolved. Such time limits need to be revisited.

<sup>35</sup> These changes are incorporated in the amendment to the South African Labour Relations Act as revised in 1996, See section 93 (3) and (3) of the New Labour Relations Act 16 of 1985.

<sup>36</sup> Hanneli Bendeman 'An analysis of the problems of the labour Dispute resolution system in South Africa' (2003) *South African Journal of Labour Relations* at 81, In this paper it is further contended that things have become totally rights oriented and parties are focusing on the rights rather than looking for solutions.

<sup>37</sup> Zimbabwe Congress of Trade Union paper, "Labour Market and Economic Development" 1998-2000.

<sup>38</sup> [www.law-online.co.za](http://www.law-online.co.za) (Accessed on 14<sup>th</sup> of October 2006).

#### **1.4 Aims and objectives of the research**

Given the above complexities and specific emerging challenges for a research in the area of labour dispute resolution, it was important to set out the aims and objectives of the present research.

##### **1.4.1 General Aims**

The primary aim of this research was to review the law and practice of statutory labour dispute resolution and establish the nature and impact of the application of international and national standards, policies, laws and good practice especially in the two target countries. Following from this, the research aimed at giving a critical comparative analysis of the dispute resolution system in South Africa and Zimbabwe with special reference to conciliation; mediation and arbitration process and explore lessons which can be learnt from each other's system. Research about dispute resolution has been done in general but here the researcher seeks to explore the common aspects and indeed the differences between South Africa and Zimbabwe and compare the two systems and come up with one common denominator for the two countries. The researcher also sought to come up with a broader, more concrete conception and more speedily attainable dispute resolution system. More so, the thesis's goal was also to explore and assess the need for an effective dispute resolution system for the two neighboring countries. All countries, developed and developing need an equitable and efficient dispute settlement system that has the confidence of all parties. Once there is an effective dispute resolution system in place, stakeholders and investors will be eager to invest in the country due to peaceful and strike free environment in the labour relations system and this will contribute to economic growth.

##### **1.4.2 Specific Objectives**

The research focused specifically on the following objectives which assisted the researcher in formulating recommendations at the end of the thesis:

- To critically analyze procedures to be followed in resolving labour law disputes through the three mechanisms in question in South Africa and Zimbabwe.
- Expose the weakness of the two systems in the two countries
- Propose ways of strengthening and reforming dispute resolution procedures in the two countries
- Synthesize the wide –ranging literature in the field of dispute resolution and come up with my perspective
- Compare the two systems and coming up with lessons which the two countries can learn from each other
- Dissemination of information by publishing research output
- Promote more debates and encouraging additional research in the area of labour dispute resolution

The above objectives are based on the analysis of the general issues discussed in paragraph 1.2. and will also guide the researcher in identifying the research methods which shall be applied in the study as they are discussed in the subsequent discussion.

## **1.5 Research Methodology**

### **1.5.1 Scope of the research**

In conducting this research there are several methods and techniques that were employed to guide the researcher in collecting, analyzing and interpreting information and observed facts. Whilst it would have been ideal for the researcher to analyze dispute resolution at a global scale, the research has been limited to South Africa and Zimbabwe as a result of the common labour history which the two countries share. Due to the fact that both South Africa and Zimbabwe are former British colonies,

they both formulate their labour law from English law and Roman Dutch Law since it was the law used during the colonial period and is still applicable today.<sup>39</sup> Furthermore, the two neighboring countries share the same labour market as they are involved in the exchange of labour. There are quite a number of Zimbabweans working in South Africa, so also are South Africans working in Zimbabwe. As a result of this, workers from both countries need to be informed of the dispute resolution mechanisms in place before they migrate. Further, the researcher has first hand experience in the two countries as he is a citizen of Zimbabwe currently residing in South Africa. This gives him the background knowledge of the labour laws in both countries which ultimately give him the privilege to access information relevant to the research especially for the proposed comparative study.

#### 1.5.2 General Approach to Sources

In essence the study was mainly literature based coupled with historical method and comparative analysis. This means that the researcher used the library as the main source of information to access text books, reports, journals; articles and other thesis. However, though previous research on this topic has been done as revealed by the subsequent literature review, most writers/authors did not provide progressive recommendations as they did not employ a comparative study of the two countries in question. It is against this background that the present researcher seeks to employ qualitative method in the research. It would have been more appropriate to use some quantitative methods as well as making independent observations in the field. However, this is beyond the financial means and scope of the study. The arguments that are advanced in this thesis are based on recent information and data that has been collected from the field studies conducted by reputable organizations. The approach in this thesis is therefore limited to analytical and some element of normative study of the existing regulatory frameworks and mechanisms

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<sup>39</sup> Roman Dutch Law is prescribed by the Constitution of Zimbabwe but is currently being ousted by various statutes through the Supreme Court. In the field of criminal law, the new Criminal code which came into operation in July 2006 stipulates that Roman Dutch shall no longer apply within Zimbabwe. See section 3 of the Criminal code which purports to wholly do away with Roman Dutch Law. This clearly shows that Zimbabwean law like the South African law also formulated on Roman Dutch law. In the South African context, this was seen in 1652 with the coming of colonisation.

in South Africa and Zimbabwe. Throughout this thesis attention has been given to the following sources as they are mentioned below

Also to be explored will be the following legal instruments which will also form a substantial part of the sources to be used in this study. Different statutes regulating employment relationships from the two countries will be given special focus. Apart from the legislations, the constitutions, Conventions, Books, Reports and Journals Bulletins and judicial decisions will also play a significant role in the research

## **1.6 Hypothesis**

### **1.6.1 Assumptions underlying the study**

From the foregoing issues, the following assumptions have guided the researcher in proving and achieving the objectives of the research:

- Disputes at work places as in all aspects of life are inevitable.
- Dispute resolution process is the life blood of every employment relationship
- South Africa and Zimbabwe have got a lot to share when it comes to labour dispute resolution mechanisms because of the common factors already discussed.
- There are important parallels between South Africa and Zimbabwe in terms of dispute resolution
- The dispute resolution mechanisms in both Zimbabwe and South Africa have made little headway in reducing adversarialism, strikes and lock outs in labour relations
- The public and majority of people involved in an employment relationship do not understand the dispute resolution process
- The national courts and dispute resolution bodies do not have the same jurisdiction

The relevance of the above assumptions to the overall discussion relates to the need to have a hypothesis upon which to base the importance of the study and provide an overall rationale for the subsequent discussions. The hypothesis gives the researcher

the structure and direction of the research as it enumerates the tentative statements that the researcher seeks either to acknowledge or reject through this present research.

#### 1.6.2 Justification of the study

The subsequent discussion seeks to indicate and defend why it is necessary to undertake this research and the benefits that will flow from the research and to whom it will be beneficial. The present researcher will also highlight the relevance of his study in terms of academic contribution and practical use that might be made of the findings at the end of the research. It is the desire and wish of the researcher that his findings would reflect knowledge, creation and socio economic value to the community.

Consistent with calls in Africa to review employment issues, the dispute resolution systems of both South Africa and Zimbabwe have been under great scrutiny and criticism from the international community. Dispute resolution has become very complicated and difficult for an ordinary man in an employment relationship to understand. Therefore, this study is of paramount importance as it seeks to promote public debates on the dispute resolution systems in both countries, this will in turn help the parties to choose the right process and right forum in terms of the act.

This study seeks to benefit everyone involved in the employment relationship, from the employee, employers to the stake holders. The research is intended particularly for arbitrators, lawyers and other professional advisers to parties in the dispute resolution process as well as students in the field of labour law and also those without formal legal background will stand to benefit from the research. The topic chosen for this study is thus

#### 1.7. Literature Review

Research in this area of study has been done through various literature relating to labour dispute resolution. The present research seeks to build upon it especially on the deficient areas that have not been exhausted. Though much has been written in the field of labour dispute resolution, the present analysis differs from the previous literature in various ways though it fits in the greater scheme of research in labour law. The subsequent

discussion seeks to clarify the relationship between the present research and the previous research. This is going to be done through analyzing writings on labour law.

Conciliation is described by Robert Venter as the first process utilized in dispute resolution.<sup>40</sup> The primary objective of conciliation is consensus seeking through a neutral third party who is appointed by the parties to assist in the resolution of the dispute. Despite the wide spread of conciliation in all aspects of life, some parties usually agree to circumvent conciliation and go directly to arbitration.<sup>41</sup> The present researcher seeks to provide a step by step process in the conciliation process and explain the relevant importance of each stage. Robert Venture's observation of conciliation lacks adequate illustration of the dispute resolution system and more particularly in that it does not incorporate adequate literature on this subject from a legal point of view. A lot of books, thesis and articles have been written from the labour law dimension. The present research therefore fits into Robert Venter book by providing flow diagrams which clearly explain each stage in the conciliation and arbitration process. Though much has been written about conciliation, authors often run away from the reality that the procedure is undermined and hence the researcher seeks to explore the reasons behind this.

The conciliation process is usually facilitated by different governmental and institutional bodies. Countries have put in place agencies or bodies to facilitate the conciliation of labour disputes. In South Africa, the CCMA has been entrusted with the task of facilitating conciliation so also is the Ministry of Labour in Zimbabwe.<sup>42</sup> John Grogan discussed the establishment of the CCMA,<sup>43</sup> so also did Munyaradzi Gwisai with the Ministry of Labour.<sup>44</sup> The current researcher intends to analyze the composition of these governmental institutions and how they are administered. This is going to be made

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<sup>40</sup> Op. cit note 15.

<sup>41</sup> Op cit note 4 at 16.

<sup>42</sup> Workers have generally been able to have their disputes conciliated with weeks of referral. The Period between conciliation referral to settlement is on average 30 days annually.

<sup>43</sup> John Grogan *Work Place Law Cape Town Juta 2001* at 301.

<sup>44</sup> Munyaradzi Gwisai *Labour and employment Law in Zimbabwe University of Zimbabwe 2006* at 269.

possible by discussing the establishment of both the CCMA and the Ministry of Labour in Zimbabwe. After looking at the composition, the enquiry will also look at the qualification of the personnel in these government institutions, an area which has been exhausted. This also fits in Bandeman's thesis where he discussed the establishment of the CCMA but in this case the researcher takes it further by comparing it side by side with Zimbabwean system.<sup>45</sup>

Conciliation is used when solving disputes concerning the interpretation or application of existing rights such as the right not to be unfairly treated.<sup>46</sup> Though the types of disputes have been thoroughly discussed in John Brand's book;<sup>47</sup> this thesis seeks to discuss the types of disputes in the South African and Zimbabwean context as prescribed by the statutory instruments in the two countries. It must also be noted that John Brand reviews a wide range of issues and concerns that are discussed in this study but he did provide recommendations and policy reforms for the two countries in question. More so, the research seeks to highlight the relationship between disputes of rights and disputes of interest. In a recent decision, the court suggested that the definition of disputes of right and disputes of interest is not absolute, and they may be cases in which parties have to choose between arbitration or adjudication and strike action.<sup>48</sup> Chapter three of the thesis discusses the types of disputes and their relationship.

Mediation is an extension of the conciliation processes meant for dispute resolution. It is a process in which a neutral third party helps the parties in dispute to 'isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.'<sup>49</sup> As in the case of conciliation and

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<sup>45</sup> Hanneli Bendeman *A reconstruction of the CCMA commissioner's perceptions of Dispute Resolution in South Africa*, A multi-perspective approach Phd thesis North West University 2004.

<sup>46</sup> John Brand and Felicity Steadman "conciliation" in: John Brand [et al] *Labour Dispute resolution* Cape town Juta 1997 at 96.

<sup>47</sup> Ibid.

<sup>48</sup> *Transnet Limited v MITUSA and others* 2002 (11) BLLR 1023(LAC).

<sup>49</sup> Charles Nupen "Mediation" in: Paul Pretorius *Alternative Dispute Resolution* Cape Town Juta 1993.

arbitration, different definitions have been submitted, but all argue on the same subject matter of finding a means of resolving the dispute amicably without any strikes and lock outs. The interplay between conciliation and mediation has not been done with extensively; there are a number of ways that have been used by different countries as regards to the distinction between conciliation and mediation.<sup>50</sup> This distinction between two concepts is widely debated amongst ADR proponents.<sup>51</sup> Some suggest conciliation is a non-binding arbitration whereas mediation is assisted negotiation.<sup>52</sup> Others maintain that the two terms are interchangeable; this is the position in South Africa and Zimbabwe. The present research differs from previous work by analyzing conciliation and mediation jointly as referring to the same kind of process seeking to settle disputes amicably. This is based on the fact that some countries distinguish between conciliation and mediation whilst others do not. The present researcher therefore intends to find out how the two processes are applied in South Africa and Zimbabwe by analyzing the relevant statutory provisions.

As far as arbitration is concerned, different authors have come up with different definitions. William Gill defines arbitration as the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons other than a court of competent jurisdiction.<sup>53</sup> Casper Lotter also suggests that arbitration is a private judicial hearing with an outcome that binds the parties and puts an end to the dispute between them.<sup>54</sup> Though various definitions have been put forward, they all have a common goal of solving the disputes amicably. There is also a considerable concern regarding the definitional issues, there are some definitions which are not legal and not backed by authority.

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<sup>50</sup> Garner Brayn *Black's Law Dictionary* 1999 at 996.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> William Gill *The Law of Arbitration* London: Sweet & Maxwell 1975 at 1.

<sup>54</sup> Casper Lotter, "Towards Arbitration" in: John Brand (e t al) *Labour Dispute Resolution* Cape Town Juta 1997 at 115.

The interest in this study is on a legal definition that is based on an ideal legislative framework. The current researcher subscribes to the various definitions submitted above and it is on those definitions that the researcher will lay the foundation of the study. However, the study will differ with Casper Lotter's definition which encompasses a private judicial hearing.<sup>55</sup> This is based on the fact the research is limited to the statutory definitions as they are provided by the relevant statutes. Defining arbitration is not enough, workers need to know the arbitration process and there after the forum which has been legislatively mandated to carry out the arbitration process, on this note, Peter Kentor provided a commentary on the practical rules of arbitration.<sup>56</sup> That be as it may, Peter only limited his commentary to unfair dismissal only without exploring other types of disputes.<sup>57</sup> To supplement these practical rules, the thesis aims at taking the study further from where Kentor left and analyze all the types of disputes and also furnish the study of unfair dismissals with case law, an aspect which Kentor did not dwell on. The previous writers mentioned above did not discuss the functions and the powers of the arbitration tribunal an area which present researcher intends to dwell on.

Arnold Sibanda and Lovemore Madhuku dealt with labour dispute resolution in Zimbabwe.<sup>58</sup> However, in their book, they did not provide a conceptual overview of the dispute resolution system which is of paramount importance to workers. More over, the authors' arguments are based on the first and old Labour Act in Zimbabwe yet the act has been periodically amended. In their book they provide that the Zimbabwean system does not differentiate rights and interest disputes yet it categorically make a distinction between the two.<sup>59</sup> This research therefore seeks to upgrade this book so that it complies

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<sup>55</sup> Ibid.

<sup>56</sup> Peter Kentor *A Commentary on the Rules with a Practical Guide for Unfair Dismissal Claims* Claremont South Africa 2005.

<sup>57</sup> Ibid.

<sup>58</sup> Lovemore Madhuku and Arnold Sibanda "Resolving labour disputes in Southern Africa: the case of Zimbabwe" *Labour Dispute Resolution in Southern Africa* University of Cape Town 1997 at 114.

<sup>59</sup> Section 2 of the Zimbabwean Labour Relations Act 16 of 1985 defines a dispute of right as any dispute involving legal rights and obligations while a dispute of interest is defined as any dispute

with the numerous amendments of the Labour Act.<sup>60</sup> In the same book, Sue King also covered the South African dispute resolution system; her research did not identify and address the seriousness of emerging challenges faced by the system.<sup>61</sup> The researcher hence intends to give a conceptual understanding of the dispute resolution mechanisms, identify and address the seriousness of emerging challenges facing the system an issue which has not been dealt with intensively.

An examination of the literature above assisted the researcher in identifying research needs and it brought the researcher up to date with reference to relevant sources, concepts and definitions. The researcher will pull this material together and use the best of it as the basis of the topic. In reviewing the literature the researcher primarily aims at exhausting gaps and loop holes which have been left behind by previous researchers on this topic

## **1.8 Scope of the study**

### **1.8.1 Chapter divisions**

The study comprises six chapters. Chapter one is the introduction which sets out the background of the study including the research questions and objectives of the study. It further states the methodology employed, outlines the structure of the study and specifies the limitations of the study. Chapter two provides the conceptual background of the various concepts relevant to the study of alternative labour dispute resolution mechanisms; this includes the nature and characteristics of labour disputes, classification of labour disputes and the general nature of alternative labour dispute resolution mechanisms. Chapter three provides an overview of the history of labour disputes in both South African and Zimbabwe. Chapter four analyses the current use of alternative dispute resolution mechanisms in South Africa including the review of arbitration awards and the weaknesses of the system. Similarly chapter five also examines the current use of

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other than a dispute of right. This section was inserted by amendment 17 of 2003 with effect from 7 March 2003. These new provisions are not incorporated in Lovemore Madhuku's book.

<sup>60</sup> The LA has been amended by Act 17 of 2002.

<sup>61</sup> Sue King; "Labour Dispute Settlement in Southern Africa: the case of South Africa" *Labour Dispute Resolution in Southern Africa* University of Cape Town 1997 at 20.

alternative resolution mechanisms in Zimbabwe including the review of awards and the weaknesses of the Zimbabwean System. Lastly chapter six is the comparative analysis and recommendations.

### 1.8.2 Limitations of the Study

The study focused on a comparative analysis of the dispute resolution systems of South Africa and Zimbabwe with particular focus on conciliation, mediation and arbitration though examples may also be drawn from other African countries. The researcher has intentionally chosen South Africa and Zimbabwe because of the common labour history which the two countries share.

It has now become common for countries to classify the dispute resolution system into private and statutory systems in the relevant statutory instruments;<sup>62</sup> the research will give specific focus on the dispute resolution mechanisms as they are specified in the statutory instruments and case law of the two countries. This means that private dispute resolution will not be looked at as it is out of the research scope and also due to the limited time available to the researcher. The three dispute resolution mechanisms of both South Africa and Zimbabwe will be examined and guidance will be given as to how they can be reformed.<sup>63</sup> Apart from the three mechanisms, the role of the courts in enforcing and reviewing awards will also form a substantial part of the thesis. The reason for excluding other dispute resolution mechanism like facilitation and other alternative dispute resolution system is mainly due to time constraints.

In this study, the present researcher will require the use of primary and secondary sources of law. Most of these sources are available in the library in print or on the web. However, access to these library resources is a drawback to the researcher. Some of the text books in the library are old and outdated whilst others are not even there. As a result of this, the researcher will have to make use of other libraries from different universities. The study

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<sup>62</sup> See Part 2 of the Zimbabwean Labour Relations Act as revised in 1996.

<sup>63</sup> The three dispute resolution mechanisms are Conciliation, Mediation and Arbitration.

compares and evaluates the effectiveness of the statutory alternative dispute resolution mechanisms as implemented by the two countries.

### **1.9 Conclusion**

This study deals with the resolution of labour disputes by the CCMA and the Ministry of Labour. The relevance of this chapter to the whole thesis is to set out the background of the study, including the research questions and objectives of the study, and reviews the existing literature on the subject. More so, it states the methodology employed and outlines the structure of the study. Having set out the approach adopted in current study, the next chapter seeks to explain and examine the different concepts that are pertinent to the thesis. The chapter will explore how the concepts have been applied in both South African and Zimbabwe.

## CHAPTER 2

### CONCEPTUAL FRAMEWORK: LABOUR DISPUTES AND RESOLUTION MECHANISMS.

#### 2.1 Introduction

The question of how to define disputes, classify them and, most importantly, the institutional framework for solving disputes requires careful analysis and consideration so as to guide disputing parties. It would therefore be pointless to proceed with a detailed study of the application of the labour disputes resolution until we understand the various concepts related to alternative dispute resolution mechanisms and hence the need for a conceptual background. Since the background of the research has been set out in the previous chapter, the following issues will be dealt with in this chapter (a) nature and definition of labour disputes (b) classification of labour disputes(c) and the characteristics of labour disputes.

The main objective of alternative labour dispute resolution mechanisms is to create labour harmony and sound labour relations between employers and employees.<sup>64</sup> Whilst some have argued that the statutory settlement mechanisms are still developing and need to be given time, others regard them as sophisticated and incapable of settling employment disputes.<sup>65</sup> Since the current system of labour relations in the whole world

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<sup>64</sup> This assertion has been proposed in various foreign and local literature on International labour law Section 2A of the Zimbabwean Labour Act 16 of 1985 (Hereinafter referred to as LA) states that the purpose of the Act is to advance social justice and democracy in the workplace by amongst other things securing a just, efficient and expeditious resolution of disputes and unfair labour practices. The Act also seeks to give effect to the international obligation of the Republic of Zimbabwe as a member state of the International Labour Organization. By the same token, section 1 of the South African Labour Relations Act 66 of 1995 (Hereinafter referred to as LRA) describes the purpose of the Act as to advance economic development, labour peace and the democratization of the work place by fulfilling the primary objectives of the Act which include the promotion of effective resolution of labour disputes, promotion of collective bargaining, and to give effect to obligations incurred by the Republic as a member of the International Labour Organization (ILO).

<sup>65</sup> Hanneli Bendeman, "A Reconstruction of CCMA Commissioners' Perceptions of the Dispute Resolution in South Africa" Thesis *submitted for a doctoral degree North West University* 2004.

recognizes conflicts, it is vital that an investigator must understand the meaning of labour dispute resolution mechanisms before he or she becomes involved in the negotiation process.<sup>66</sup> It is only after understanding the concept that we can be certain that a labour dispute does in fact exist.

## 2.2. Nature and Characteristics of Labour Disputes

### 2.2.1 General nature

The meaning of the word dispute has been the subject matter of major debate at various levels as the definition varies from author to author and from country to country. However, most of the definitions have in common their limitation of a labour dispute to a dispute between an employer and his employees or their union.<sup>67</sup> In countries following the British tradition of industrial relations, the relevant legislation gives a general definition of a labour dispute.<sup>68</sup> This is the position in South Africa and Zimbabwe,<sup>69</sup> where the word 'dispute' is defined in the respective Labour Relations Act.<sup>70</sup>

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<sup>66</sup> Stakeholders in the employment relationship include employers, employees, and government, employer and employee organizations.

<sup>67</sup> Michael Salomon *Industrial Theory and Practice* Financial Times/Prentice Hall, 2000 at 553, in this book, a labour dispute is defined a formal expression of collective employee dissatisfaction at the organization level resulting from either a prior failure to resolve a grievance or failure to agree on a matter of interest within a negotiating process.

<sup>68</sup> Part 1 of the LA as amended by section 17 of 2003, states that a dispute means a dispute relating to any matter concerning employment which is governed by this LA. In the case of South Africa, the LRA defines a labour dispute as that which includes an alleged dispute and that in relation to a lock-out or strikes.

<sup>69</sup> Ibid.

<sup>70</sup> See Carl Mischke, "Beginnings: conflict, grievances, disputes" in : John Brand [et al] *Labour dispute resolution* Kenwyn Juta 1997 at 11 defines a dispute as a highly formalized manifestation of conflict in relation to work place related matters which may include the failure to address a grievance.

There are two ways which are often used in defining labour disputes.<sup>71</sup> Firstly, the general definition is based on the distinction between the different types of disputes as shall be discussed below, as well as the parties thereto, and secondly labour disputes can be viewed in a general way without making a substantive distinction between different types.<sup>72</sup> The latter assertion is based on the external and behavioural manifestations and regards disputes as conflicts of view between the parties which are manifested by departures from normal working conditions.<sup>73</sup> The former view, which has also been adopted by the United Kingdom and has been substantially maintained in most former British colonies including South Africa and Zimbabwe, is based on the distinction between rights disputes and interest disputes as well as a distinction between the parties thereto and the subject matter of the dispute.<sup>74</sup>

Whichever criteria a country might choose to define a labour dispute, Sonia Bendix argues that these definitions submitted by different authors contain two common elements that are essential features of a dispute.<sup>75</sup> Firstly she submits that in order for there to be a dispute there must be evidence of insistence by one party and secondly there must be resistance by the other party with respect to specific demands. A labour dispute exists and continues to exist so long as there is insistence by one party and resistance by the other with respect to employment and working conditions. In the definition therefore, the word 'continued' is of paramount importance. The mere raising of a demand or grievance, which also entails disagreement, does not signify the existence of a labour

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<sup>71</sup> *Conciliation in Industrial Disputes A Practical Guide* International Labour Office Geneva 1998 at 14.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> The early definition in the United Kingdom, which served as a model for legislation in a number of former British colonies including South Africa and Zimbabwe, was incorporated in the South African legal system through section 5(3) of the Trade Disputes Act of 1906.

<sup>75</sup> Sonia Bendix *Industrial Relations in South Africa* Cape Town Juta 1996 at 227.

dispute.<sup>76</sup> Thus a simple argument between an employee and employer does not constitute a labour dispute. Hence a dispute will only arise if there is no final agreement on a demand and it must also be noted that strikes and lock-outs are pressure tactics available to employees and employers, alone they do not form a dispute rather they are manifestations of a dispute.<sup>77</sup>

## 2.3. Types of Disputes

### 2.3.1 Logic governing the distinction

In South Africa and Zimbabwe, national legislation and practice distinguishes between different types of labour disputes for the purposes of applying different institutions of settlement.<sup>78</sup> Two main distinctions have been developed (a) the first one is based on the number of persons involved in the dispute.<sup>79</sup> In that regard a distinction is normally made between individual and collective disputes<sup>80</sup> (b) the second criterion is based on the nature of the issues involved regarding the application or interpretation of existing rights in which case a distinction is made between disputes of interest and disputes of rights.<sup>81</sup> The subsequent discussion seeks to explain the types of disputes further.

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<sup>76</sup> In *Edgars Stores Ltd v SACCAWU* (unreported) at 447, it was held that a dispute must at a minimum postulate the notion of expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions.

<sup>77</sup> A variety of situations may indicate that a dispute is underway e.g. protracted negotiations, a work slowdown, mass absenteeism, picketing. It would be inaccurate to regard the terms labour dispute, strikes and lock-outs as synonyms. The aforesaid conducts are pressure tactics, on their own they don't suffice as labour disputes.

<sup>78</sup> In Japan the distinction between rights and interest dispute is well accepted whereas in Australia it is not really relevant.

<sup>79</sup> Butler and Finsen *Arbitration in South Africa* Cape Town: Juta 1993 at 30.

<sup>80</sup> Dowie Bosch [et al] *The Conciliation and Arbitration Hand Book: a comprehensive guide to labour dispute resolution procedure* LexisNexis Butterworths 2004 at 6 where the distinction between the different types of disputes is well explained. It is further argued that the distinction between the categories of disputes is not an easy one in practice.

<sup>81</sup> The distinction between disputes of rights and disputes of interest can be described as the distinction between the existence of rules and their creation. The distinction can be further defined as the distinction between the making of rules and their application.

### 2.3.2 Individual disputes South Africa

As the name suggests, individual disputes are relationships between a single employer and an employee.<sup>82</sup> They are mostly founded on the common law contract of employment and correspond largely to rights disputes. In the employment relationship, the termination of the contract and non-renewal of fixed term contracts are vitally important aspects which need special focus and hence are possible areas of dispute between the individual employee and an employer. An employer is deemed to have dismissed the employee if he/she violates the terms and conditions of a contract or statutory provisions.<sup>83</sup> The right not to be unfairly dismissed is a statutory right entrenched in the legislation and therefore, any violation of such a right entitles the aggrieved party to recourse via the prescribed procedure.<sup>84</sup> The legislature has also identified a variety of employment practices apart from dismissal which they pronounced under the general definition of unfair labour practice.<sup>85</sup> However, the Labour Court has accepted that the LRA's definition of unfair labour practice is not necessarily exhaustive, other forms may be recognized under the broader constitutional guarantee of fair labour practice.<sup>86</sup> The procedure to be followed for challenging such dismissal is provided for in the LRA.<sup>87</sup> The dispute can be referred to the CCMA or the bargaining council for conciliation or arbitration.<sup>88</sup>

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<sup>82</sup> Op cit note 71 at 15. This distinction seems to be based upon the quantitative criterion which refers to the number of parties involved in a dispute.

<sup>83</sup> Section 186 (1) of the LRA.

<sup>84</sup> Section 12 b (1) of the LRA states that every employee has the right not to be unfairly

<sup>85</sup> In terms of schedule 7 of the South African LRA, unfair labour practice can be divided conveniently into two categories: labour practices relating to unfair discrimination, and other unfair labour practice. In both cases it is, however, important to note that these unfair labour practices defined in schedule 7 can only arise between an employer and an employee.

<sup>86</sup> Section 23 of the Constitution confers the right to fair labour practices on everyone.

<sup>87</sup> Section 191 of the LRA states that if there is a dispute about the fairness of a dismissal or a dispute about unfair labour practice or a dismissal, the dismissed employee may refer the dispute in writing to the council or CCMA if there is no council.

<sup>88</sup> If the CCMA has jurisdiction, the bargaining council does not, and vice versa.

### 2.3.3 Individual disputes in Zimbabwe

Just like in South Africa, individual disputes in Zimbabwe are of a legal nature because when a party to an employment contract alters binding provisions, the absence of agreement leads to the extinction of the employment relationship resulting in a dispute. The party affected by the alterations to the conditions of the contract will take the dispute to the Ministry of Labour for Conciliation or arbitration. That is why a controversy will always emerge when a worker claims non-compliance with certain provisions of a contract of employment.

Unfair labour practices also give rise to individual disputes and are resolved through statutory alternative dispute resolution mechanisms.<sup>89</sup> The legislature in Zimbabwe identified a variety of employment practices apart from dismissal which they pronounced under the general definition of unfair labour practice. The LA defines unfair labour practices<sup>90</sup> and confers on labour officers the jurisdiction to conciliate and arbitrate unfair labour practices brought to them or which have come to their attention within two years of occurrence.<sup>91</sup> Unlike its South African counterpart, the list of unfair labour practices listed in the Zimbabwean LA is exhaustive<sup>92</sup> though the Minister of Labour may prescribe further unfair labour practices from time to time and amend or repeal such notices after consultation with the Labour Court.<sup>93</sup> Therefore, any party who feels prejudiced by any unfair labour practice may approach the Ministry of Labour for

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<sup>89</sup> In Zimbabwe, section 8 of the LA defines unfair labour practices.

<sup>90</sup> Section 8 of the LA sets out a list of unfair labour practices by the employer which includes: preventing or obstructing employees in the exercise of any right conferred to him by the LA, refusing to negotiate in good faith with a workers' committee or trade union which has been duly formed, failing to comply with a collective agreement, demand from an employee or prospective employee a sexual favour as a condition for recruitment, creation of jobs, improvement of remuneration. Section 9 also goes further to provide a list of unfair labour practices by trade union or workers committees.

<sup>91</sup> Section 194 of the LA.

<sup>92</sup> In *Muwenga v PTC* 1997 (2) ZLR 483, it was held that the list of unfair labour practices is exhaustive although the minister may prescribe further unfair labour practices in terms of section 10 of the LA.

<sup>93</sup> Section 10 of the LA.

conciliation and arbitration.<sup>94</sup> As individual disputes are concerned with the employment contracts, they are also related to rights disputes which also emanate from an individual contract employment.

#### 2.3.4. Collective disputes in South Africa

Collective labour disputes have to be distinguished from individual labour disputes.<sup>95</sup> The collective label is applied to the relationship between employers and organized labour. Collective disputes denote a confrontation between an employer and a group of employees and their combined work force, normally represented by one or more trade unions.<sup>96</sup> The essential difference between the two types of disputes lies in the number of workers involved and also from the fact that collective disputes are not defined in connection with a contract of employment. Accordingly, the important factor in a collective dispute is the collective interests involved. Thus any party to a dispute of mutual interest involving trade unions and employers' organizations may in a collective voice refer the dispute to the CCMA.<sup>97</sup> Collective labour law deals with organizational

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<sup>94</sup> In Zimbabwe, unfair labour practices may be committed by the employer and by trade unions and workers union. See section 8 and 9 of the LA.

<sup>95</sup> See Halton Cheadle *Current Labour Law: A review of recent developments in key areas of labour* 1996 Kenwyn: Juta, at 20 where it is submitted that the distinction between individual and collective labour disputes is conceptually important in determining new industrial rights. The nature of rights depends on the relationship infringed. In collective bargaining the court should do no more than holding a ring, in individual disputes the interest of the employer and employees should be balanced so that justice can be done.

<sup>96</sup> John Grogan *Collective Labour Law* Cape Town: Juta 1999 at 15. Employers' organization is defined as 'any number of employers in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and their employees or some of their employees.' Employers' organizations are therefore, the employers' counter-part of trade unions.

<sup>97</sup> Section 134 of the South African LRA states that any party to the dispute about mutual interest may refer the dispute in writing to the CCMA, if the parties to the dispute (a) are on the one side (i) one or more trade unions (ii) one or more employees or (iii) one or more trade unions and one or more employees and (b) on the other side (i) one or more employers' organization (ii) one more employers or (iii) one or more employers' organizations and one or more employers.

rights of employees and they are also resolved through statutory procedures.<sup>98</sup> Subjects to collective disputes are the bodies competent to represent collective interests to the extent that such interests may be violated. Such subjects are trade unions, associations of employers and occasionally associations or informal groups of employees.

In South Africa, disputes arising in the process of acquiring collective and organization rights are dealt with by the CCMA.<sup>99</sup> More so, the LRA guarantees all registered trade unions the full range of organizational rights conferred by the LRA.<sup>100</sup> Statutory ADR also plays a key role where there is a dispute about collective bargaining, strikes and lock-outs. This is particularly true where the other party refuses to bargain or to establish a bargaining council.<sup>101</sup> Such disputes must be referred to either a bargaining or statutory council or the CCMA if there is no council.<sup>102</sup> Collective agreements are the end product of collective bargaining and therefore they normally have greater relevance than individual contracts of employment. When employees in a sector or workplace are unionized their terms and conditions are likely to be determined by a collective agreement rather than an individual contract. Consequently, if there is a dispute about the interpretation or application of a collective agreement, such disputes must be resolved through the procedure provided for by the collective agreement. This follows from the fact that the LRA requires collective agreements to provide for a dispute resolution procedure to resolve disputes about the interpretation or application of such collective agreements.<sup>103</sup> It is only in the case where there is no procedure or no operative procedure

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<sup>98</sup> Organizational rights are set out in Part A of chapter 111 of the LRA.

<sup>99</sup> John Grogan *Workplace Law* Cape Town: Juta 2001 at 298.

<sup>100</sup> Section 11 to 16 of the LRA and item 13(3) of Schedule 7.

<sup>101</sup> In terms of section 64 of the LRA a refusal to bargain includes a refusal to recognize a trade union as a collective bargaining agent, a withdrawal of recognition of a collective bargaining agent, a party's resignation from a bargaining council or disputes about appropriate units, bargaining levels or bargaining subjects.

<sup>102</sup> Section 4(2) and 135(3) (c) of the LRA.

<sup>103</sup> Section 24(1) of the LRA.

that parties may collectively refer the dispute to the CCMA for resolution by conciliation and failing which arbitration.<sup>104</sup>

### 2.3.5 Collective disputes in Zimbabwe

The position is the same in Zimbabwe where trade unions and employers' organizations are given the right to resolve collective disputes through collective industrial action only if it is a dispute of interest.<sup>105</sup> In a country that has a substantial inflation like Zimbabwe, collective disputes normally involve wage determinations as workers are constantly negotiating to maintain some semblance of real wages.<sup>106</sup> The dispute must first be conciliated by the labour officers or employment councils. If the employer and the trade union fail to conclude an agreement about the exercise of organizational rights, either the union or the employer may refer the matter to the CCMA or to the Ministry of Labour in the case of Zimbabwe for conciliation and if it fails the dispute must be referred to arbitration.<sup>107</sup> Though unfair labour practices are classified under individual disputes, they can also be committed by trade unions and organizational groups giving rise to collective disputes. In this regard, the LA lists actions which amount to unfair labour practices committed by trade unions and workers' committee,<sup>108</sup> such practices give rise to collective disputes and should be resolved through statutory conciliation and failing which arbitration follows.

An important feature of collective labour disputes is the involvement or participation of a group of wage earning workers and the collective nature of the interest at stake.<sup>109</sup> The growth of trade unions across the whole world has brought about the concept of

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<sup>104</sup> Section 24 (2) of the LRA.

<sup>105</sup> Section 104(1) of the LA.

<sup>106</sup> Joseph Krislov and Helio Zylberstajn "Collective Labour Disputes in Sao Paulo" *The International Journal for Comparative Labour Law and Industrial Relations* 1991 at 94.

<sup>107</sup> Section 22 of the LRA provides that any party to a dispute about interpretation or application of the LRA as regards organizational rights may refer the dispute in writing to the CCMA.

<sup>108</sup> Section 9 of the LRA read together with section 93 of the LA.

<sup>109</sup> Benjamin Aaron, "The NLRB, Labour Courts and Industrial Tribunals" *Industrial and Labour Relations Review* October 1985 vol 39 Number.

collective labour disputes and the rise of collective bargaining. Collective labour law therefore, regulates matters such as collective bargaining between employers and trade unions as well as strikes and lock-outs.<sup>110</sup> Just like in South Africa, statutory alternative dispute resolution mechanisms play a key role where there is a dispute about collective bargaining, strikes and lock-outs. Where there is a collective dispute, workers contemplating strike or protest action must follow the statutory procedure prescribed in order for the strike or lock-out to be protected.<sup>111</sup> It is on this ground that a collective dispute must first be referred to the statutory dispute resolution mechanisms for conciliation before workers embark on a strike.<sup>112</sup> The obligation not to utilize the strike weapon while third party services are offered for a dispute settlement, and for a short period of time, is a common method for the suspension of the right to strike.<sup>113</sup> Similar provisions are also provided for in South Africa.<sup>114</sup> The LA prohibits workers from embarking on a collective industrial action unless an attempt to conciliate the collective dispute has been made.<sup>115</sup> The dispute must first have been conciliated by labour officers or employment councils before the workers strike.<sup>116</sup> More so, collective industrial action is also prohibited by the law if parties have agreed to submit the dispute to arbitration.<sup>117</sup> This is a clear indication that statutory ADR plays a key role in the resolution of disputes

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<sup>110</sup> A strike is normally collective action taken by a number of employees for a work-related purpose.

<sup>111</sup> Section 104 of the LA.

<sup>112</sup> Section 104 (2)b of the LA states that no employees may engage in a collective job action unless an attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section 93.

<sup>113</sup> This limitation of the right to strike is acceptable according to International Labour Organisation Convention Number 192 of 1952.

<sup>114</sup> In South Africa, pre-strike procedures are set out in section 64 of the LRA

<sup>115</sup> Ibid.

<sup>116</sup> Section 93 of the LA.

<sup>117</sup> Section 104 (3) b of the LA. This section is analogous to paragraph 6 of the International Labour Organization Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92) which states that if a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the parties should be encouraged to abstain from strikes and lock-outs while the arbitration is in progress and to accept the arbitration award.

before they develop into strikes. If there are no statutory instruments in place to resolve such disputes, strikes will be the order of the day.

#### 2.3.6 Comparison

In view of the above, it can be stated that in both South Africa and Zimbabwe, there is a clear classification of labour disputes. Collective disputes lead to the conclusion of collective agreements as enjoyed by employers' and employees' organizations. In South Africa and Zimbabwe, trade union recognition has included collective agreements requiring parties to first seek conciliation before engaging on strikes.<sup>118</sup> If left unresolved, collective labour disputes which are also related to interest disputes can lead to strikes and lock-outs.

Though the distinction between the two types of disputes is conceptually useful, it is not absolute, neither is it watertight, as individual and collective disputes tend to overlap. In both South Africa and Zimbabwe, an individual dispute can develop into a collective dispute particularly where a point of principle is involved and is taken up by a trade union. Similarly, actions by collective entities may impact on the individual relationship especially where a wage agreement has been concluded between an employer and a trade union which determines the amount of remuneration to which an employee will be entitled. Accordingly, this criterion is insufficient, because a dispute affecting one person does not lose its collective character whether it refers to a single person or to an indefinite number of individuals. Therefore, in both South Africa and Zimbabwe, collective labour law deals with collective entities while individual law deals with the basis for the

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The Zimbabwe Congress of Trade Unions and its affiliates have entered into various collective agreements though at times it is subjected to political pressure from the government.

relationship between an individual employee and the employer.<sup>119</sup> These relationships may however interact.<sup>120</sup>

#### 2.4. Interest disputes and rights disputes.

The other accepted distinction in both South Africa and Zimbabwe is between rights and interest disputes. Although there might be many other types of disputes in an employment relationship, the main distinction is between dispute of interest and disputes of right. In practice the distinction between the two categories is not an easy one to make and countries have adopted various approaches to this kind of distinction.<sup>121</sup>

##### 2.4.1 Rights disputes in South Africa<sup>122</sup>

A right is that to which a party is entitled to by law, by agreement or by established practice. Disputes of rights therefore, refer to disputes between workers and employers involving the application, interpretation violation of laws regulating industrial relations.<sup>123</sup> Such issues may be the terms of an employment contract and may also be

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<sup>119</sup> Each dispute in essence represents a conflict of interest, legitimate or non-legitimate, rational or irrational. However, in view of the above classification it is a usual practice to divide disputes into individual and collective disputes or to make a distinction between collective and individual disputes.

<sup>120</sup> Annali Basson *et al* *Essential Labour Law* Houghton South Africa: Labour Law Publications 2002 at 20.

<sup>121</sup> In *Eskom v Marshal* 2003 (1) BLLR 12 (LC) at par 20, it was held that sometimes there is 'middle ground between the poles' of disputes of right and disputes of interest, for example, where there is a legitimate expectation of a benefit.

<sup>122</sup> Unfair labour practices fall within the umbrella of rights disputes. Collective and individual disputes such as different forms of misconduct, breach of agreements, and breach of statutory obligations, dismissals arising from misconduct, incapacity or operational requirements are normally referred to or resolved through arbitration.

<sup>123</sup> Right disputes relate to whether the rights exist and /or have been exploited. The terms and conditions of an employment contract giving rise to rights disputes may be enshrined in a collective agreement concluded between one or more registered trade unions, on the one hand, and on the other hand, one or more employers, registered employers' organizations or a combination of employers and employers' organizations.

public statutes as well as laws of sufficiently uncertain standing so as to invite disputes and issues. The conclusion of a contract of employment creates reciprocal rights and obligations between the employer and the employee which if violated may give rise to rights disputes. Similarly, collective agreements also give rise to basic rights and obligations which if infringed may result in rights disputes. In addition to the duties assumed under individual contracts or collective agreements, employers are also obliged to carry out duties imposed by and to adhere to the requirements of, such legislation as is applicable to them. Of these, the most important rights are to observe prescribed working hours, to grant leave and most importantly to accord employees the various rights conferred on them by the Basic Conditions of Employment Act (BCEA)<sup>124</sup> and the LRA. If there is a violation of any of the rights, then a dispute of rights would occur. The South African LRA specifically requires collective agreements to provide for a procedure to resolve disputes about their interpretation and application first by conciliation and then arbitration. It is only in the absence of such provisions or where their operation is frustrated that the services of the CCMA can be used.

#### 2.4.2 Rights disputes in Zimbabwe

The Zimbabwean LA provides for a list of fundamental rights of employees with which every worker is furnished.<sup>125</sup> It follows that any violation of such rights by the employer will give rise to rights disputes. Most importantly, rights disputes fall under the umbrella of unfair labour practices which involve a single employee and a single employer.<sup>126</sup>

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<sup>124</sup> Basic Conditions of Employment Act 75 of 1997 was promulgated to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution.

<sup>125</sup> See section II of the LA which states that every employee is entitled to membership of trade union, protection from forced labour, protection against discrimination, protection of employees' right to fair labour practice.

<sup>126</sup> The definition of unfair labour practices includes a variety of conducts; it includes unfair conduct relating to promotion, demotion or training and more widely, the provision of benefits to employees and unfair discrimination. See John Grogan *Workplace Law* Cape Town: Juta 2001 at 218.

Like any other labour disputes, they are also resolved through statutory alternative labour dispute resolution mechanisms as stipulated by the legislation. In this relationship, one of the parties will be claiming that the other has infringed or denied some existing legal right. It is on this ground that rights disputes arise from the application or interpretation of existing laws or agreements. This has led to the conclusion that rights disputes are mostly concerned with individual disputes and indeed the two concepts are notoriously difficult to separate. This does not however mean that rights disputes cannot be collective in nature. The collective character of a dispute of right does not depend solely on the number of employees involved or the subject matter of the dispute but, it also depends on the response of the employees themselves to a particular circumstance. Employees may for instance acquiesce in the dismissal of a particular individual or they may identify with the individual concerned and decide on a collective response to the employer's decision.<sup>127</sup> This is directly in contrast to the common law position which requires disputes of rights to arise out of alleged breaches of individual contracts. Rights disputes have been distinguished from other types of disputes in many countries for the purposes of providing their submission to special procedures well suited to resolve such disputes.<sup>128</sup> For a dispute settlement to be effective it is necessary first to concentrate on the nature of the dispute and establish a mechanism that is capable of solving such a dispute. In that regard disputes of right are generally resolved either through arbitration or Labour Court adjudication, thus the Zimbabwean LA prohibits workers from embarking

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<sup>127</sup> Mellish and Collins Squires, "Legal and Social Norms in Discipline" (1976) 5 *ILJ* (UK) 164 at 175.

<sup>128</sup> The Zimbabwean Labour Relations Act 16 of 1985 as amended by Act 17 of 2002 Part 1 defines a dispute of interest as any dispute other than a dispute of right. This is a dispute over which an employee has no legal claim and is usually settled through power play. A demand for 100% salary increase during bargaining is a dispute of interest and while strikeable it is not adjudicable. On the other hand, a dispute of right is defined as any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or a contract of employment.

on a collective industrial action where the issue involved is a dispute of right.<sup>129</sup> In South Africa, such disputes cannot be brought before the CCMA for settling, neither are they strikeable.<sup>130</sup>

#### 2.4.3. Interest disputes in South Africa<sup>131</sup>

The classification of labour disputes into rights and interest disputes depends on whether labour disputes result from an existing legal rule as laid down in the law, if a labour dispute lack such a legal basis then it is regarded as a dispute of interest which is also characterized as social or economic rights. In contrast to rights disputes, interest disputes are disputes over issues not regulated by any law or agreement, but caused by the clash of conflicting economic interests. Thus in some countries the term economic disputes is used more frequently than interest disputes. Interest disputes therefore are interrelated to collective disputes which have been discussed above. They arise where one of the parties demands the creation of new rights which the party is not yet entitled but to which he would become entitled to.<sup>132</sup> Such disputes arise where workers and employers cannot agree upon whether to continue or not to change terms of conditions of work, establishment of new rights thus interest disputes are subject to negotiation and once the agreement has been reached the interest sought becomes a right.<sup>133</sup> Accordingly, disputes of interest refer to the revision of rights by collective bargaining or a compromise on such interest, irrespective of whether this is concluded in the form of a collective agreement.

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<sup>129</sup> Section 104 of the LA only allows workers to embark on a collective job action where a dispute of mutual interest is involved.

<sup>130</sup> In the case of South Africa, disputes about enforcement of employment contracts cannot be referred to the CCMA. They can be referred to the Labour Court for adjudication. See section 77(3) of the LRA.

<sup>131</sup> *Collins v Volkskas* 1994 ILJ 398 (LC). Disputes of interests refer to the regulation of rights for the future.

<sup>132</sup> For example unsatisfied demand for an increase in wages, modification of existing collective agreements.

<sup>133</sup> See Van Jaarsveld *Principles of Labour Law* Durban: Butterworth 2002 at 157 an interpretation as wide as possible should be given to the words mutual interest and it will include any matter which fairly and reasonably could be regarded as affecting the common interest of the parties concerned.

The means of settlement in such a case supports the proceedings of settlement through direct dialogue between the parties in collective bargaining process or through conciliation or mediation. In the event of the parties failing to reach an agreement, interest disputes can be processed through conciliation or collective bargaining as the case may be and it is only after conciliation that parties can resort to industrial strikes or lock-outs.<sup>134</sup>

#### 2.4.5 Interest disputes in Zimbabwe

In Zimbabwe, workers, employees and trade unions are entitled to collective job action to resolve disputes of interest provided an attempt has been made to conciliate the dispute.<sup>135</sup> In a state of functioning trade unionism like South Africa, in which employers bargain as a matter of course with the workers' organizations, disputes of interests mostly concern the employment terms to be adopted for the new agreement. On the other hand, where trade unionism is struggling to achieve the bargaining stage, the bitterest disputes of interest are apt to be those over the principles of unionism itself, that is, the recognition of trade unionism and the right to organize and to bargain effectively.<sup>136</sup> This is the situation in Zimbabwe where members of the independent Trade Union Organisation face harassment and intimidation from the government forces; it is difficult for them to carry out trade union activities. In such an instance, disputes which are mostly likely to occur are disputes over the recognition of a trade union.

Interest disputes generally arise out of collective bargaining relationship and are referred to the Ministry of Labour in the first instance for conciliation and thereafter can lead to industrial action. They involve the establishment of fresh rights for example higher wages, and usually arise in the context of collective bargaining. Because they arise in context of collective bargaining, it follows that they are open to negotiation and this can be done through bipartite consultations consisting of joint consideration by employers'

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<sup>134</sup> This excludes disputes arising in essential services in which reference of unresolved disputes of interest to arbitration is compulsory. Section 46(1) and (2) of the LR A

<sup>135</sup> Section 104(1) of LA read together with subsection 2(b).

<sup>136</sup> Accessed at [www.icftu.org/display/document](http://www.icftu.org/display/document) on 17 March 2007.

and workers organizations' on matters of mutual interest. Alternatively, negotiations may also be done through tripartite negotiations in which the government and public authorities are involved together with the employer and employee organizations.

#### 2.4.6. Comparison

Although there is a broad agreement in both South Africa and Zimbabwe that interest disputes concern the modification or enactment of new rules and rights disputes concern the interpretation or application of existing norms, it seems that there are no clear cut border lines and that the distinction may not be equally relevant in all countries.<sup>137</sup> In both South Africa and Zimbabwe, the line between the different disputes discussed above is not always an impregnable wall, rather semi-permeable membranes through which disputes which are nominally of one type pass to and are handled under procedures usually reserved for disputes of the other type. Some countries make a clear distinction between the two whilst others do not consider it necessary.<sup>138</sup> In the case of South Africa and Zimbabwe, it is important to note that the distinction between the two is recognized though in practice it is difficult to differentiate the two.

### 2.5 General Characteristics of Alternative Dispute Resolution Mechanisms

#### 2.5.1. Conciliation and Mediation

Conciliation/Mediation is the preferred first step in resolving labour disputes through consensus seeking. Some countries do not differentiate between mediation and conciliation whilst others do.<sup>139</sup> The distinction between the two processes is

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<sup>137</sup> See Hanani and Blainpain *Industrial Conflict Resolution in Market Economies* Kluwer Law and Taxation 1984 at 8.

<sup>138</sup> The LRA does not explicitly distinguish between conciliation and mediation and it refers to the term "conciliation."

<sup>139</sup> Sarah Christie and Lovemore Madhuku *Labour Dispute Resolution in Southern Africa University of Cape Town* 1996 at 117 where it is stated that the Zimbabwean LA does not distinguish between conciliation and mediation and in the case of South Africa, the term mediation was used in the 1980s and 1990s. Since the promulgation of the South African Labour Relations Act in 1995 conciliation has become the more commonly used term because this is the term that the Labour Relations Act uses.

unrecognized and today mediation and conciliation are frequently considered as synonymous.<sup>140</sup> Both mediation and conciliation refer to the intervention of a third party who provides assistance in the resolution of an ongoing or potential dispute but the difference comes in that in conciliation, the conciliator plays a passive role whereas in mediation the mediator becomes actively involved by seeking and suggesting possible alternatives to the dispute.<sup>141</sup> Mediation does suggest a somewhat more institutionalized, formal arrangement in which some full-time mediator attempts to resolve the dispute whilst conciliation can be done even through the telephone.<sup>142</sup> Mediation therefore involves an attempt at conciliation, but in this instance the third party is present and plays a pivotal role in the conciliation process. In literature, mediation is taken as a set of activities taken with the aim that parties supported by one or more mediators by means of negotiation should, by a mutual consent come to the resolution of the disputes.<sup>143</sup> The mediator endeavours through a process of persuasion and discussion to bring the parties together and to find means of resolving their dispute amicably. In order for the mediation process to be successful, the disputants must understand that the emphasis is on cooperatively resolving the dispute not on winning; this is not an easy concept for some participants to accept because prior to the mediation, they may have been involved in adversarial meetings. For that reason, the procedure is normally used when parties are involved in a dispute but need to preserve their employment relationship from breaking apart.

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<sup>140</sup> See U.S Dept of Labour 1960.

<sup>141</sup> The terms conciliation and mediation are sometimes used interchangeably. However it appears that the term conciliation is used as an umbrella term to include a range of processes including mediation designed to bring about consensus.

<sup>142</sup> See Arbitration and Other ADR Mechanism, Vista University Study Manual Department of Commercial Law course MLW 200 at 8 where mediation is also defined as an informal voluntary negotiation process in which the active intervention of an acceptable, impartial and neutral party involved in order to resolve the dispute.

<sup>143</sup> [www.adrr.com/adr/essayi.htm](http://www.adrr.com/adr/essayi.htm).

Sonia Bendix further describes the conciliation process as an act of procuring goodwill or inducing a friendly feeling.<sup>144</sup> In its purest form, conciliation involves a third party who helps the disputing parties identify the cause of their differences and the relative importance of the various issues at stake.<sup>145</sup> This is done by establishing a forum in which parties that are in dispute or have failed to reach agreement can come together once again and attempt to solve their differences. The whole conciliation process is private and confidential and is conducted without prejudice. Public interest dictates that all information disclosed in the conciliation forum should be kept confidential; disclosure by any one of the parties would seriously undermine the efficiency of the process. Conciliation can be used to resolve both disputes of rights and disputes of interest. However parties normally conciliate rather than arbitrate disputes of interest. Parties also frequently arbitrate rather than conciliate disputes of right which include the interpretation or application of existing rights.<sup>146</sup>

#### 2.5.2. The Mediator/Conciliator<sup>147</sup>

Conciliation success greatly depends on the capabilities of the conciliators or the third party involved. The conciliator as a neutral, impartial participant should be appropriately trained and have some knowledge of, and experience in the labour relations. Mediators derive their acceptability from being perceived as independent, impartial and as having the necessary skills to facilitate the mediation process.<sup>148</sup> This in essence means that the

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<sup>144</sup> Op cit note 75 at 235

<sup>145</sup> The conciliator also helps the parties to establish alternative solutions and their various implications. However, the responsibility for making decisions and reaching a solution still remains a joint one between the two parties. Tustin and Geldenhuys *Labour Relations: The Psychology of Conflict and Negotiation* Cape Town: Oxford University Press 2000 at 134 also pointed out that the fact that the effective mediator is a stabilizing influence, helps the parties achieve their goals with minimum friction, and helps them avoid a breakdown of discussion, which might result in a strike.

<sup>146</sup> Op cit note 70 at 18.

<sup>147</sup> In this study, the word conciliator is used to mean an individual conciliator or a board consisting of several conciliators.

<sup>148</sup> For more on mediator's tactics see Mark Anstey "Mediation in South African Industry: Concepts, Skills, Approaches and Problems" *South African Journal of Labour Relations* Vol 10 No 1 March

mediator requires 'people skills' in addition to some understanding of the field out of which the dispute arose.<sup>149</sup> In statutory conciliation, the powers and functions of the conciliators are defined by the statute.<sup>150</sup> The mediator's role is basically passive, restricted to activities such as scheduling meetings, encouraging the exploration of differences and to keep the discussions going, and the negotiations may be done during his absence.<sup>151</sup> It is absolutely vital that all participants understand the behaviour of the mediator. The mediator is not there to help you win, but to help you reach some compromise. His/her role is to facilitate communication and cooperative problem solving. In the mediation process, the mediator is supposed to follow the distinct procedures as they are stipulated by the two parties or by the regulating statute.<sup>152</sup> The mediator controls the process of the negotiations but does not determine or hold any responsibility for the outcome of the negotiation; the outcome is ultimately left entirely in the hands of the parties concerned. Therefore, the mediator has no decision making power but this does not mean that the mediator will not have a personal opinion regarding the outcome of the dispute.

#### 2.5.4. Arbitration

Arbitration is yet another alternative that can be used by disputants without resorting to litigation. In many respects, it is similar to litigation in structure but differs in that parties

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1996 at 33. In this article it was importantly stated that there are three major issues which are of concern to mediators and these are (1) the acceptability of the mediator (2) the timing of the entry into the dispute (3) the strategic implications of the request for assistance. Mediators view it as very important that the reputation and perceptions of the mediator and his employing agency be impartial enough to be acceptable to the parties in dispute.

<sup>149</sup> See Trollip Tim *Alternative Dispute Resolution in Contemporary South Africa* Durban Butterworth 1991 at 41 refers to some characteristics of mediation as honesty, integrity, impartiality, politeness, tact, sympathetic nature, a commitment to the process and parties, an even temperedness, patience, good listening skills, self-confidence and the ability to communicate.

<sup>150</sup> Section 135 and 142 of the South African LRA.

<sup>151</sup> Parties may request time to caucus on their own without the conciliator or the other party being present.

<sup>152</sup> Some of the distinct but interdependent steps include introduction, story telling, problem solving, and agreement.

can mould and adapt the arbitration procedure. Arbitration is the referral of a dispute to an arbitrator for determination by him in a judicial manner after hearing both parties.<sup>153</sup> This procedure allows the disputants to refer their dispute to a third party for a final decision after the arbitrator has impartially received and considered evidence as well as submissions from both parties.<sup>154</sup> The third party can be an individual arbitrator or an arbitration court not acting as court of law. In its purest form, arbitration is a form of adjudication and should therefore be distinguished from mediation.<sup>155</sup>

Arbitration has developed into one of the most important and preferred means of settling disputes in the labour field. The major characteristic of arbitration is that the dispute is determined by the third party who makes a binding award upon the parties. The arbitrator listens to and investigates the demand and counter-demands on both sides in order to come up with a final settlement that is binding. The arbitrator should at the outset show that he is in command of the situation. The personal attributes that make up a good arbitrator were aptly summed up in the remarks of a well known arbitrator at a banquet held by Chartered Institute of Arbitrators where he stated that the ideal arbitrator should have the wisdom of Solomon, the patience of Job, the humility of St Francis and the ability to stay awake after lunch.<sup>156</sup>

Though arbitration has been widely used, Trollip puts forward that not all disputes can be referred to arbitration.<sup>157</sup> It should therefore, not come as a surprise to find different national legislations stipulating the specific disputes which should be taken for

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<sup>153</sup> Lotter and Mosime *Arbitration at Work* Cape Town: Juta, 1993 at 2 where arbitration is defined as a process whereby parties to a dispute agree to refer the issue to an independent and impartial third party to decide the matter and to make an award which they accept as final and binding upon them.

<sup>154</sup> Op cit note 149 where arbitration is defined as a formal process in which the parties to a dispute jointly ask a neutral third party to hear their respective cases and then to make an award, which they undertake in advance to accept as final and binding upon them.

<sup>155</sup> In both processes the two parties agree to refer a dispute to a third party but they differ in that in mediation the third party does not make a binding agreement.

<sup>156</sup> Op cit note 36

<sup>157</sup> Op cit note 149.

arbitration. Statutory restrictions are those disputes which are excluded by the statute from being resolved through arbitration.

## **2.6 The Award**

The award marks the final settlement of the dispute. It is final, unless the arbitration agreement provides otherwise and subject to the relevant provisions of the Act. The arbitrator must reconcile the conflicting allegations of fact and resolve the differing points and come up with the final award. Due to its finality, the award is not subject to appeal which might be one of the reasons why it has been commonly used in resolving disputes and as a result courts may not enter into the merits of the dispute on review. After the award, all parties are supposed to respect and abide by the award made by the arbitrator as it is binding. To be final the award must have dealt with every issue of the dispute with certainty and passed within the time limit stipulated by the relevant Act.<sup>158</sup> Though the award, is binding, arbitrators are aware of the limitation of arbitral tribunals more particularly in that they have no coercion powers to enforce their awards. This implies that arbitrators cannot do on their own but need assistance of the court in enforcing the award.<sup>159</sup>

## **2.7 Conclusion**

It is perhaps inevitable that the dispute resolution mechanisms are contrasted as processes with different procedural requirements. It is important not to lose sight of the fact that they are an integral part of one dispute resolution system. Although arbitration involves a significantly different and less direct approach, it is nevertheless preceded by some form of conciliation and mediation. In essence the mechanisms are all part and parcel of the total collective bargaining process as they have a common goal of resolving disputes in an employment relationship.

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<sup>158</sup> In South Africa, the tribunal must make the award within four months of receiving the written notice from one of the parties.

<sup>159</sup> Article 27 of the Model Law on International Commercial Arbitration as adopted by the United Nations. It basically allows the arbitration tribunal to seek court assistance when enforcing the awards.

The preceding discussion was aimed at clarifying some of the key concepts in the field of dispute resolution. Most importantly the objective of the chapter was to analyze the labour dispute resolution mechanisms and the principal laws that govern their operation. After discussing the classification and definition of labour disputes, it is also important to explore the historical development of the various dispute resolution concepts. For that reason, the next chapter seeks to explore the historical development of the labour disputes in South Africa and Zimbabwe

## CHAPTER 3

### HISTORICAL PERSPECTIVE

#### 3.1 Introduction

To understand the forces that precipitated the development of labour dispute resolution mechanisms, it is essential to trace the birth of the first regulatory frameworks that sought to regulate labour relations. Having dealt with the conceptual background in the previous chapter, the subsequent discussion outlines the historical development of labour disputes. This is done initially by way of identifying and critically analyzing the various historical phases which the two countries experienced<sup>160</sup> and later through an account and analysis of the various repressive laws which were passed by the colonial government in furthering its interests.<sup>161</sup>

##### 3.1.1 Pre-colonial period in South Africa and Zimbabwe<sup>162</sup>

Very little is known and has been written about the pre-colonial period both in South Africa and Zimbabwe. Because of obvious problems of the predominant historical methodologies and technological limitations during this period, it is difficult to describe with precision the labour practices that could have existed in the pre-colonial period. The general belief is that before colonization, there was a low population density, unsophisticated agricultural and hunting practices and there was no need to develop sophisticated labour regulations. A brief review of the Southern African's history reveals that the pre-colonial era was characterized by traditional values and lifestyle.<sup>163</sup>

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<sup>160</sup> The phases will be classified in this thesis as pre-colonial, colonial and the present period.

<sup>161</sup> The chapter concentrates particularly on the experiences of African workers under the repressive laws that were expanded and systematically utilized against black Africans.

<sup>162</sup> With no written history and failure of the successive Dutch, British and apartheid regimes to record the laws of pre-colonial Southern Africa, there is a lack of information about the laws. However, the current legal systems in Southern Africa recognize the importance of traditional legal systems and therefore the need to refer to those systems and practices.

<sup>163</sup> Don Ncube *The influence of Apartheid and Capitalism on the development of Black Trade Unions in South Africa* Johannesburg Skotaville, 1985 at 1.

### 3.2. Developments in South Africa: Colonial Period

The origins and development of labour relations in South Africa should be seen against the background of colonization of Africa by certain European countries. Colonization and the difference in perception between black and white workers concerning the development and utilization of natural resources gave rise to the development of labour disputes in South Africa. This consequently led to the advent of conflict resolution mechanisms and legislation to regulate the settlement of mine disputes. Before colonization Africans were agro pastoralists as discussed above, but with the coming of colonization and the discovery of gold and diamonds, Africans began to work in non-agricultural activities. The growth of industrialization and activities marked the advent of disputes at workplaces as people started to be involved employment relationships.

#### 3.2.1 Discovery of Minerals and Development of Mines: Towards the Regulation of Industrial Disputes

The discovery of diamonds 1867 and gold in 1886 marked the beginning of a new industrialized South Africa. The discoveries were to alter the face of South Africa and begin a process of change which would bring the country within the orbit of worldwide industrial civilization. The discovery of minerals meant that the existing pattern of the economy which was agriculturally-based would give way to an industrial economy.<sup>164</sup> It also meant that disputes which were not common during the pre-colonial area became part of the industrial society and hence the need arose for a dispute settlement framework.<sup>165</sup>

The economy as a whole was given a new lease of life and suddenly new outlets for agricultural products were created. With the expansion of the mining industries, it became clear that there was an urgent need for more labour in the mines more

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<sup>164</sup> Francis Wilson *Labour in the African Goldmines 1911-1969* Cambridge University 1972 at 1.

<sup>165</sup> *ibid*

particularly skilled labour since Africans were regarded as unskilled.<sup>166</sup> In order to address this problem, a large number of skilled workers were recruited.<sup>167</sup> The most critical skills which were in short supply were artisans and engineers and a large number of them were recruited from overseas.<sup>168</sup> These artisans brought with them major developments in the organization of workers in South Africa. The imported skilled workers did not only bring knowledge and skills necessary for mining, but they also brought with them British unions which provided them with a power base in the work environment.

### 3.2.2 The Emergence of Trade Unions

The newly opened diamond fields acted as a magnet to fortune hunters from all over the country. Throughout South Africa, people gave up their occupations to go in search of the gold and diamonds. As mining on the Witwatersrand grew to become the life blood of the economy, there was a corresponding proliferation of craft unions in the labour market. The Amalgamated Society of Carpenters and Joiners was established as the first locally based trade union.<sup>169</sup> Subsequently, various trade unions were also formed in an effort to promote labour justice. However, some of these black trade unions collapsed due to lack of organization.<sup>170</sup> The advent of trade unions marked the beginning of collective labour

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<sup>166</sup> South Africa did not have sufficiently skilled labour force; Europeans were employed to work as the skilled labour.

<sup>167</sup> In sharp contrast to the whites, black workers were unskilled, cheap and in abundance. They were also deprived of the political freedom to vote.

<sup>168</sup> Since South Africa had close ties with United Kingdom, the discoveries lured a large number of British immigrants to South Africa who brought with them a British system of Trade Unions.

<sup>169</sup> Slabbert and Swanepoel *Introduction to Employment Relations Management* Durban : Butterworths 1998 at 25

<sup>170</sup> Ken Luckhardt *Organise or Starve, The history of South African Congress of Trade Union* London: Lawrence and Wishart 198 at 40 where it is further stated that the decade of the 1920s witnessed the rise and fall of the Industrial and Commercial Workers Union of Africa (ICU) the first nationally based African worker's organisation. It virtually collapsed into localised and weak factions that formed the basis for the more serious trade union organising work in the 1930s.

relations in the country as workers were now speaking collectively.<sup>171</sup> Worker representation through trade unions started to play an important role in the initially agricultural economy. Disputes between unions and employers started to be a common feature in the mines. Originally, blacks were not involved in the trade union movement, but they soon realized that involvement in such a system could have advantages in worker representation and dispute resolution. Consequently white trade unions started to be in conflict with black trade unions over a number of issues and this marked the emergence of strikes in the industrial system.<sup>172</sup> The labour unrest and the strikes are themselves a clear manifestation of an inefficient dispute resolution system that was incapable of settling disputes. Faced with such a crisis, state intervention and legislative control over the black labour was introduced in order curb strikes.

### 3.2.3 Industrial Dispute Prevention Act 20 of 1909

The Smuts led government was alarmed by the unrest contained in the militancy of the white workers and the first outcome of the concern was the passing of the Industrial Dispute Prevention Act.<sup>173</sup> Major provisions of the Act were relatively based on the principles of the Industrial Dispute Investigation Act passed in Canada in 1907.<sup>174</sup> The statute provided that where there was a deadlock, no strike or lock-out could take place

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<sup>171</sup> Op cit note 75 at 57, further stated that the white workers brought with them the European and especially British brand of trade unionism, based at that time on the ideal of a universal worker movement.

<sup>172</sup> A lock-out is defined as the exclusion by an employer of employees from the employer's workplace, for the purposes of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches the employee's contracts of employment in the course of or for the purpose of the exclusion, this is differentiated from a strike in which employees refuse to work. See John Grogan *Work Place Law* 2001 at 370.

<sup>173</sup> Act 20 of 1909.

<sup>174</sup> See P.S Nel *Worker Representation in Practice in South Africa* Academia Pretoria 1985 at 48. The enactment of the Act above was as result of a serious strike by white workers at the Knights Deep Mine in 1907 after a proposal by employers that skilled work should be officially given to blacks. The strike was also as result of complaints by white workers about unsatisfactory economic and social conditions.

until a government conciliation board had investigated the matter. During the course of the negotiations, employers were not allowed to increase or reduce wages, hours or otherwise change the conditions of employment. It further recognized the need for a well-established dignified agency for the proper discussion of grievances and their adjustment without resorting to strikes. This marked the birth of conciliation and conciliation boards in the South African labour system.<sup>175</sup> More so, the Act also introduced the statutorily defined arbitration system. Compulsory arbitration and statutory arbitration were also key themes of the Act in resolving disputes in the mines.

#### 3.2.4 Mines and Works Act 12 of 1911

It was however felt by the government that the Industrial Dispute Prevention Act did not effectively resolve disputes and the mushrooming of strikes in the mining industry.<sup>176</sup>

The result was the enactment of the Mines and Works Act which was promulgated in an attempt to substantiate all previous legislation relating to the mining sector.<sup>177</sup> Soon after the promulgation of this Act, the principle of protecting white jobs by legislative means was firmly established and whites had their own specific skilled jobs whilst blacks were deemed to be unfit for skilled jobs. The Act therefore facilitated the institutionalization of racial discrimination in South Africa as blacks were not represented. It legitimized the long term mining practice in which whites effectively monopolized skilled jobs and this triggered more disputes in mines as black Africans were not content with the job discrimination.<sup>178</sup> In spite of this law, mine owners continued to give more and more jobs to blacks miners to save costs.<sup>179</sup> Their wages remained the same no matter what work they were doing and this angered the Black miners. Over the next few years, more

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<sup>175</sup> Detailed provisions regulated the manner of appointment and operation of these conciliation boards. The findings of the conciliation board were only legally binding if both parties to the dispute agreed to it. This saw the introduction of statutory conciliation in South Africa.

<sup>176</sup> The government which was in power during this time was the 1909 elected Het Volk government which was led by General Jan Smuts.

<sup>177</sup> Act 12 of 1911, the Act was also seen as a racially discriminating legislation that gave the whites superiority in job allocation

<sup>178</sup> G.V Doxey *The Industrial Colour bar in South Africa* Greenwood Press 1961 at 117.

<sup>179</sup> *ibid*

regulations were added to the law extending the colour bar and to regulate disputes in the mines.<sup>180</sup> Amongst the statutes was the Black Labour Regulation Act 15 of 1911<sup>181</sup> which was designed to regulate Black labour matters in the labour environment.<sup>182</sup> More importantly it made it a criminal offence for Africans to break their labour contracts in the event of a dispute between the parties.

### 3.2.5. Industrial Conciliation Act, 1924

The Rand rebellion was probably the most critical turning point in South Africa's pattern of employment and dispute resolution. The major development that took place as a result of the Rand rebellion was the introduction of conciliation through the promulgation of the Industrial Conciliation Act.<sup>183</sup> While maintaining the basic principle behind the 1909 Transvaal Act, the new ICA went considerably further and established statutory *ad hoc* conciliation for the resolution of industrial disputes.<sup>184</sup> The ICA repealed the Industrial Disputes Prevention Act 20 of 1909 and was intended to curb the increasing incidents of

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<sup>180</sup> Owen Crankshaw, "Change in the racial division of labour during apartheid era" *Journal of Southern Africa Studies* volume 22 at 633. Colour bar implies an occupational classification that tries to be sensitive to the ways in which the racial division of labour was shaped by legal and institutional mechanisms of racial discrimination by the level of certification of the population and by work-place dynamics.

<sup>181</sup> The phrasing of the second Black Laws Amendment Act 102 of 1978 includes the term Black instead of Bantu in compliance with the change brought by the Black Labour Regulation Act 15 of 1911.

<sup>182</sup> The Act placed the recruitment and employment of blacks on a more satisfactory basis; however it made no provision for collective bargaining and negotiations between employers and black workers or for the redressing of grievances. One of the other shortfalls of this Act was that it did not provide dispute resolution mechanisms. Unlike the Transvaal dispute resolution Act 20 of 1909 the Labour Regulation Act was applicable through-out South Africa.

<sup>183</sup> Hereinafter referred to as ICA.

<sup>184</sup> The Act allowed for the creation of standing employer-employee councils with wide powers of negotiation and wage determinations. The boards or industrial councils could obtain legal enforcement for the agreement reached in the councils.

strikes that had been organized by white workers.<sup>185</sup> It sought to achieve industrial peace by providing dispute settlement machinery and a forum for employers and employees to bargain collectively.<sup>186</sup> It essentially offered white workers and their trade unions a range of economic benefits based on racial privilege in exchange for political powerlessness. Generally, the ICA was promulgated by the government for three specific reasons as listed below:

1. The law allowed for joint boards or industrial councils to be formed on which registered trade unions and employers in a particular industry were represented.
2. No strikes or lock-outs were allowed while the councils were negotiating an agreement or a dispute.<sup>187</sup>
3. It formed part of the overall policy of providing preferential employment opportunities to white workers as opposed to blacks in an attempt to alleviate the "poor white" problem

### 3.3 Specific Developments during the Apartheid Period

When the National Party came into power in 1948, a new era in South Africa's history began. In the twentieth century, the system of racial separation became enforced by law under the policy of apartheid. Segregation was found in most fields in the society but later moved to employment following the Rand Revolt. Several segregational laws both in employment and outside employment were promulgated to further the interests of the whites at the expense of the blacks.<sup>188</sup> The 1940s represented a period of crisis for the

<sup>185</sup> An earlier statute, the Transvaal Industrial Dispute Prevention Act 20 of 1909 applied as its name suggests only to the Transvaal. It provided for the appointment of ad hoc boards of conciliation and investigations in certain industries specified in the Act. See section 1 of the Act.

<sup>186</sup> Section 2(1).

<sup>187</sup> Section 12 (1) stipulates that any employer or employee who contravened this section was guilty of an offence and the primary reason for this was to ensure that no job loss or time was lost before the outcome of the conciliation.

<sup>188</sup> Some of the segregational laws include the Group Areas Act of 1950 which divided land into areas in which blacks and whites had to reside, the Bantu Self -Governance Act of 1950 which created Bantu lands based upon tribal groups and the Bantu Education Act of 1953 which offered inferior education to blacks.

state, the rapid polarization of Africans led to industrial unrest culminating from the strikes. Faced with these challenges, the Nationalist government appointed the Botha Commission of Inquiry with the specific instruction to investigate the entire spectrum of industrial relations which had been adversely affected by the industrial expansion. As a result of the Commission, the government scrapped the Industrial Conciliation Act pending the outcome of the Botha Commission. The commission's report which came out in 1951 led to the promulgation of the new Industrial Conciliation Act 28 of 1956.<sup>189</sup> The commission further proposed that African trade unions should be recognized and given bargaining rights although stringent conditions for recognition were to be set. The previous Industrial Conciliation Act of 1924 and 1937 did not recognize black trade unions and therefore there was a need to incorporate black trade unions into the system.<sup>190</sup>

However, the ICA of 1956 continued with the system of dualism by keeping Africa workers away from other workers, it excluded all Bantu workers and restricted mixed unions. Apart from total exclusion of black workers from registered union, the Act also included a prohibition on the registration of new mixed trade unions whilst placing very restrictions on the operation of existing mixed unions.<sup>191</sup>

To compliment the racial segregation, the Bantu Labour Act of 48 of 1953 was also promulgated to regulate the resolution of disputes between black workers and their employers.<sup>192</sup> The 1953 Act completed the construction of the racially exclusive industrial relations in South Africa. This led to a new wave of nationalism and militancy among black workers. The broader industrial relations framework, the racially exclusive industrial system, through its repressive machinery created the impetus for a wide-spread

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<sup>189</sup> The Wage Act of 1957 and the Settlement of Disputes Act 48 of 1953 were also passed as a result of the Botha Commission.

<sup>190</sup> Op cit note 177. The ICA of 1956 repealed the 1924 and 1937 ICA statutes.

<sup>191</sup> Ibid at 135

<sup>192</sup> The Act was also aimed at establishing machinery whereby the interest of Black workers could be protected in agreements which concerned black workers.

formal and informal resistance against the apartheid state. This was specially pronounced in the wake of the Durban strikes wave of 1973, after which the number of unregistered trade unions grew in response to the repressive laws of the government.

The industrial relations system and the apartheid regime started to experience pressure from the African working class and in response the regime amended the Bantu Labour Act by introducing liaison and works committees.<sup>193</sup> Notwithstanding the existence of this plant level committee system in which black workers could consult and negotiate with the employer and had limited freedom to strike, the organization of black workers in unofficial trade unions continued. These unregistered unions focused their attention on thorough organization which was backed by militant collective action and the unions grew rapidly despite the government's efforts to quash them.<sup>194</sup> This exposed the shortcomings of the industrial system and the government appointed the Wiehahn Commission of Enquiry into Labour Relations which reported in 1979 and recommended a number of reforms.<sup>195</sup> The commissioning of the enquiry was as a result of a number of factors which had jeopardized industrial peace.<sup>196</sup> The most far-reaching recommendation was that African workers were to be allowed to join registered trade unions and be directly represented on industrial councils or conciliation boards and thereby ending the dual system.<sup>197</sup>

In response to the recommendations, the government accepted the commission's proposals and this resulted in the promulgation of various amendments to the Industrial Conciliation Act of 1956 and the name of the new Act was changed to the Labour

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<sup>193</sup> See Black Labour Relations Regulations Act 48 of 1955 as amended by Act 70 of 1973..

<sup>194</sup> Ibid.

<sup>195</sup> For more information see the Report of the Inquiry into Labour Legislation (RP 47/1979).

<sup>196</sup> Some of the reasons for the appointment of the Commission include the increasing utilization of black labour, the dualistic nature of industrial councils and works committees, the claim of non-workers for better job opportunities etc.

<sup>197</sup> See The Wiehahn Commission Report. Some of the recommendations of the Commission includes, full involvement and participation in the economic life for all population groups with little state involvement, free competition within the labour system, without legal restrictions.

Relations Act of 1956. Another important proposal was to replace the industrial tribunal with an industrial court that had the jurisdiction to resolve labour disputes. The functioning of the court was premised on the distinction between disputes of rights and disputes of interest.<sup>198</sup> More so, it also recommended the adoption of a statutory advisory body, the National Manpower Commission (NMC) which would consist of persons appointed by the minister including representatives of Business and labour.<sup>199</sup> The body was also given the mandate to make recommendations to newly named Minister of Manpower on Labour Matters. It is through the commission's recommendations that the name of the ICA of 1956 was changed to Labour Relations Act. Following from the commission's recommendations which literally gave space to Unions, there was the mushrooming of trade unions and trade federations amongst the black workers.<sup>200</sup> The formation of these trade unions gained momentum in 1985 with the formation of the Congress for South African Trade Union which combined 33 trade unions.<sup>201</sup>

### 3.4 Developments in Zimbabwe

#### 3.4.1 Colonization of Zimbabwe

The immediate genesis of colonial Zimbabwe grew out of the discovery of the main gold reef on the Witwatersrand in 1886.<sup>202</sup> It was the mining of gold in Rhodesia that led to the colonization of the country by the very same whites who had earlier on colonized South Africa. The country was occupied in 1890 by Europeans from South Africa under the administration of Rhodes's British South African Company on the basis of a charter

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<sup>198</sup> For an in-depth of the classification of disputes see chapter two of the thesis.

<sup>199</sup> Its functions were amongst other things to continually survey the labour market and evaluate the effectiveness of labour legislation.

<sup>200</sup> Op cit note 166 at 33, some of the trade unions which were formed include the Council of Unions of South Africa (CUSA), Azanian Confederation of Trade Unions (AZACTU) which was mainly of an African nature and the National Council of Trade Unions (NACTU).

<sup>201</sup> The trade unions which affiliated and formed the South African Congress of Trade Union (COSATU) include the Council of Unions of South Africa (CUSA) and Azanian Confederation of Trade Unions (AZACTU).

<sup>202</sup> Ian Phimister *An economic and social history of Zimbabwe* London; Longman, 1988 at 4.

granted to the British Company.<sup>203</sup> The mining permission was granted following a mineral concession which was signed by Lobengula and this provided the basis for the mining.<sup>204</sup> Soon after the signing of the concession, whites started to gain confidence and the mining industry began to expand.

The financial ambitions of the capitalists and the crosscurrents of the imperial expansion descended upon the gold mines and this marked the development of disputes in the mines leading to the need for dispute resolution mechanisms. However, a major preoccupation in this era was the demand for cheap African labour from the reserves.<sup>205</sup> The absence of a stabilized labour force, shortage of skilled manpower partly accounted for the failure of the mining industry during the first ten years of its existence. Faced with the shortage of labour, the government drafted a combination of taxes, levies, appropriations, forced labour and other means to secure adequate supplies of labour at low wages.<sup>206</sup> Regrettably, the tax instrument did not lure enough labour since taxes could be paid in kind; resulting in African workers selling their produce to pay for the tax which was required by the government.

### 3.4.2 Industrialization and Regulation of Labour Disputes

#### 3.4.2.1 Masters and Servant Act of 1901

As a result of the low wages and high taxes, black workers began to desert their employers and the government responded by recruiting workers from other African

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<sup>203</sup> Hereinafter referred to as the B.S.A, British South African Company was the Rhodes-led company which was sent to explore the mineral fields in Rhodesia.

<sup>204</sup> Lobengula was the king of the Amandebele who was persuaded to sign a treaty in 1888 which effectively made Matabeleland which was under his jurisdiction a sphere of the British influence. This is made clear by Lobengula's statement which is quoted as follows "the grant of all metals and minerals situated and contained in my kingdom, together with full power to do all things that they may deem necessary to win and procure the minerals."

<sup>205</sup> See *Labour conditions and discrimination in Southern Rhodesia* ILO 1978.

<sup>206</sup> Tax laws for labour recruitment had earlier on been implemented in South Africa by the colonizers after the abolishment of slavery.

countries like Malawi, Mozambique and Northern Rhodesia.<sup>207</sup> By deserting, black workers in many instances collectively rejected poor working conditions as well as forced labour. The colonial reaction to these evasions by African workers was the promulgation of the Masters and Servants Act of 1901.<sup>208</sup> The Act laid the basis of a primitive labour law system designed to fast-track the establishment of a racist capitalist system on the back of cheap and forced labour.<sup>209</sup> It was clearly intended to create a stable work force and more specifically to regulate labour disputes within the industrial society. Through the provisions of the 1901 Act, the government introduced restrictive and discriminative controls which were applicable to Black workers only.

One major feature of the labour statutes passed during this time was the differentiation that was made between African workers and others. The 1901 Act was not an exception to this; it had its salient features which effectively denied African workers the freedom of association, freedom of organization and the right to strike. Most importantly, the 1901 Act stipulated the minimum number of working days per contract, as well as the extent of such labour required to constitute a working day.<sup>210</sup> One of the most archaic sections of 1901 Act was that it made it illegal for an employee in domestic service to refuse to accompany his master or any of the family; the consent of the employee was not required, nor his preferences to have to remain with his family have any legal ground.<sup>211</sup> This meant the employee would go with the employer when he/she moved to another place.

As far as collective bargaining is concerned, the government through the 1901 Act ensured that the bargaining power remained on an unequal basis and trade unions, collective bargaining or strikes were expressly prohibited.<sup>212</sup> There were legal provisions

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<sup>207</sup> See Godfrey Kanyenze and Blessing Chiripanhura, "Brief history of the union movement in Zimbabwe" *Zimbabwe Congress of Trade Union Paper September 2001*.

<sup>208</sup> Hereinafter referred to as 1901 Act.

<sup>209</sup> Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe* University of Zimbabwe 2006 at 18.

<sup>210</sup> Section 5 of the Act.

<sup>211</sup> Section 25 (1) and (2) of Act.

<sup>212</sup> Re Southern Rhodesia 1901 AC 221.

that made it an offence liable to a fine or imprisonment for up to three-months for a person who persuades or endeavours to persuade any servant to depart from his work for a strike action.<sup>213</sup> Thus an intended strike action would rather render its proposer liable to prosecution. This was also worsened by the fact that the 1901 Act did not provide for mechanisms recognizing trade unions and hence the Act did not offer worker protection.<sup>214</sup> There was a provision however for free and voluntary meetings between employers and employees to consult and discuss *bona fide*<sup>215</sup> matters arising from the Masters and the Servants Act.<sup>216</sup>

As in the case of South Africa, pass laws were also enforced in Rhodesia in 1904 in an effort to create a stable workforce. They were designed to regulate the movement of black labour and stabilize contracts of employment. These laws were part of the segregation government and they effectively put African workers under their employers as African workers could not move freely to reach markets where their labour would fetch the highest price.<sup>217</sup> According to the Pass Law Act of 1904 all African males in Rhodesia over the age of 16 were required to carry a registration certificate complete with photograph and fingerprints at all times.<sup>218</sup> The idea behind this was to regulate desertions in relation to the total labour supply. The only exemption made was for Africans living legally in certain Tribal Trust Lands within the recognized area of their village. The penalty for contravening the pass laws was a fine. It can be seen that the white government was eager to restrict the movement of the work-force.

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<sup>213</sup> Section 55(a).

<sup>214</sup> The Act did not have provisions for collective bargaining especially for agricultural workers.

<sup>215</sup> See the South African Native Area Act of 1923 and the Pass Law Act of 1956, both statutes made it compulsory for all black South Africans to carry pass books so as to control the movement of the labour force.

<sup>216</sup> Section 56.

<sup>217</sup> Ibid, Workers who knew that the gold mines in the Transvaal paid the best wages developed tactics for avoiding the snares set by the state to halt the consistent movement of labour.

<sup>218</sup> The provisions were also later implemented by the Smith regime under the Registration and Identification Act of 1976.

#### 3.4.2.2 African Labour Regulation Act 16 of 1911

The British government however realized that the repressive laws were not sufficient to regulate the labour disputes in Rhodesia and began to see the need of implementing more repressive laws. In that regard, the African Labour Regulation Act was promulgated in 1911.<sup>219</sup> The Act covered all African workers employed to perform manual labour in mining, agriculture, husbandry and trade or manufacture. The most important clause in the Act prohibited black workers from breaking or breaching any contracts which they would have made with their Masters.<sup>220</sup> Like its predecessors, the Act did not provide an effective dispute resolution; rather it only prohibited the use of economic force in resolving disputes. The situation prevailed up until 1922 when the British Government organized a referendum to determine whether Southern Rhodesia was to join South Africa or to be linked directly to London.<sup>221</sup> Following the referendum discussions, Rhodesia was declared an independent colony in 1923.

#### 3.4.2.3 Industrial Conciliation Act 1934

The most far-reaching legislation that was passed by the British government after Rhodesia became an independent colony was the Industrial Conciliation Act of 1934.<sup>222</sup> Coupled with the previous statutes, the Industrial Conciliation Act marked the development of statutory labour dispute resolution in Rhodesia. It was a strike by European employees in the building industry that resulted in the passing of the Industrial Conciliation Act. As economists were encouraging the development and use of cheap African potentialities against white wage earners, the whites were not pleased and were determined to challenge the proposals. They saw themselves placed between the capitalists desire to decrease labour costs and the willingness of the Africans to accept wages below the minimum needed to support the accustomed white standard of living. This eventually led to disputes by European workers who were determined to defend

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<sup>219</sup> The Act was originally passed as Ordinance 16 in 1911.

<sup>220</sup> Section 31 (d) of the Act.

<sup>221</sup> The electorate was composed of 60 Africans out of a total of 14,763 voters.

<sup>222</sup> The Act was modelled on the 1924 South African Industrial Conciliation Act, which had come into effect after the 1922 Rand Revolt.

their jobs and high salaries and because of lack of proper dispute resolution mechanisms these disputes developed into strikes.

The provisions of the Industrial Conciliation Act covered all disputes except those engaged in domestic services, agriculture, the civil service and those employed by the Rhodesian Railways. Agricultural disputes were regulated under the Masters and Servants Act while those in the public service were regulated by direct negotiation with the employer.<sup>223</sup> Disputes within the Rhodesian Railway were excluded from the Industrial Conciliation Act simply because the Railway Company serviced both Southern Rhodesia and Northern Rhodesia. Soon after Rhodesia was declared an independent colony from Northern Rhodesia the Railway workers were incorporated into the Industrial Conciliation Act.<sup>224</sup> All sectors of wage employment relationships were now regulated by either the Industrial Conciliation Act or the Master and Servant Act.<sup>225</sup>

The Industrial Conciliation Act was enacted for three different reasons; firstly it was to maintain harmony and peace in the industry, secondly to provide for apprenticeship, and to maintain a decent standard of living in the country.<sup>226</sup> Most importantly, the Act provided for the creation of industrial councils by trade unions and employers associations. It further expressly excluded Africans in the definition of employees and hence it introduced a method of industrial conciliation for Europeans while leaving the black workers under the Masters and Servants Act as they were not considered as employees. The Industrial Conciliation Act did not recognize African trade unions but gave them limited rights and they were required to apply for registration. This is directly in contrast to white unions which were regarded as automatically registered.<sup>227</sup> All disputes could be referred to the industrial council or conciliation board or a single

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<sup>223</sup> Act 5 of 1901.

<sup>224</sup> Raftopoulos and Ian Phimister *A History of the Labour Movement in Zimbabwe* 1997 at 4.

<sup>225</sup> Act 5 of 1901.

<sup>226</sup> Southern Rhodesia Debates 10 April 1934.

<sup>227</sup> At first African unions were reluctant to register, but after a short period they realized they had little option but to register.

arbitrator or a panel of arbitrators with an independent authority. Strikes were therefore prohibited where the dispute was covered by an industrial council.

During the late 1930s and 1960s, Rhodesia became more industrialized and more people began searching for survival in the urban areas. By 1950, the number of black workers in the urban areas had trebled. As time went on, Bulawayo and Salisbury's locations simply groaned and heaved with the sheer weight of the human load they had to bear.<sup>228</sup> Sanitation was non-existent in most locations and compounds, hookworms and other diseases were wide spread. Following the wide-spread poverty, the Howman commission<sup>229</sup> was appointed to investigate the economic social and health conditions of black workers.<sup>230</sup> The Commission recommended the establishment for a wage board for African workers and the need to pay wages that would improve the standard of life for Africans. The government failed to implement the recommendations and in response African workers organized themselves into trade unions and carried out the first countrywide strikes in the history of the colony, namely the 1945 Railway strike and the 1948 general strike.<sup>231</sup>

The most decisive and influential strike was the general strike which started in Bulawayo on the 13<sup>th</sup> of April 1948. The strike, which erupted as a result of the government's failure to address worker's concerns attracted more than 40 000 people and was marked

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<sup>228</sup> Vambe, *From Rhodesia to Zimbabwe* London (1976) 174.

<sup>229</sup> For the Commission's report See *Report of Committee to investigate the Economic, Social and Health conditions of Africans Employed in Urban areas*, 1944 at 9.

<sup>230</sup> The commission was appointed in 1944 and concluded that seventy percent of all black workers had suffered from bilharzias. Malnutrition, tuberculosis and pneumonia were also detected by the commission.

<sup>231</sup> Kenneth P Vickery; "The Rhodesian Railway African Strike of 1945, Part 11: Cause consequence and significance" *Journal of Southern African Studies*. In 1945, immediately following the conclusion of the Second World War, a major strike by African employees took place on the Rhodesian Railways. The railway served both Northern Rhodesia (Zambia) and Southern Rhodesia, it was the region's transportation railway.

by militancy and violent strikes which spread across the whole country.<sup>232</sup> These events came to represent landmarks in the history of the conciliation process in Zimbabwe. The strikes themselves were a litmus test for the conciliation and arbitration machinery present at that time. If an effective system were in place, such strikes would not have occurred. The conciliation and negotiation machinery provided by the Industrial Conciliation Act were ineffective and hence workers had to use economic power as a means of dispute resolution.

The most relevant result that was brought by the 1948 revolt was the introduction of trade unions for black workers in the labour system. The revolt laid the basis for the first viable trade union in Rhodesia.<sup>233</sup> Soon after the strike, the Southern Rhodesian Trade Union was formed in 1954 becoming the first real trade union in Rhodesia.<sup>234</sup> Realizing the emergence of trade unionism and the futility of suppressing them, the government amended the Industrial Conciliation Act of 1934 in 1959 and brought in some changes to the Act.

The promulgation of the new amendment to the Industrial Conciliation Act of 1934 allowed union rights and collective bargaining to black workers who later became organized.<sup>235</sup> Unions had to register to obtain the benefits under the Act and a status for

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<sup>232</sup> The three major concerns that led to the strike include (1) Poor wages (2) Better living Standard and conditions for black workers (3) Demand for a minimum national wage.

<sup>233</sup> The first change was the extension of the definition of employee to certain categories of African Workers mainly in manufacturing and trade.

<sup>234</sup> The Trade Union was led by the late Dr Joshua Nkomo who later became the vice-president of Zimbabwe. It was the first trade union that was formed by blacks workers, previous unions were headed and controlled by whites.

<sup>235</sup> Mswaka, *The Labour Market and Impact of African Trade Unions in the economic development of Southern Rhodesia*. Unpublished dissertation Oxford 1975. Trade unions were however supposed to register under strict conditions e.g. they were only supposed to register if they were representatives of employees, non-political, financially healthy and with consent of the employer. African unions found registration difficult, unregistered trade unions were made subject to all liabilities of the registered unions and all names of officials had to have their names and addresses

collective bargaining. This was easier for established white unions which were already registered and had established *bona fide* relations with the Ministry of Labour. After 1959, black workers through sustained demands and an increase in worker organization were able to form trade unions and became part of a sustainable industrial society.<sup>236</sup> The new Act implied a fundamental change in the patterns of institutionalized collective bargaining and industrial boards.<sup>237</sup> This realization of trade unions also assisted African workers in resolving their disputes collectively.

The creation of trade unions for black workers also resulted in collective disputes which were traditionally resolved as interest disputes through conciliation and mediation. Under the new Industrial Conciliation Act, conditions were laid down for resolving industrial disputes through a system of industrial councils and industrial boards, heavily weighted in favour of the regime and white employers. Moreover it mandated representation of black workers to be equal to that of employers on industrial council and on industrial boards which negotiate agreements.<sup>238</sup>

While the new Act purported to be non-racial in principle, in practice the trade union movement was racially segregated. The Act allowed the formation of fragmented trade unions on the basis of race and this adversely hindered the black trade union movement as they were prohibited from using their funds for political purposes or receiving funds

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lodged with the industrial registrar and were also precluded from affiliating with any political organization.

<sup>236</sup> Rushil Ranchod, "The Artifice of Independence: Reconsidering the Labour Movement in Zimbabwe to 2001" *Postable* 1 (2) 2004. Registering a union was extremely difficult, the state had to approve the constitution, and the Minister of Labour had the right to supervise union elections and to regulate union dues.

<sup>237</sup> The old labour boards system had largely functioned on the basis of horizontal principles of wage regulation. The ICA introduced direct union management negotiations for a limited number of workers. The ICA has been based on the principle of verticalism i.e unions could only obtain legal rights to represent workers or a class of workers in a certain industry or trade, occupation; this had the effect of decentralizing the bargaining structure.

<sup>238</sup> Mswaka, "The relationship between wages and employment in Rhodesia" *Rhodesian Journal of Economics* 1954-1968 September 1972.

from political organizations. An additional factor which weakened black trade unions was the disunity and competition between federations competing with each other for independence.<sup>239</sup> In the multi-racial unions, Africans found themselves with very little collective voting strength and little executive control in these unions. In fact, Africans who were elected to the executive posts were often specifically charged with the task of looking after the interest of workers in the lower grades and thus there was both explicit and tacit acceptance of effective segregation within multi-racial trade unions. The Industrial Conciliation Act was further amended in 1973. The amendment eliminated the first two options and required disputes to be submitted to an industrial tribunal appointed by the minister. An award made after arbitration was binding in the case of essential services. These were designated as such by the minister in the Government Gazette.

Although the Act brought trade unionism to Rhodesia, its overall effect for the African workforce was to make it virtually impossible for black trade unions to function, since the registration of trade unions was vested in the Registrar of Trade Unions who executed state control over unions in an attempt to separate them from the emerging anti-colonial political struggles.<sup>240</sup> Despite the existence of the draconian labour laws which restricted black workers' right to strike and union rights, black workers continued to strike though the government continued to severely dispel them.<sup>241</sup> Therefore, trade unions continued to play a key role in worker representation despite the colonial government's brutal response to the strikes.

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<sup>239</sup> Weber, *Zimbabwe the facts about Rhodesia International Defense and Aid Fund for Southern Africa* London 1977. Voting rights in unions which included black members were confined in such a way as to guarantee white workers' dominion.

<sup>240</sup> The office of the registrar was a government department which had the ideology of restricting trade union movement. It is therefore possible that the office made it difficult for the unions to register. See also Op cit note 82 at 21.

<sup>241</sup> The 1960 to 1961 Strike movement accelerated working class struggles, the movement which was labeled the *ZHII* strike was led by Joshua Nkomo.

The Maintenance of Law and Order was also passed to regulate freedom of assembly and association.<sup>242</sup> The Act prohibited persons from organizing public gatherings on Sundays and public holidays.<sup>243</sup> This meant that the rights of workers to collective bargaining were severely limited as workers could not organize meetings in public to raise their concerns on these days.<sup>244</sup> Only registered trade unions were given the freedom rights to organize public meetings. One can rationalize and argue that since trade unionism was weak; it as well meant that there was no machinery to resolve interest disputes which are frequently resolved through collective bargaining with trade unions. This mostly affected African trade unions with nationalist sympathies as they were in most cases unregistered and therefore could not have meetings on Sundays and public holidays which was virtually the only day convenient for African workers. Workers who failed to disperse or reassemble elsewhere committed an offence and police officers were given powers to use reasonable powers to disperse such unions. Although the constitutional council invalidated some of the conditions which were imposed on trade unions, there were still many bans on public meetings in the African reserves.

Post-independence Zimbabwe was characterized by regulation and intervention of the government into the dispute resolution system. After Zimbabwe received independence in 1980 there was a tidal wave of strikes which swept through Harare reaching most other towns in the country. Much was expected of Zimbabwe's newly independent government with its challenges of redressing colonial racism which had overlaid the racial differences between black and white workers. The demand of the strikers was overwhelmingly for higher wages.<sup>245</sup> For two months the government tried to end the strikes through

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<sup>242</sup> Law and Order Maintenance Act chapter 39 describes freedom of assembly as that freedom commonly called the freedom of public assembly and does not confer on any individual the right to be at any place situated on the land belonging to or vested in the crown or local authority.

<sup>243</sup> Section 6A.

<sup>244</sup> Powers to prohibit all or any class of public processions and public gatherings for up to three months in the area are vested in District Commissioners subject to confirmation by the Minister of Law and Order, he may also specify the hours at which gatherings may be held and may impose conditions on the meetings.

<sup>245</sup> South African Labour Bulletin volume 12 number 6/7 August/September 1987 at 109.

conciliation and persuasion but to no avail.<sup>246</sup> In the midst of the strikes, workers committees were introduced by the Ministry of Labour to provide a channel of communication between workers and management. Their predominant role was to be industrial relations bodies involved in issues ranging from routine shop floor grievances right through to performing the trade union role of bargaining for wages and conditions of service improvements at Employment Board meetings.

The government's response to the strikes for better wages was legalizing the state control remuneration through the Minimum Wage Act 4 of 1980.<sup>247</sup> The minimum wage was to establish a measure of control while the state prepared a more sound and coherent legal framework to regulate relations between employers and employees. The Act did not establish for the first time the principle of minimum wages, which was first established by the Industrial Conciliation Act.<sup>248</sup> In contrast to the Industrial Act, the Minimum Wage Act introduced workers rights, worker's committees and a prohibition of unfair labour practices which is a further development from the previous Industrial Conciliation Act. The Employment Act was also passed by the new government to regulate relations between employer and employee more specifically the militant workers.

### **3.5. Comparison between South Africa and Zimbabwe**

One major feature common to the labour systems that was in place in South Africa and Rhodesia was the differential positions of African workers from other workers, more particularly the whites. Successive discriminatory laws were passed to foster a system of privilege and inequality which severely damaged African economic and social interests. Africans were subjected to greater regulation and control than non-Africans. In both South Africa and Zimbabwe, labour was classified into skilled, semi skilled and unskilled

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<sup>246</sup> Ibid at 108.

<sup>247</sup> Minimum wages were set at \$70 per month for industrial workers, \$43 for miners and \$30 for agricultural and domestic workers. For many workers this was considerable improvement.

<sup>248</sup> See Industrial Conciliation Act 21 of 1945 section 27(1), The Native Labour Board Act 26 of 1947 section 21(2) and the Non-Industrial Conciliation Act 26 of 1947, the statutes prescribed a certain minimum wage for certain workers.

labour and black workers were regarded as unskilled. This meant that Africans were the least paid as they were doing unskilled jobs. This inequality in skills resulted in uprisings and strikes by African workers which were destroyed by the government through the use of force. The absence of clear dispute resolution procedures resulted in a number of strikes and militancy amongst mine workers. At a political level, the majority of Africans were disenfranchised and were not involved in any decision-making body. The racially based statutes without international status were discriminatory against Africans and restricted their opportunities for advancement.

The labour regulations and economies of the two countries are inseparable, interlinked and indeed both were dominated by the same monopoly, British colonies. They both went through the same phases of racial discrimination and colonial oppression. Workers in both countries shared a common enemy and a common goal of eliminating capitalist exploitation in the two respective countries.<sup>249</sup> As a result of the colonial rule in both countries, the increasing controls and deteriorating labour conditions lead to the effective denial of right to strike, discriminatory or inadequate labour legislation, and prison labour, poverty in black communities, migration and job reservation

Unlike during the colonial period where black workers were denied the right to form trade unions, the current system in both countries now allows all workers to join and form trade unions of their choice as well as participating in the activities of such unions. Trade unions in both South Africa and Zimbabwe have established good relations with one another. The Zimbabwe Congress of Trade Union has frequently been sharing information through holding workshops with the Confederation of South African Trade Union despite the growing politicization of labour relations in some parts of the two countries. Today, South Africa and Zimbabwe are members of International Labour Organizations and have ratified different conventions aimed at realizing the democratic labour rights. South Africa has been a member of the International Labour Organization since 1919 to 1966. It rejoined the organization in 1994. Since then, twenty three conventions have been ratified. Similarly, Zimbabwe has ratified twenty conventions.

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Workers were against the British colonialists, Most Africans were unenfranchised and right less

More, so the two nations have put in place democratic Constitutions which contain labour rights which are applied without discrimination and are binding on all stake holders. South Africa has put in place the CCMA while Zimbabwe has madated the Ministry of labour as the core institution for statutory labour dispute resolution.

## CHAPTER 4

### LABOUR DISPUTE RESOLUTION IN SOUTH AFRICA: CURRENT POSITION

#### 4.1. Introduction

This chapter will focus on the operation and practices of the new statutory alternative labour dispute resolution system in South Africa. This will be done through critically analysing the challenges and weaknesses of the dispute resolution system. The idea is to outline the problems that currently affect the statutory dispute resolution institutions in South Africa. In this regard, the chapter calls attention to the main structures which have been legislatively mandated to facilitate the dispute resolution process of which case the Commission for Conciliation Mediation and Arbitration is the centrepiece.<sup>250</sup> In this section, the study also discusses the review of CCMA awards by the labour court. As indicated at the outset, this thesis will not concentrate on private dispute resolution.

#### 4.2. Alternative Labour dispute resolution Institutions and procedures

##### 4.2.1. Commission for Conciliation Mediation and Arbitration

The CCMA is a dispute resolution body established under the LRA in November 1996 as a response to the old dispute resolution system which was complicated, lengthy and pitted with technicalities.<sup>251</sup> The primary dispute settlement agencies set up under the previous Act, namely industrial councils, conciliation boards and the industrial court had proved

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<sup>250</sup> Hereinafter the CCMA.

<sup>251</sup> On 21 July 1995, the National Economic Development Labour Council tabled a report recommending the adoption of a draft bill, based on the agreements reached between the negotiating parties, the public submissions and other stakeholders. An explanatory Memorandum which accompanied the draft bill included the following statement with regards to conciliation machinery and procedures: "Existing statutory conciliation procedures are lengthy, complex and pitted with technicalities. Successful navigation through the procedures requires a sophistication and expertise beyond the reach of most individual and small business. The merits of the dispute usually get lost in procedural technicalities. Errors made in the initiation of the conciliation process can be fatal to an applicant's claim for relief. A lack of resources and poor remuneration and training all conspire to render the statutory conciliation ineffectual." The CCMA was therefore established in the hope that an appropriate and effective dispute resolution mechanism would be made to the parties in dispute.

over time utterly unequal to their task.<sup>252</sup> Statistics of the Department of Manpower showed that the success rate of the statutory machinery was a paltry twenty percent for conciliation boards and less than thirty percent for industrial councils.<sup>253</sup> So by introducing the CCMA, it was hoped that disputes could be resolved more effectively and that the national settlement rate would increase. The new system abolished the Industrial Court and conciliation boards and now centres on the CCMA. The CCMA is independent from the state and any trade union or employer's organisation.<sup>254</sup> As a juristic person, the state does not take any primary responsibility for the body; instead the responsibility is shared by employers, organised labour and the state.<sup>255</sup> Though funded by the government, it is not state controlled and this allows the commissioners to give their judgments without fear and favour. This however does not mean that it is not an organ of state;<sup>256</sup> it is bound by the Bill of Rights in the Constitution just like any other organ of the state.<sup>257</sup>

For the Commission to be effective in accomplishing the purposes for which it has been designed, certain people have to be responsible for the administration and governance of the Commission. The CCMA is governed by a tripartite body nominated by the National Economic Development and Labour Council<sup>258</sup> (NEDLAC) and appointed by the Minister of Labour.<sup>259</sup> The governing body consists of eleven persons, an independent person appointed by the Minister of Labour as Chairperson, nine other persons nominated

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<sup>252</sup> D du Toit *et al Labour Relations Law A Comprehensive Guide* Durban Butterworth 2000 at 24.

<sup>253</sup> Ibid.

<sup>254</sup> Section 112 and 113 of the LRA.

<sup>255</sup> The CCMA does not belong to and is not controlled by any political party trade union or business organization.

<sup>256</sup> An organ of state means any functioning or institution exercising a public or performing a public function in terms of section 239(b) (ii) of the LRA.

<sup>257</sup> Section 8 (1) of the Constitution.

<sup>258</sup> Hereinafter NEDLAC.

<sup>259</sup> Sections 116 of the LRA, its members are drawn from labour, business and the state.

by NEDLAC and the Director.<sup>260</sup> The members comprise three representatives each from the state, organised labour and organised business and they meet on a quarterly basis.<sup>261</sup> The tripartite body is the supreme policy-making body of the CCMA and may convene *ad hoc* meetings if the need arises. In broad terms, the director heads the CCMA and is responsible for the day-to-day business of CCMA whilst the governing body is responsible for policy-making.

### 4.3 Dispute Resolution Procedural Framework

#### 4.3.1 Conciliation Hearing

The commissioner begins the conciliation meeting by introducing himself/herself and this involves some small talk and pleasantries. Thereafter, the commissioner will explain the process that will be followed and the parties will each be given an opportunity to make an opening statement. An opening statement is a summary of the events that led to the dispute and need to be in detail. Once the conciliator knows the facts of the case, the next step will be to decide the right procedure and this involves the use of mediation, facilitation and fact finding. The role of the commissioner is to assist the parties in resolving the dispute, by utilising appropriate means at his disposal through analysing the causes of the dispute as well as offering settlement options.<sup>262</sup> In order to achieve this, the conciliator is empowered to ask open ended questions to test the focus of the parties and possible outcomes.<sup>263</sup> Perhaps this is where co operation of the parties is needed, parties are supposed to answer questions and every party is required to participate in the process.

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<sup>260</sup> The director of the CCMA is an ex-officio member of the governing body. The current director of the body is Ms Nerine Kahn and the chairperson of the governing body is Mr Vincent Zwelibanzi Mntambo.

<sup>261</sup> The members of the governing body are appointed for a period of three years and may resign or be removed from office by a court order or by the Minister of Labour.

<sup>262</sup> Helga Landis, *Employment and the law, A practical guide for the workplace* Cape Town Juta 2004 at 399.

<sup>263</sup> In asking questions, the commissioner should not be legalistic or complicated but should be as flexible as possible.

To encourage the co operation of parties in the process, the Commission conducts the negotiations in a private place and any information that is disclosed in the meeting is confidential.<sup>264</sup> This essentially means that no person may repeat or testify any information that was disclosed in the conciliation process during subsequent arbitration or any other hearing and hence the statements are made without prejudice.<sup>265</sup> The motivation behind this rule is to encourage parties to voluntarily disclose information without fear of being bound by the statements in subsequent proceedings. A point of difficult however exists where the information that was disclosed in the conciliation process is also materially relevant in the arbitration process. However it is still a procedural rule that the conciliation process is private and confidential, as long as it is consistent with public policy and natural justice, the rule should be welcomed. Disclosure of such conciliation information will do harm than good to the conciliation process.

After the conciliation process, the final agreement is reduced to writing. In some instances the heads of agreement are drafted and signed at the conciliation process by all the parties. When conciliation has failed or the thirty day period has expired, the commissioner is supposed to issue a certificate<sup>266</sup> stating whether or not the dispute has

<sup>264</sup> Conciliation proceedings are private and confidential and are conducted on a without prejudice bases. Disclosures made without prejudice have their foundation in an express or implied undertaking that such disclosures should be veiled in absolute secrecy. See *Agnew v Union and Insurance Co Ltd* 1977(1) SA 617 (A)

<sup>265</sup> The rule precluding conciliators, commissioners and parties to conciliation proceedings from testifying about them was held to be unconstitutional in the case of *Kasipersad v CCMA and others* 2003 (2) BLLR 187 (LC). It was stated that conciliation are by nature is confidential, however the rule precluding parties to such meetings and commissioners from testifying about the proceedings contravenes the right to administrative justice.

<sup>266</sup> Certificate of outcome issued by the commissioner is sufficient proof that conciliation of the dispute has been attempted. It was further stated in *Sapakoe Tea Estate (Pty) Ltd v Maake* 2002 (10) BLLR 1004(LC) that the issue of a certificate implies that there was a dispute about which the CCMA enjoyed jurisdiction and that one of the jurisdictional facts for valid arbitration where purportedly satisfied. It is mandatory for the CCMA conciliator to issue a certificate of outcome if the conciliation fails. See *NUM v Henric Exploration Pty Ltd* 2001 (2) BLLR 209 (LC) there is no prescribed period within which the certificate should be issued. The conciliator has the discretion

been resolved or not.<sup>267</sup> The commissioner must serve a copy of the certificate on each of the parties or representatives while filing the original certificate with the CCMA.<sup>268</sup> The outcome certificate must clearly describe the nature of the dispute;<sup>269</sup> the description might be similar to the one in the referral form.<sup>270</sup> It is at this stage that the expertise of the commissioners comes into play. Some commissioners are not qualified to the extent that some certificates have been submitted incomplete or have not been submitted at all and at times they delay the conciliation process due to their incompetence as well a lack of confidence in themselves.<sup>271</sup> The Commission should therefore employ commissioners who have the necessary negotiation skills.

In 2002 the government amended the LRA<sup>272</sup> by inserting the process of Con-arb into the dispute resolution process.<sup>273</sup> This process must follow the conciliation proceedings once

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as to when to issue the certificate. It is submitted that the discretion should be exercised taking into consideration the need to resolve the dispute expeditiously.

<sup>267</sup> The certificate is issued in terms of section 135(5) of the LRA, if an agreement is reached the conciliator will summarise all the issues and will assist the parties in drawing up a settlement agreement which must be signed by all the parties. In the case of the CCMA, LRA form 7.12 sections 135 (5) read together with rule 15 of the CCMA regulate the issuing of the certificate.

<sup>268</sup> In *Van Rooy v Nedcor Bank Ltd* 1998 (3) LLD 376 (LC) It was held that if a certificate was issued incorrectly, the matter should be taken on review to the Labour Court.

<sup>269</sup> However, the parties are not bound by the commissioner's description of the dispute; the referring party characterizes the nature of the dispute as he wishes to pursue it. See *NUMSA V Driveline Technologies (Pty) Ltd* 2000 1 BLLR 20 (LAC)

<sup>270</sup> Marion Fouche *Rules of the CCMA and the Labour Court* Butterworth 2003 at 19

<sup>271</sup> A controversial issue was however held in *NUMSA v Driveline Technologies (Pty) Ltd and others* 2000 (1) BLLR 20 (LAC). It was stated that while a commissioner would normally describe the nature of the unresolved dispute, his or her failure to do so has no bearing on the subsequent proceedings. The accumulation of such minor irregularities has greatly affected the procedural framework for the CCMA as there is room for such kind of mistakes.

<sup>272</sup> Amendment 12 of 2002 to the LRA now makes it possible for conciliation and arbitration to take place on the same day but only for disputes concerning probation. See section 191(5A) of the LRA.

<sup>273</sup> However, the practice had already been endorsed by the Labour Court well before it was legislatively endorsed. See *Nginza v Ford* NO (2000) 21 ILJ 1184 (LC).

a certificate stating non-resolution has been issued in disputes concerning dismissals or unfair labour practices relating to probation.<sup>274</sup> In essence, this process allows conciliation and arbitration to take place continuously on the same day provided there is no objection by any party to the matter being dealt with. Thus the same person is both a conciliator and an arbitrator.<sup>275</sup> The problem with using the same commissioner for both processes is that the conciliator may have become a privy to confidential information in the conciliation meeting which may compromise his or her ability to arbitrate the dispute. The purpose of the con-arb is to provide a one stop dispute resolution process thereby avoiding the need to request arbitration, the matter automatically goes on to arbitration. This improves the efficiency of the CCMA and maintains pressure to settle the disputes expeditiously amongst the parties. The procedure and rules to be followed in the con-arb are similar to those in the conciliation and arbitration process.

#### 4.3 2 Arbitration Hearing

When conciliation has failed and one of the parties has requested arbitration, the CCMA appoints a commissioner to arbitrate the dispute but this can only be done after all the jurisdictional facts have been established. If there is a likelihood of bias, prejudice, interestedness, in relation to the person suggested, that individual is disqualified from presiding over the dispute.<sup>276</sup> Thus the CCMA is obliged to appoint a new commissioner should it receive any objection about the first commissioner.<sup>277</sup>

<sup>274</sup> Section 191 (5A) of the LRA provides for con –arb of certain dismissal and unfair labour practice disputes only. Ironically there is no provision for con – arb in other disputes to which the process would be well suited e.g. disputes concerning the interpretation and application of a collective agreement surely, all disputes desire a quick decision and therefore the co-arb process should be available for the resolution of all disputes. In other dismissal and unfair labour practice disputes con–arb can be used as long as there is no objection from the other party.

<sup>275</sup> The arbitrator could be the same person who conciliated the matter. In general, most commissioners are reluctant to serve as both a conciliator and an arbitrator for fear of perception of bias. The argument put forward is that a commissioner may be a privy to confidential information arising from private sessions with both parties during the conciliation phase.

<sup>276</sup> Chanla S.K, *Law of Arbitration and Conciliation Practice and Procedure* 1998 at 251.

<sup>277</sup> Section 136(4) of the LRA states that an objection may be based on the refusal of another party to have the same person who conciliated the dispute to carry on with the Arbitration process.

To promote the participation of parties in the arbitration process, the CCMA rules give parties the discretion to hold pre-arbitration meeting.<sup>278</sup> This is an optional meeting which the LRA does not compel parties to hold but it is usually advisable to conduct such a meeting to narrow the issues.<sup>279</sup> The purpose of such a meeting is to establish as precisely as possible the contentious issues and will therefore become the subject of arbitration. It is an effort to speed up the arbitration process and limit issues before the commissioner as well as reaching a consensus.<sup>280</sup> Thus the need for a pre arbitration conference is more likely in complex cases which require the services of specialist arbitrators.<sup>281</sup> Although the pre-arbitration meeting is not compulsory, parties may be directed to hold such conference by the director of the CCMA and in such an instance the meeting becomes compulsory.<sup>282</sup> A directive from the CCMA to hold a pre arbitration conference means that the director has deemed this necessary in order to facilitate the arbitration. If the applicant fails to attend the compulsory pre arbitration hearing the matter may be dismissed by the commissioner and if the respondent does not attend and does not have justifiable cause, an order of costs may be made against him.<sup>283</sup>

The process used in arbitration is normally the adversarial approach similar to that in the normal civil courts.<sup>284</sup> Essentially, this means each side presents its case and examines the other party's case. Generally the party who bears the onus of proof will begin the case. The party who begins gives his opening statement and then the other party is also given the chance to give his opening statement as well.<sup>285</sup> The opening statements should

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<sup>278</sup> Rule 20 (9) of the CCMA Rules.

<sup>279</sup> Ibid.

<sup>280</sup> Peter Kantor *CCMA: A commentary on the rules* Claremount South Africa 2005 at 77.

<sup>281</sup> The meeting is essentially a minuted meeting held informally.

<sup>282</sup> CCMA rule 20.

<sup>283</sup> CCMA rule 20(3) read with rule 30.

<sup>284</sup> Andrew Pons *Labour Relations Handbook* Cape town Juta 1997 at 12-17

<sup>285</sup> See section 192 (2) of the LRA, the question as to who begins the case depends on the type of the dispute, in a dismissal case where the parties agree that the employee was dismissed, the onus is on the employer to prove the fairness of his dismissal, and the employer begins. But if there is a

be brief; it should encapsulate the issues in dispute, the witness to be brought before the tribunal and what they will tell tribunal.<sup>286</sup> The relevant importance of the statement of the case is to set out in chronological order, the material facts upon which the applicant relies and the legal issues involved. If there is any documentary evidence which is mentioned in the opening statement, it should be submitted to the arbitrator and to the other party's representative.<sup>287</sup> Parties in arbitration cases normally rely on various documents such as clock cards, employee cards and minutes of meetings and complaints forms.

The parties are responsible for securing the presence of their witnesses. Evidence in chief is one of the methods that is used to present evidence that proves a party's case. The purpose of evidence in chief is to place on record all relevant facts of the case that the witness has first hand knowledge of. Parties usually use this stage as a means of clarifying the essential elements of the dispute. Witnesses are called to give evidence under affirmation and the representative will then prompt the witnesses by asking questions so that the witness's version is put to the arbitrator.<sup>288</sup> When questioning, a representative is not allowed to ask leading questions simply because it would amount to the representative giving evidence instead of the witness.<sup>289</sup> The witness is then cross examined by the opposing party or his representative in order to draw out facts which support his case as well as to highlight those statements made by the witness that the

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dispute as to whether or not the employee was dismissed the onus is on the employee to prove the existence of the dismissal. See section 192 (1) of LRA.

<sup>286</sup> Some of the contents of the opening statements include, issues to be decided, indicate whether substantive and procedural fairness are in issue or not, what evidence will be lead and a brief outline of the case.

<sup>287</sup> At this stage each party must indicate to the arbitrator whether it accepts that the documents submitted by the other party are what they purport to be.

<sup>288</sup> In *Morningside Farm v Van Staden No and another* (1998) ILJ 1204 (LC) the court held that failure to administer an oath constitutes a gross irregularity .It is a trite in law that witnesses who give evidence in court are required to take an oath. It therefore follows that a commissioner who fails to administer an oath or fails to ensure an affirmation, commits a gross irregularity.

<sup>289</sup> Leading questions are questions which suggest the answer

other party disagrees with.<sup>290</sup> It may also be used to discredit a witness so that the arbitrator disregards his or her evidence.

When all the parties have been given the opportunity to cross examine witnesses the next stage is re-examination. Parties normally use this stage to clarify or explain issues that were raised during cross examination. At this stage, the representative is given another opportunity to pose questions to his witness in a friendly manner in order to come up with new evidence. It also gives the witness the opportunity to explain or complete matters raised during cross examination. However, its importance is questionable as the witness cannot give an explanation or clarify his inconsistency. The last stage before the award is the closing statements which are also termed arguments. The party who began the case is customarily required to give his or her closing statements first and then the other party will respond. The relevant importance of the closing statements is to remind the arbitrator of the issues to be decided, summarise and analyse evidence given during the hearing, apply the law to the facts by referring to judgements and text books and deal with submissions and arguments of the other side.

#### 4.4 Review of CCMA awards

For CCMA decisions to be upheld, they must be justifiable in relation to reasons given in the award.<sup>291</sup> Justifiability requires that commissioners must apply their minds seriously

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<sup>290</sup> In *Mutual and Federal Insurance Co Ltd v CCMA* (unreported, Labour Court J533/97 the court considered the employers allegations that the arbitrator had committed a gross irregularity in the conduct of the proceedings because he failed to allow proper examination of the employee.

<sup>291</sup> As far as the test for whether commissioners have complied with the requirement of substantive rationality is concerned, Judge Froneman in *Carephone case v Marcus and other* 1998 (11) BLLR 1093 (LAC) added that “It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him or and the conclusion he or she eventually arrived at.” He was clearly aware that this test involved redrawing to some extent the line between review and appeal, however he stressed that the distinction had not been abolished hence he explained how the line should be drawn in the following words “According to the *New Shorter Oxford Dictionary* ‘justifiable’ means able to be legally or morally justified, able to be shown to be just, defensible. It

and cautiously to the evidence and reach conclusions on rational rather than illogical grounds.<sup>292</sup> If a CCMA decision lacks justifiability in terms of the LRA, it is reviewable and any party can approach the Labour Court for a review of the case. In terms of the LRA, a party may apply to the Labour Court on the basis of an alleged defect with a commissioner's ruling in terms of section 145 of the LRA.<sup>293</sup> In recent years, there has been major debate on whether such applications for review can be made under section 145 or 158(1) (g) of the LRA.<sup>294</sup> The relationship between section 145 and 158(1) (g) is confused by the fact that the former refers specifically to arbitration awards of the CCMA while section 158(1)(g) is found among the list of powers of the Labour Court. Since arbitration by the CCMA is a function provided for in LRA and section 158(1) (g) is introduced with the words 'despite section 145,' arbitration awards are excluded from this section.<sup>295</sup> The learned judge held the phrase 'despite section 145' found in section 158(1) (g) should be construed to mean nothing more than despite the review of arbitrators' awards on very narrow grounds in terms of section 145.<sup>296</sup>

The test for review of CCMA awards was set in the case of *Carephone v Marcus and others*.<sup>297</sup> In this case, the Labour Court ruled that applications for review of CCMA

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does not mean 'just' justified or correct. On its plain meaning the use of the word 'justifiable' does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself, it makes a very clear distinction between reviews and appeals.

<sup>292</sup> *Fair Foods v CCMA and others* 1999 (20) ILJ 1701.

<sup>293</sup> Section 145 of the LRA. A defect referred to in subsection (1) means (a) that the commissioner (i) committed misconduct in relation to the duties of the commissioner as an arbitrator (ii) committed a gross irregularity in the conduct of the arbitration proceedings or (iii) exceeded the commissioner's powers or (b) that an award has been improperly obtained.

<sup>294</sup> Section 158(g) states that the Labour Court may, despite section 145 review the performance or purported performance of any function provided for in the Act or any act or omission of any person or body in terms of this Act or any other law.

<sup>295</sup> In *Edgars Stores v Director CCMA* 1998 ILJ 350 (LC) judge Revelas J interpreted section 158(1) (g) to exclude its application in terms of arbitration proceedings although the court accepted that the section had the effect of extending the Labour Court's power of review.

<sup>296</sup> Ibid.

<sup>297</sup> 1998 (11) BLLR 1093 (LAC)

awards must be brought under section 145. The key to this judgement was that the Labour Court is permitted to ask whether a commissioner's order is justified by the evidence that was led at the hearing and by the law and principles that commissioners are required to apply. This was also confirmed in the case *Pep Stores v Advocate AP Laka* in which an employer attacked a commissioner's decision on both procedural and substantive grounds.<sup>298</sup> The Judge uttered these important words:

"I want to suggest that in addition to procedural defects, section 145 gives the Labour Court the power to enquire whether the award is appropriate within the meaning of section 138(g). The preoccupation of this court in reviewing awards on this basis will be whether there has been a failure of justice. In time the Labour Court will have to establish when justice has failed. For purposes of this judgement I want to suggest that an award will be found to inappropriate if it is shown that (1) the commissioner ignored direct evidence placed before him (2) the commissioner relied on evidence not placed before him (3) the commissioner committed a serious error of law. Where it is shown that one or more or a combination of these factors is present the court will review an award of the Commission."

Review relates to the process of decision making and not to the final outcome, therefore if there is a miscarriage of procedural fairness, the award will be reviewed and set aside. In *Platinum Mines Ltd v CCMA and other* the court held that the award was reviewable because the commissioner had failed to appreciate the ambit of his duties under the LRA.<sup>299</sup> The test adopted by the Labour Appeal Court gave CCMA commissioners more leeway than the statute allows, as it insulates their decisions from review unless the record is devoid of reasons capable of justifying the outcome. However, in the *Carephone case*, it was held that reviews of CCMA awards should not be treated as appeals but some investigation of the merits is necessary to decide whether the award was justifiable. Although it has long been said that a reviewing court unlike one of appeal

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<sup>298</sup> 1998 (9) BLLR 952 (LC) in this case the judge confirmed the Carephone judgement and expressed his disagreement with the judgments that held that section 158(1)(g) subsumed section 145 .

<sup>299</sup> Ibid.

should not enter into the merits of the decision, the position has changed in terms of the constitutional requirement of justifiability. Commissioners should enter into the arena of merits but should be cautious when doing so as it might defeat the distinction between review and appeal.

#### 4.5 Grounds for review in terms of section 145 of the LRA.

##### 4.5.1 Misconduct

Firstly, in all forms of arbitration whether private or statutory, an award can be reviewed if the arbitrator committed misconduct in relation to the commissioner's duties as an arbitrator.<sup>300</sup> Certain actions by commissioners will plainly amount to misconduct.<sup>301</sup> This was confirmed in South Africa where it was held that a gross mistake or carelessness by an arbitrator can be indicative of misconduct contemplated in the LRA.<sup>302</sup> The commissioner is required to give due consideration to the issues, failure to do so amounts to misconduct.<sup>303</sup> In *Reunert Industries v Naicker* the Labour Court held that while misconduct did not embrace a mistake of law or fact, gross mistake or carelessness on the part of the commissioner may also constitute misconduct, thus gross carelessness and gross negligence can also amount to misconduct.<sup>304</sup> But the more difficult question is whether an arbitrator is guilty of misconduct by making a mistake. To answer this question, Judge Willis AJ in the *Shoprite case v Ramdaw and others* began by noting the striking similarity between section 145 of the LRA and section 33 of the Arbitration Act.<sup>305</sup> According to him, the judicial interpretation of the Arbitration Act, he said errors

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<sup>300</sup> Section 158 of the LRA.

<sup>301</sup> In *Dickenson and Brown v Fishers Executors* 1915 AD 166 at 175 it was stated that the existence of some wrongful, improper or *mala fide* conduct on the part of the commissioner involving some degree of personal turpitude amounts to misconduct.

<sup>302</sup> See *Reunert Industries (Pty) Limited t/a defence industries v Naicker and others* 1977 BLLR 1632 (LC).

<sup>303</sup> In *Abdul v Cloete* No 1988 (3) BLLR 264 (LC) the court also held that an incomprehensible and self contradictory award amounted to gross misconduct, justifying the setting aside of the award.

<sup>304</sup> 1997 (12) BLLR 1632 (LC).

<sup>305</sup> [2001] 9 BLLR 1011[LAC]. More so, In *Amalgamated Clothing v Veldspun* 1994 (1)SA 162 (A) Some judges took the view that because the legislature borrowed the wording of section 33 of

of fact or law by arbitrators do not amount to misconduct. However the question for the purposes of the interpretation of section 145 of the LRA is whether, by adopting the language of the Arbitration Act in the formulation of section 145, the legislature intended to circumscribe the Labour court to the same extent as the High Court had chosen to circumscribe itself when reviewing private arbitration awards.<sup>306</sup> To Wallis AJ in the Shoperite case, the answer was self evident and flowed from what he described as:

“Well established canon of statutory interpretation that where the legislature deliberately includes language in a statute which in the same or similar context had been subject to clear judicial interpretation, the legislature intends to include such language on the basis that it bears the interpretation already given by it to the courts”

Judge Landman in support of the above view, concluded that the principles applicable are basically a summary of those formulated by the courts in the interpretation and application of section 33 of the Arbitration Act.<sup>307</sup> However, further comments can be construed as permitting the setting aside of awards in terms of section 145 on grounds of misconduct in circumstances not provided for in section 33 of the Arbitration Act. Therefore, the legislature did not intend to limit the grounds of review of CCMA awards to those that were accepted by the High Court. In *Standard Bank of South Africa v CCMA* it was held that this thought was initially based on the fact that the LRA provided in

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Arbitration Act when it drafted section 145 of the LRA, the lawmakers must have been aware of judgments in which the High Court has held that the terms misconduct and gross irregularities in the proceedings in the Arbitration Act must be taken literally to mean that an arbitrator does not commit misconduct merely by making a mistake, but only by improperly favouring one party for unacceptable reasons. The practical effect of this view was that the High Court refrained from interfering with arbitration awards on review unless the arbitrator had acted in manner that was demonstrably biased. See also *Dickenson v Brown* 1915 AD 166 and *Donner v Erlich* 1928 WLD 159

<sup>306</sup> According to the interpretation of the Arbitration Act, errors of fact or law or law by arbitrators do not amount to misconduct even if there is no evidence apparent from the record that supports the arbitrator's award. Gross irregularity ordinarily relates only to procedural irregularities. Excess of power occurs when arbitrators stray beyond their terms of reference.

<sup>307</sup> *Eskom v Hiemstra NO and others* 1999 (10) BLLR 1041(LC).

section 158(1) (g)“despite section 145” the Labour Court is empowered to review acts of the CCMA commissioners on any grounds permissible in law.<sup>308</sup>

#### 4.5.2 Gross Irregularity

Secondly, an award may be set aside where the commissioner committed a gross irregularity during arbitration proceedings. It is not surprising that due to the incompetence of some commissioners, a number of procedural irregularities have been identified during review proceedings. There are quite a number of irregularities which the labour court has regarded as grossly irregular, the most important ones being the granting of legal representation inappropriately and the denial of parties the right to cross examine witness.<sup>309</sup> Review is not an appeal and therefore it is not related to the merits of the matter but to the commissioner’s conduct. However in *Mutual and federal Insurance v CCMA* the court plainly indicated that gross irregularities are not limited to those of a procedural nature.<sup>310</sup> Judge Jali cited a passage from *Gold Fields v Johannesburg City Council* with the following verbatim:<sup>311</sup>

“It seems to me that gross irregularity fall into broad classes, those that take place openly, as part of the conduct of the trial—that may be called patent irregularities and those that take place inside the mind of the judicial officer which are only ascertainable from the reasons given by him and which may be called latent irregularities. The crucial point is whether it prevented a fair trial of issues. If it prevented a fair trial of issues then it amounts to a gross irregularity.”

What then is gross irregularity in relation to CCMA arbitrations? The phrase has been interpreted as to be concerned with an irregularity in the process or method utilized to conduct the arbitration hearing rather than the outcome thereof and goes as far as refusal to hear evidence.<sup>312</sup> If the arbitrator comes to a wrong decision as to the competency of a

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<sup>308</sup> 1998 (5) BLLR 510 (LC).

<sup>309</sup> Some of the conducts which have been classified by the Labour Court as gross irregular include failing to determine the dispute, basing an award on documents not admitted as evidence, gravely misunderstanding evidence.

<sup>310</sup> 1997 (12) BLLR 1610 (LC).

<sup>311</sup> 1938 TPD 55.

<sup>312</sup> *Bester v Easigas and Another* 1993 (1) SA 30 (C) AT 42.

witness, the admissibility of documentary or oral evidence, or the relevance and propriety proof of particular facts, the award passed therein is reviewable and can be set aside by the court.

It is only in the case of gross irregularity which amounts to a miscarriage of justice, that the court will be justified in setting aside or refusing to enforce the award.<sup>313</sup> The requirement that irregularity should be sufficiently serious to warrant review limits court's power to intervene and upholds the notion of finality in the arbitration awards.<sup>314</sup> Another common ground of irregularity is where the commissioner fails to administer or affirmation to the witnesses before they appear in the hearing.

#### 4.5.3 Exceeding power

An award may also be reviewed and set aside if the commissioner or arbitrator exceeds his powers.<sup>315</sup> Arbitrators often exceed their jurisdiction if they mistakenly assume their jurisdiction. Excess of power may have a wider meaning. In private arbitration, arbitrators exceed their powers by stepping outside the parameters set by their terms of reference so too do commissioners. CCMA commissioners exceed their powers when they do not act within their jurisdiction. There are quite a number of cases which have been reviewed because the commissioners acted *ultra vires*. In the case of *National Entitlement Workers Union v John NO and others*, the court held that excess of power takes place when commissioners stray from their ambit of jurisdiction or make a rulings or award remedies which are beyond their powers.<sup>316</sup> The case of *Oracle Corporation v CCMA*, also serves as an example.<sup>317</sup> On review, the labour court found that the commissioner exceeded his powers by making a finding on the merits. The commissioner

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<sup>313</sup> *Goldfields Investment Ltd and Another v City Council Johannesburg and Another* 1938 TPD 551 at 560.

<sup>314</sup> Cowling, "Finality in arbitration" 1994 SALJ 306 AT 314.

<sup>315</sup> In *Quality Workware Manufacturing v Commissioner Adair* 1998 (4) BLLR 419 (LC) it was held that commissioners exceed their powers if they mistakenly assume jurisdiction.

<sup>316</sup> 1997 (12) BLLR 1623 (LC).

<sup>317</sup> 2005 (10) BLLR 982 (LC).

failed to comprehend that review is not appeal and hence has nothing to do with the merits of the case.

The fourth ground of review is when commissioners obtain awards improperly and where there are accusations of bias or where one of the parties gives false evidence during the hearing. In *Moch v Nedtravel*, it was stated that an award can be reviewed on the grounds of the commissioner's conduct if there is reasonable suspicion of bias in his conduct leading to substantive unfairness in the proceedings.<sup>318</sup> Commissioners are entrusted with the duty to act impartially without fear and favour and therefore if there is any likelihood of bias the award must be set aside.

#### 4.6 Enforcement of the award

Once the award has been issued by the arbitrator, it becomes binding and must be adhered to by all the parties. However, the fact that an arbitration award has been issued does not necessarily mean that the award will be complied with. If a party refuses to comply with the terms of an arbitration award, parties may resort to having the award made an order of court.<sup>319</sup> In making such an award, the court in effect adopts it as if it were its own.<sup>320</sup> Before the enactment of the Labour Relations Amendment Act of 2002, awards of CCMA commissioners had to be made orders of the Labour Court to render them enforceable. This required an application in terms of section 158(1) (c) of the LRA. The amendment to the LRA sought to provide a new remedy to give force to awards.<sup>321</sup> CCMA awards can now be enforced in terms of section 143<sup>322</sup> and section 158(1) (c) of

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<sup>318</sup> 1996 (3) SA (A) at 8.

<sup>319</sup> Section 158 (1) (c) of the LRA, according to the section, an award may also be made an order of the Labour Court and executed as a court judgement.

<sup>320</sup> Butler and Finsen *Arbitration in South Africa: Law and Practice* Cape Town Juta 1993 at 273.

<sup>321</sup> This was affected by changing section 143 of the LRA, which previously stated that an arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of section 158(1) unless it is an advisory award.

<sup>322</sup> Section 143 states that (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award (2) an arbitration award may only be enforced in terms subsection (1) if the director has

the LRA. By using this provision parties to statutory arbitration can force another party to comply with the directives of the award. It is important to note that the magistrate court has no power to make an award an order of court since that jurisdiction has been entrusted to the Labour Court.

Whilst it is acceptable that the arbitration tribunals need assistance from the Labour Court in the enforcement of awards, such an intervention should guard over the integrity of the arbitration process by refusing to enforce arbitration awards that are outcomes of flawed proceedings. It was indicated that the power of the Labour Court to make an award a court order is part of the supervisory powers of the Labour Court of the activities of the arbitration tribunals.<sup>323</sup> Therefore it cannot be disputed that the Labour Court does, and should exercise some degree of control and supervision over the arbitration process, but this should not be unnecessarily extended in a way that undermines the powers of the tribunals, there is a need of a healthy relationship between the labour court and the tribunals.<sup>324</sup> The fundamental question as regards the enforcement of arbitration awards through having the award made an order of court is the manner in which the Labour Court should exercise this discretion. It seems as if the Labour Court favours making arbitration awards an order of court, but it will however not do so automatically as it is required to judge each case on its merits after hearing evidence.<sup>325</sup>

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certified that the award is an award contemplated in subsection (1) lastly if a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court. Section 158(1)(c) which empowers the Labour Court to make an arbitration award or any settlement agreement, other than a collective agreement an order of court was not repealed by the amending Act. So parties now have a choice of remedies.

<sup>323</sup> *Deutsch v Pinto* 1997 (18) ILJ 1008 (LC) at 1015H.

<sup>324</sup> In *Foschin Group (Pty) Ltd v CCMA* 2000 1 BLLR 100(LC)

<sup>325</sup> Ibid, it was stated that it may be necessary in hearing a section 158(1) (c) application to hear evidence.

## 4.7. Current Challenges and Weaknesses

### 4.7.1 Inadequate legal qualifications

The CCMA relies on the services of both full time and part time commissioners to handle the caseload and to ensure that both conciliation and arbitration processes are finalised within the set time frames. The governing body must therefore appoint as many commissioners as it considers necessary to perform the functions conferred to it by the legislature bearing in mind that the success of the CCMA depends on the qualities and attributes of the commissioners.

There have been complaints about the quality of arbitration awards, a lack of logic and unacceptable levels of spelling and grammatical errors by ill-qualified commissioners.<sup>326</sup>

The number of review applications and the setting aside of awards indicate the failure of commissioners to apply the law due to inadequate qualifications. On review of CCMA awards, the labour court is permitted to ask whether a commissioner's award is justified by the evidence that was led at the hearing and by law and principles that commissioners are required to apply.<sup>327</sup> The material before the commissioner will usually consists of a dispute of fact and law. Therefore, a decision based on incorrect interpretation of the law is reviewable. To avoid this, commissioners must be legally qualified and must have background knowledge of the law. Unfortunately, there are no clear guidelines in the LRA about the exact legal qualification of commissioners.<sup>328</sup> The absence of qualifications raises questions as to how commissioners will handle some of the complex interpretative issues that will certainly come their way. This is a major draw back as some of the commissioners are alleged to be incompetent and giving wrong awards which end

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<sup>326</sup> CCMA volume I NO 10.

<sup>327</sup> CCMA Rule 20(2).

<sup>328</sup> The only qualification in the LRA is that the person must be independent and competent which of course is a vague qualification, See section 117(6) and 117(2)(9) which also seek to balance gender on the appointment of Commissioners.

up reviewable in the Labour Court.<sup>329</sup> The case of *Santa and other v CCMA and others*,<sup>330</sup> serves as an example, the court held that the commissioner had misinterpreted an agreement which had been concluded by the parties. The court further held that the commissioner had failed to consider the applicant's arguments and hence the award was set aside. In as much as extensive experience in labour matters is an important qualification, it must be balanced with professional and relevant qualifications, together they produce a qualified and experienced commissioner. The legislation should stipulate the exact legal qualifications of the commissioners and this will also ensure that commissioners remain independent, professional, and competent. Legally qualified commissioners could contribute to fewer errors and mistakes in the process.

#### 4.7.2 Long delays in the process

The idea behind alternative dispute resolution mechanisms is to be more expeditious than litigation. However, in practice, the machinery for the settlement of disputes is not expeditious, the reporting and resolution of disputes takes unnecessarily long time. This has caused major delays in the finalisation of cases in time as stipulated by the Labour Relations Act. Three reasons have been forwarded as the primary cause of these delays.

##### 4.7.2.1 Late referrals and Condonation

The first reason for the delay arises from late referrals and condonation. An employee must refer the dispute to the CCMA within thirty days from the date on which the dispute occurred. If the employee fails to do so within that time set, he/she is required to make an

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There are quite a number of cases which are referred to the labour court for review, In most cases the awards are set aside due to the gross irregularity of commissioners and this reveals the incompetence of the commissioners. Some of the cases include *Oerlikon Electrodes SA v CCMA and others* 2003 (9) BLLR 900 (LC), *Crown Chicken v Kapp and others* 2002 (6) BLLR 493(LAC). *Mabaso and others v Universal Product Network* 2003 (9) BLLR 871(LC), *Riekert v CCMA* 2006 (4) BLLR 353 (LC) and others, *Exactics-Pet (Pty) Ltd v Patelia NO and others*. 2006 BLLR 551 (LC).

<sup>330</sup>

2005 (10) BLLR 1019 (LC).

application to the CCMA to condone that he failed to refer his case timeously.<sup>331</sup> This prolongs the whole dispute resolution process as disputants have to wait for a long time for the remedy. The most problematic issue with regard to condonation was raised in *Shoprite Checkers v CCMA* where it was stated that the moment when condonation must be granted is not expressly provided for in the LRA.<sup>332</sup> This application should preferably be dealt with prior to the conciliation as it is a jurisdictional step.<sup>333</sup> In this case, the Labour Court considered the moment to be that before commencement of arbitration. On the other hand, the LRA provides that the CCMA can condone late referrals at any time, so if it has not been dealt with at pre-conciliation phase, it should be dealt with as soon as everyone realises that it needs to be considered.<sup>334</sup> In support of this view, Soni AJ in *Gianfranco Hairstylists v Howard* states that the words “any time” means that condonation can be sought or granted during the conciliation proceedings and not afterwards.<sup>335</sup> Further more, in *Alloy Casting v Smith* it was observed that it is open to the employee to make a contingent application for condonation to the conciliating bargaining

<sup>331</sup> See Code on Guidelines on Conciliation Proceedings, *Government Gazette* 18936 Gen 896, 5 June 1998. The code deals with the following matters, condonation for late referrals, what happens if a party fails to attend conciliation proceedings, application for postponement and impartiality of commissioners. The decision made at conciliation on whether or not to grant condonation in terms of section 191(2) are subject to review by the labour court. The Labour Court reviewed a ruling by a commissioner granting condonation to an employee for late referral of an unfair dismissal dispute in *Moolman Brothers v Gaylard NO and others* 1998 (19) ILJ 150 (LC) it was stated that the decision of the commissioner is discretionary in nature but must be exercised judicially on consideration of all facts.

<sup>332</sup> 2000 (7) BLLR 835(LC).

<sup>333</sup> In the judgement of *Van Royen v Nedcor Bank Ltd* 1998 (5) BLLR 540 (LC) it was held that unless late referrals of dismissal disputes for conciliation are condoned, the CCMA lacks jurisdiction to issue arbitration awards. This strand of thinking is positioned on the assumption that non-compliance by the CCMA with section 191(2) deprives the commission of jurisdiction to deal with any phases for the procedure laid down by section 191 after the last moment in which condonation could conceivably given during the processing of the dispute. See also *NUMSA and another v Voltex* 2000 (5) BLLR 619.

<sup>334</sup> [www.CCMA.org.za](http://www.CCMA.org.za) accessed on the 22<sup>nd</sup> of May 2007.

<sup>335</sup> 2000 (3) BLLR 292 (LC).

council official during the course of the conciliation.<sup>336</sup> From the above judgments, none of them above explains the cut off point for an application for condonation. However, what is clear is that section 191 of the LRA is peremptory which follows that condonation is necessary for the dispute that was referred beyond the thirty day deadline and that the fatality of the late referral is cured by condonation.<sup>337</sup>

#### 4.7.2.2 Non-Attendance

The second reason for delay arises from non- attendance by the parties on the set day. On the set day, every party must be present and may appear in person or represented by a director or any member or office bearer<sup>338</sup> of a registered trade union.<sup>339</sup> If the party who referred the dispute to the CCMA fails to attend, the commissioner may dismiss the matter by issuing a written ruling.<sup>340</sup> If the respondent or his representative fails to attend, the commissioner may continue with the proceedings in the absence of that party or postpone the matter to a later date.<sup>341</sup> The rationale behind this is to ensure that parties do not attempt to cause delays or inconvenience the whole process.<sup>342</sup> CCMA commissioners have however the power to postpone arbitration hearings provided all the parties have agreed to the postponement. This rule has resulted in delays in the finalisation of cases.<sup>343</sup> It is now a striking feature of the CCMA that a large number of

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<sup>336</sup> 2000 (2) BLLR 165 (LC).

<sup>337</sup> CCMA Rule 23(3).

<sup>338</sup> Office bearer means a person who holds office in trade union, employer's organisation or a council.

<sup>339</sup> Section 135(4) of the LRA.

<sup>340</sup> *Paymaster Services (Pty) Ltd v Mogwe* 1999 ILJ 610 (LC).

<sup>341</sup> Section 138 (5) and CCMA Rule 30.

<sup>342</sup> If parties are not informed of the postponement, they should assume that arbitration will proceed on the scheduled date since application for postponement does not mean that postponement will automatically be granted. Until such a time as the parties have received a written ruling of a postponement they must accept that the matter will continue.

<sup>343</sup> John Brand, "CCMA: Achievements and Challenges, Lessons from the first three years" *Industrial Law Journal* 2000 (21) at 83.

disputes involve failure of either parties to attend the hearing on the set day. Instead of the thirty days period required for conciliation, the period is extended.<sup>344</sup>

#### 4.7.2.3 Procedural Irregularities

The third reason for the delay is caused by the fact that the CCMA places so much emphasis on procedural irregularity. While the expeditious resolution of disputes should be the first priority, the process within the CCMA has become more adversarial and technical, things have become totally rights oriented and parties are focusing on their rights rather than looking for solutions. The CCMA has not been able to resolve disputes expeditiously as has been hoped at the time of its establishment.<sup>345</sup> The system in the CCMA places so much emphasis on procedural fairness in the conciliation and arbitration processes which has also increased the role of labour lawyers in the system.<sup>346</sup> If the commissioner omits any of the procedural requirements, the decision will be set aside and this result in unacceptable delays. In *Mornigside Farm v Van Staden* it was held that it is a procedural law/trite that witnesses who give evidence are required to take the oath or affirm as a witness.<sup>347</sup> It therefore follows that a commissioner who fails to administer an oath or fails to ensure an affirmation commits a gross irregularity. Furthermore, the court held that the failure to allow proper cross-examination of witnesses amounts to a gross irregularity so also is the failure or refusal by the commissioner to give the representative an opportunity to put the different or contradictory versions to the others side's witness.<sup>348</sup> For these reasons, merits of disputes often get lost in a thicket of procedural technicalities and resolution of the dispute takes time.

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<sup>344</sup> Ibid

<sup>345</sup> Ngcukaitobi T, "Sidestepping the CCMA: Unfair disputes in High Court" 2004 *Industrial Law Journal* 2 at 25.

<sup>346</sup> Ibid.

<sup>347</sup> 1998 (19) ILJ 1204 (LC).

<sup>348</sup> *Mutual and Federal Insurance v CCMA* (unreported, Labour Court, J533/97, 19 November 1997) the court considered the employers allegation that the arbitrator had committed a gross irregularity in the conduct of the proceedings because he failed to allow(a) proper cross-examination of the employee, (b) the company's representative to address argument on contradictions between the

To avoid review applications and delays, commissioners must avoid technicalities by conducting the hearing in a manner appropriate to resolve the dispute fairly and quickly with minimum legal formalities. Thus in *Avril Elizabeth Home for the Mentally Handicapped v CCMA* the Labour Court held that commissioners should avoid technicalities and legal formalities in conducting arbitration hearing.<sup>349</sup> In this case, the court set aside a commissioner's award because the commissioner had applied a strict criminal law test of proof beyond reasonable doubt, rather than the correct test of proof on a balance of probabilities and this constitute a material irregularity. Although there is too much emphasis on the procedure and rules in the processes, there are times when the courts have condoned the exercise of such rules.

#### 4.7.3 Jurisdictional Cases

The CCMA may only arbitrate disputes in respect of which the CCMA has been legislatively mandated to arbitrate.<sup>350</sup> Before the case is heard, the arbitrating commissioner is obliged to determine whether the CCMA has jurisdiction to arbitrate the dispute. For that reason, the CCMA's jurisdiction can be challenged by any party who feels that the CCMA exceeded its jurisdictional steps delaying the actual hearing of the case. The increasing number of jurisdictional cases has prolonged the finalisation of cases. In the case *MEC Tourism, Environmental and Economic Affairs, Free State v Nondumo and others* the employee referred an alleged unfair labour practice dispute to the CCMA after the date on which the fixed term contract expired.<sup>351</sup> The applicant contended that the CCMA lacked jurisdiction because the applicant's fixed term contract had expired by the time he referred the dispute. The court held that the applicant's argument that the CCMA lacked jurisdiction was without merit, even if the first

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employees evidence at the arbitration hearing and at the disciplinary enquiry, and the company representative an opportunity to present closing arguments.

<sup>349</sup> 2006 (9) BLLR 833 (LC).

<sup>350</sup> Section 136 (1) of the LRA.

<sup>351</sup> 2005 (10) BLLR 974 (LC).

respondent's contract had expired by the time he referred the matter, the dispute concerned an unfair labour practice perpetrated while he was employed by the applicant.

#### 4.7.4 Legal representation

The issue of representation in the CCMA is a very contentious issue. Whether or not parties to the CCMA ought in practice to be legally represented is one of the thorniest issues especially in arbitration.<sup>352</sup> There is a school of thought which holds that the whole purpose of the CCMA is to settle disputes without the procedures and complexities of the courts imported by lawyers.<sup>353</sup> It is argued that the CCMA is not a replica of the courts and the presence of lawyers may rapidly cause the proceedings into becoming a carbon paper of the national courts hearing.<sup>354</sup> On the other hand, there are those who believe that the orderly presentation of evidence and arguments requires specialist skills and experience and inhibiting the use of lawyers sometimes brings confusion and disorder.<sup>355</sup> In his speech, the Minister of Labour uttered the following words with regards to the use of legal representation:

“The CCMA now has objective data that confirms the long held suspicion that confirms that lawyers are milking the labour market regime to death by unnecessarily complicating and consequently prolonging cases to the detriment of both employers and employees.”<sup>356</sup>

Whilst the idea behind representation is to cater for marginal and uneducated workers, problems often arise in the interpretation of the CCMA rules as some representatives bring their own interpretations inconsistent with the CCMA rules. More so, it has become common to see vulnerable workers who seek the assistance of the CCMA being escorted into Kuyasa house by unscrupulous operators claiming to be lawyers.<sup>357</sup> Lawyers have

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<sup>352</sup> Butler and Finsen *Arbitration in South Africa* Cape Town Juta 1993 at 178.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> Budget vote speech by Honourable Minister of Labour MMS Mdladlana National Assembly 15 May 2007.

<sup>357</sup> This is according to a CCMA statement accessed at [www.labourguide.co.za](http://www.labourguide.co.za) on 10-09-2007.

been trying to convince CCMA users that the services of the institution can not be procured without professional legal assistance and representation.<sup>358</sup> In view of this, we would have to closely examine the role and functions of legal representation within the CCMA in a manner that would limit the damaging role lawyers are having in our labour system.

Yet another problem associated with legal representation is that a party who is not represented or represented by an incompetent person may develop feelings of exclusion and alienation resulting in withdrawal or non attendance. Whilst there is a negative perception of legal practitioners in conciliation, the role of lawyers in arbitration is very important because they can assist in defining the dispute, streamlining proceedings thereby making the job of an arbitrator easier.

#### 4.7.5 Overworking commissioners

The kind of work load which the CCMA commissioners are carrying is a major source of problem as it negatively affects the quality of conciliation and arbitration awards. CCMA figures indicate that the average duration of conciliation is two hours for individual disputes, two to four hours for mass dismissals, one to three days for wage disputes and three hours for other disputes.<sup>359</sup> As for arbitration, the average duration of an arbitration hearing is half a day for individual dismissals and one day for other disputes.<sup>360</sup> Average time taken to resolve the whole conciliation process is twenty six days and arbitration forty eight days. Therefore, the combined average to resolve a case (inclusive of all process) is sixty six days. This is a source of stress as commissioners are required to hold three conciliation hearings per day and two or three arbitration hearings per day as well as write reasoned awards for each hearing within 14 days.<sup>361</sup> As a result of this pressure,

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<sup>358</sup> Ibid.

<sup>359</sup> CCMA vol 1 10 as quoted by Brand J, "CCMA: Achievements and Challenges, lessons from the first three years" *Industrial Law Journal* 21 at 83.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

commissioners make haste decisions and this affects the quality of arbitration awards and the conciliation process.

#### 4.7.6 Language

Another problem in the CCMA processes is the fact that South Africa is a multi-lingual society with eleven official languages and therefore commissioners are not always able to interpret for the parties. More so, most of the CCMA handouts and guidelines are written in English and this makes it difficult for ordinary workers to understand.

#### 4.7. Conclusion

On the basis of the previous descriptive and analytical account, it can be seen that disputants are not capacitated to deal with the sophisticated labour dispute resolution system. Most role players do not have the knowledge and skills to operate effectively in the system. Though people are much aware of their rights, the possibility that the dispute resolution system is becoming less adversarial is still far. This is evidenced by the complex and technical process involved in the system. However, the government has also done considerable work in the area of dispute resolution. The introduction of the CCMA shows that South Africa is on the right track, what is needed is to fine tune them to suit the current industrial system. This can only be done through sharing experiences with other countries at local, regional and international level. Therefore, the next chapter unpacks the Zimbabwean dispute resolution system in an effort of trying to address the South African challenges

## CHAPTER 5

### STATUTORY LABOUR DISPUTE RESOLUTION IN ZIMBABWE

#### 5.1 Introduction

Having discussed the statutory alternative dispute resolution system in South Africa, it is now necessary to explore the alternative dispute resolution system in Zimbabwe so as to compare it with the previous discussion. Just like South Africa, Zimbabwe has experienced labour disputes over the past decade due to the inefficiency of the alternative dispute resolution mechanisms.<sup>362</sup> It is on that ground that the Zimbabwean labour law recognises the use of alternative dispute resolution mechanisms in the resolution of disputes.<sup>363</sup> On that basis, this chapter has two distinct purposes. The first is to understand the statutory labour alternative dispute system and labour policy in Zimbabwe. Secondly, the chapter seeks to expose the weaknesses of the statutory dispute resolution process as provided by the state via the Ministry of Labour.

##### 5.1.1 Institutions and Policies for labour dispute resolution

There are a wide range of approaches relating to the organisational and rules of procedure governing the settlement of labour disputes. Many countries like South Africa have chose to establish specialised jurisdictions made up of labour tribunals, commissions and boards. The Zimbabwean government has also established different platforms through which labour disputes may be resolved.<sup>364</sup> Recourse to these alternative dispute resolution institutions has been preferred to the formal courts because they are cheap, flexible and

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<sup>362</sup> Brian Wood, "Roots of Trade Union Weakness in Post – Independence Zimbabwe" *South African Labour Bulletin* volume 12 Number 6 at 67 where it is stated that by the end of 1980 there had been about one hundred and fifty three strikes and well over 300.000 production days lost. As for South Africa, the official figure was 207 strikes and 174 days lost, undoubtedly the largest since the 1948 general strike.

<sup>363</sup> See part X11 of the Labour Relations Act 16 of 1985.

<sup>364</sup> In the Voluntary Conciliation and Arbitration Recommendation of 1951 (Number 92), governments are given the mandate to make available conciliation machinery which is free of charge and expeditious to assist in the prevention and settlement of disputes. This convention leaves room for member states of which Zimbabwe is also a signatory to design their dispute settlement system consistent with it.

speedy.<sup>365</sup> The institutions were legislatively mandated to resolve and cope with the high labour disputes which had characterized the industrial market especially soon after the country's independence.<sup>366</sup> The question which needs to be answered here is whether the government institutions and policies in pursuing these objectives of resolving disputes expeditiously, cheaply and in a flexible fashion have been realised.<sup>367</sup>

## 5.2. The Ministry of Labour and its role in alternative dispute resolution<sup>368</sup>

The Labour Act puts emphasis on alternative dispute resolution mechanisms as they are less confrontational than the adversarial system.<sup>369</sup> Indeed it was the LA which directly introduced specialised labour institutions in the dispute resolution system.<sup>370</sup> The key institution responsible for statutory dispute resolution is the Ministry of Labour.<sup>371</sup> Just like any other organ of state, the Ministry is headed by a Minister appointed by the president of the Republic and runs the day to day business of the Ministry including the labour dispute resolution department. Unlike in South Africa where the CCMA has been created to take responsibility of dispute resolution, the Zimbabwe Ministry of Labour is closely involved in both statutory conciliation and arbitration.<sup>372</sup>

The Ministry plays an important role in the resolution of labour disputes and it operates primarily through its labour relations officers who are full time employees of the

<sup>365</sup> The term formal court is used here to mean the Magistrate courts, Supreme Court and High Court.

<sup>366</sup> Chiripanhura and Makwavarara, "The Labour Market and Economic Development" *Zimbabwe Congress of Trade Union (ZCTU)* paper 1980-2000.

<sup>367</sup> Section 2A of the LA clearly brings out the government's efforts in resolving labour disputes by clearly stating the purpose of the LA is to advance social justice and democracy in the workplace by securing the just, effective and expeditious resolution of disputes and unfair labour practices.

<sup>368</sup> Hereinafter the Ministry.

<sup>369</sup> Section 93 of the Labour Relations Act 16 of 1985 (hereinafter referred to as the LA) specifies the powers of labour officers in the conciliation process.

<sup>370</sup> Sections 88 and 89 introduced the concept of state involvement in the labour dispute system with the creation of specialised labour forums namely the Labour Court, and the labour relations officers.

<sup>371</sup> Section 93 of the LA.

<sup>372</sup> *ibid.*

Ministry.<sup>373</sup> Though the Ministry's functions are widely defined, its most conspicuous role is the resolution of disputes at workplaces which in turn creates a peaceful labour market.<sup>374</sup> The Ministry provides a shift from the conventional adversarial dispute resolution towards alternative dispute resolution mechanisms placing more emphasis on conciliation, mediation and arbitration. Officials in the Ministry of Labour are empowered to settle labour disputes in accordance with the LA.<sup>375</sup> In this discussion, we shall enquire whether the traditional dispute resolution machinery in which the Ministry plays a leading role is sufficiently efficient, adequate or appropriate for enlisting the co-operation of the parties in the workforce. On the other hand, a question might also be asked whether the Ministry meets present day needs of enhancing the participatory role of stakeholders. The point here is that the dispute resolution machinery should be based on the tenets of industrial democracy, as an extension of popular democracy and in this respect should allow the participation of all the parties. The involvement of representatives from workers and employers in the dispute resolution process serves to enlist the practical knowledge and experience of employers and workers themselves. It is unfortunate that the Ministry is not governed by a tripartite body as in the case of the CCMA, parties to the dispute have greater confidence in a tripartite structure than a government controlled body.

### 5.2.1 Outline of the Conciliation Hearing

Due to the similarities of the legislative and colonial history of South Africa and Zimbabwe, the practice and procedure involved in the conciliation process is basically the same.<sup>376</sup> As noted in chapter two, conciliation is a process in which a person

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<sup>373</sup> Sarah Christie and Madhuku *Labour Dispute Resolution in Southern Africa* 1996 at 121.

<sup>374</sup> Ibid at 118, where it is stated that the Department of Labour Relations in the Ministry of Labour is the state's instrument for implementing its labour policies. By law and in practice, the department is central in the settling of disputes.

<sup>375</sup> Op cit note 365.

<sup>376</sup> As discussed previously in chapter three, South Africa and Zimbabwe have a common law heritage.

independent of the parties attempts to assist them to resolve a dispute.<sup>377</sup> The Ministry provides conciliation services upon request of either party to a dispute or on its own initiative.<sup>378</sup> In other words, labour officers may intervene even if the dispute has not been referred by one of the disputing parties. The labour officers should assist the parties to understand the problem and resolve the dispute.<sup>379</sup> The whole conciliation process is commenced by filing a dispute with the Ministry of Labour. However, there is no formal process for referring disputes to a labour officer but it is advisable to lodge a written complaint for proof of referral.<sup>380</sup> Either the employee or employer may in the case of a dispute or a claim approach the Ministry for assistance at the labour officer's place of business.<sup>381</sup> After the dispute has been referred to the Ministry, a labour officer is supposed to be appointed to conciliate the dispute. The labour officer must not be biased and must conduct the proceedings impartially without fear or prejudice.<sup>382</sup> Officers assigned to the case must work as neutral intermediary and cannot impose a settlement. They must further disclose any conflict of interest or relationship that might affect the

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<sup>377</sup> See Rule 7 of the Conciliation Guidelines as published in terms of section 127 of the LA. Conciliation is also taken to mean, to reconcile or bring together, especially opposing sides in an industrial dispute. This section corresponds to Article 1 of the UNCITRAL Conciliation Rules of 1980 which defines conciliation as a means of bringing opposing parties or individuals into harmony. A conciliator is one who brings opponents into harmony or who conciliates.

<sup>378</sup> Section 94 (1) of the LA states that no labour officer shall entertain a dispute or an unfair labour practice unless it is referred to him or has come to his attention.

<sup>379</sup> Section 93 (1) of the LA empowers a labour officer to whose attention a dispute has come, to attempt to settle the dispute through conciliation.

<sup>380</sup> Munyaradzi Gwisai *Labour and employment Law in Zimbabwe* University of Zimbabwe 2006 at 280. Forwards that no form currently exists to refer a dispute, he suggests that the procedure for referring disputes should be kept relatively informal.

<sup>381</sup> This means that the referring party is obliged to take the first step (i.e. to refer the dispute for conciliation) if that party wishes to use the Ministry for conciliation. Handling, faxing, sending by registered post or e-mailing a written declaration of dispute to a labour officer's place of business is also accepted as a means of delivery.

<sup>382</sup> *Majora v Kuwirirana Bus Service (Pvt) Ltd* 1990 (1) ZLR 87.

impartiality of the hearing and withdraw if there is any possibility of impartiality; this promotes social justice and democracy at the work place.<sup>383</sup>

The LA requires labour officers to settle disputes within thirty days from the date on which the referral was made unless the parties agree to extend the period of conciliation up to a maximum of ninety days.<sup>384</sup> The labour officer may seek the full thirty day period to seek a solution to a dispute provided there remains a solution to the settlement. The agreement to extend the conciliation period is made in accordance with form LR3 and this can only be done if no settlement is achieved within the thirty day period prescribed by the LA.<sup>385</sup> If the officer fails to resolve the dispute or at the end of the thirty day or any extended period, the officer must issue a certificate of no settlement in form LR 2. Similarly, if the parties come to an agreement on the matter, the terms of the agreement are set in form LR 1. Three copies of this form shall be completed by the officer concerned of which one shall be retained by him and the others shall be given to the parties in the matter. The certificate is considered to be proof that the labour officer attempted to conciliate the dispute. Labour officers should resolve the disputes within the prescribed time limit, this is important because failing to follow the process and time limits may fundamentally impair industrial peace.

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<sup>383</sup> Section 2A of the LA states that promotion of social justice and democracy at the workplace is the purpose of the LA. Furthermore, Rule 2 of the code of ethics for conciliators and arbitrators requires them to act with honesty, impartiality, due diligence and independent of any outside pressure in discharging their functions. More importantly, labour officers are required to avoid entering into any financial, business or social relationship which is likely to affect their impartiality or which might reasonably create a perception of partiality or bias.

<sup>384</sup> Section 93(3) of the LA read together with clause 6 of Statutory Instrument 217 of 2003 states that a labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall not spend more than ninety days before attempting to settle it.

<sup>385</sup> Section 3(4) of Statutory Instrument 217 of 2003 states that where a labour officer has issued a certificate of no settlement, the parties to the dispute may, notwithstanding the certificate, agree to extend the period of conciliation, which agreement shall be in form LR 3.

On the set day, each party must be present and may appear in person or represented by a fellow employee, an official of a registered trade union or employers organisation or a legal practitioner.<sup>386</sup> However the use of lawyers in conciliation can raise unnecessary points, they tend to be very legalistic and hence they play a very limited role in the conciliation process. Thus any dispute settlement process under the LA must comply with the principle of social justice and democracy in the work place and should be non legalistic, just, effective and expeditious.<sup>387</sup> Although it has been pointed out that the assistance of lawyers is unnecessary, caution should be taken where the parties are illiterate. There is a need for the services of practitioners where both parties in the dispute do not have the capacity to deal with the dispute system provided in terms of the LA. Where parties are illiterate the Ministry should allow the use of legal practitioners to assist the parties. This should however be treated as an exception to the general rule that practitioners are not allowed in the conciliation process.

The conciliation process is confidential, without prejudice process aimed at helping the parties to reach an agreement.<sup>388</sup> It is a fundamental principle of conciliation that the whole conciliation process should be conducted in closed door and kept confidential.<sup>389</sup> More so, the labour officer who conciliated the dispute may not be compelled to be a

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<sup>386</sup> Section 4 of Statutory Instrument 217 of 2003 states that parties must be allowed the right to representation by a fellow employee, an official of a registered trade union, employer's organisation or a legal practitioner.

<sup>387</sup> This was well summarised in the case of *Marcussen and Cocksedge v Dzikiti LC /H/53/05*, where it was held that the Labour Court and the dispute resolution system were created to dispense simple, cheap and speedy industrial justice, unhampered by legal jargon and technicalities. In this regard the Ministry should not readily accept the use of legal practitioners as it might defeat the motive behind the establishment of the dispute resolution system.

<sup>388</sup> This section corresponds to Art 14 of the UNCITRAL Conciliation Rules of 1980 which provides that the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

<sup>389</sup> The Ministry may not disclose to any one, including any court, any information, knowledge or document which it required confidentially or on a without prejudice basis unless the party that divulged that information states otherwise. See Rule 7 (2) of the Conciliation Guidelines.

witness in any other proceedings in respect of what happened during the conciliation. Public interest dictates that all information disclosed in conciliation be kept confidential disclosure by the conciliator would seriously undermine the efficiency of the process. In South Africa it was held that for the process to be successful the parties need to have sufficient confidence in the commissioners to raise issues or to make concessions, parties can only do this if they are confident that the process will be confidential.<sup>390</sup>

### 5.2.2 Outline of the Arbitration Hearing

Just like in South Africa, conciliation is a compulsory first step; the purpose of conciliation is to afford the parties the opportunity to resolve the dispute with the assistance of labour officers.<sup>391</sup> If there is no agreement, the labour officer must issue a certificate of no settlement.<sup>392</sup> This shows that an attempt has been made to conciliate the dispute by the labour officer and hence the need for arbitration.<sup>393</sup> Therefore, LA requires a dispute to be referred to arbitration after conciliation has failed; it must be referred in terms of form LR4/LR5 within fourteen days of a certificate of no settlement

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<sup>390</sup> *NUMSA v Cementation Africa Contracts (Pty) Ltd* 1998 (19) ILJ 1208 (LC) at 1210E.

<sup>391</sup> *In Zellco v Post and Telecommunications* (currently trading as Netone) 1998(2) ZLR106 (H) It was held that though it is obligatory to refer the matter for conciliation when one party disputes the entitlement of the other, there had to be a dispute requiring conciliation. Where there is no genuine dispute requiring resolution through the process of conciliation, conciliation will not be the first step.

<sup>392</sup> Section 93 (5) of the LA states that after a labour officer has issued a certificate of no settlement and the parties to the dispute have not agreed to extend the period of conciliation, the labour officer shall refer the dispute to compulsory arbitration in form LR 4.

<sup>393</sup> Attempts are normally made to resolve disputes through conciliation in accordance with section 93 of the LA prior to referring that dispute to arbitration. In terms of section 3(1) of Statutory Instrument 217 of 2003, "attempt to settle" shall refer to (a) any form of communication by the labour officer to either party in respect of the dispute or unfair labour practice or (b) any form of notification for the parties to attend any proceedings in respect of the dispute or unfair labour practice (c) any hearing that the labour officer may conduct in respect of the dispute or unfair labour practice.

having been issued.<sup>394</sup> However, if parties so wish or the conciliator has come to the conclusion that there is no reasonable chance of the dispute to be resolved by conciliation, the matter may be referred to arbitration before the expiry of the thirty days.<sup>395</sup> In terms of the statutory dispute resolution system, not all disputes can be referred to arbitration. The LA requires a dispute in which parties have agreed in terms of the LA to have the dispute determined by arbitration in terms of section 98 of the LA.<sup>396</sup> As far as disputes of interests are concerned, the LA allows a dispute in which the parties are engaged in an essential service and the dispute concerns a dispute interest to be referred to arbitration.<sup>397</sup> Similarly, rights disputes can also be referred to arbitration in terms of the LA especially where there is an agreement between the parties to do so.<sup>398</sup> This essentially means that both interest and right disputes can be referred to statutory arbitration under the Zimbabwean law.<sup>399</sup> In both rights and interest disputes, the arbitrator should offer the parties a reasonable opportunity of making representations on the matter including the terms of reference to arbitration.<sup>400</sup> This assists the parties to outline the issues in dispute which are to be brought before the arbitrator.

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<sup>394</sup> Section 5(2) of Statutory Instrument 217 of 2003 provides that the labour officer shall refer the dispute to compulsory arbitration not later than fourteen days from the expiry of the thirty days referred to in subsection (3) of section 93 of the LA

<sup>395</sup> Section 93 (1) of the LA.

<sup>396</sup> Parties can either agree to have their dispute resolved in terms of section 93(1) or 93(5) (b) of the LA.

<sup>397</sup> Section 93 (5) (a) of the LA.

<sup>398</sup> Section 93 (5) (c) of the LA. This section provides that the conciliator may refer the dispute to compulsory arbitration if the dispute is a dispute of right. Maybe the use of the word “may” as opposed to “shall” is meant to give the labour officer a discretion to refer the dispute to arbitration.

<sup>399</sup> In terms of section 93(5) (b), the conciliator may with the agreement of the parties, refer the dispute to compulsory arbitration. The wording of the section is wide enough to cover both rights and interest disputes.

<sup>400</sup> Section 98(3) provides that in ordering a dispute to be referred to compulsory arbitration, the Labour Court or the labour officer as the case may be shall afford the parties a reasonable opportunity of making representations on the matter.

Arbitrators are appointed by the Minister after consultation with the senior president of the court and the advisory council.<sup>401</sup> There is no compulsion to choose arbitrators from lawyers, retired judges or private institutions like the Commercial Arbitrators Centre.<sup>402</sup> However, though arbitrators are given the power to hear any dispute in terms of the Labour Court, a labour officer or designated agent who attempted to conciliate the dispute shall not be appointed as the arbitrator in that dispute. In carrying out their duties, arbitrators are guided by the code of ethics for conciliators and arbitrators as published in terms of the LA by the Minister. It is of importance to note that the arbitrator must act fairly and honestly,<sup>403</sup> thus it is mandatory for the arbitrator to disclose to the parties any circumstances which give rise to justifiable doubts to his impartiality.<sup>404</sup> Labour officers are required to ensure compliance with the objectives and purpose of the LA namely advancement of social justice and democracy in the workplace.

Just like in conciliation, parties may appear in person or may be represented by any of their choice. If the party fails to attend despite given reasonable notice of the date, time and place of proceedings the arbitrator may proceed with the hearing of the merits unless reasonable and sufficient cause is given. The labour officer may also postpone the matter or upon application by the party in attendance enter a default judgement.<sup>405</sup>

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<sup>401</sup> Section 98(6) of the LA.

<sup>402</sup> Op cit note 374 at 279.

<sup>403</sup> This requirement is entrenched in Rule 2 of the code of ethics for conciliators and arbitrators; it is also analogous to Article 12, 13 and 34 AA of the UNICITRAL Model Law.

<sup>404</sup> In *Musonzoa (Pvt) Ltd v Standard Fire and General Insurance* HH-85-02, judge J Chinhengo stated that where the arbitrator has a prior association with one of the parties, the test to be applied as to whether this would result in impartiality is an objective one, whether a reasonable person in the circumstances of the arbitrator would have foreseen that there was real danger of the arbitrator acting unfairly in favour of one of the parties. In *Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe* HH-5511-05, Bhunu J stated that being a senior partner in a law firm representing the parties in a related matter was held to be such substantial interest.

<sup>405</sup> Section 7 of Statutory Instrument 217 of 2003.

### 5.3 The Award

After hearing both parties, the labour officer shall make an appropriate award in the form LR 7 to settle the matter. This award is to be served on both parties.<sup>406</sup> Perhaps a fundamental principle of arbitration awards is that they should be binding and final, especially on disputes of fact.<sup>407</sup> While it is agreed that there is a need for finality in litigation, one must draw a distinction between arbitration and litigation. The very essence of arbitration is the flexibility it offers to parties, it is therefore against this background of flexibility that it is open to parties to have the effects of their award set aside.<sup>408</sup> Where an award has been registered, it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court and a failure to comply with such a registered determination amounts to an unfair labour practice.<sup>409</sup> The award must be in writing and it must give a clear outcome and reasons for such an outcome.<sup>410</sup> The labour officer must explain the basis of an award especially where figures are involved not just to pluck figures from nowhere. Most importantly, the award must address all the main arguments of the parties to the arbitration.<sup>411</sup> It therefore follows that if the labour

<sup>406</sup> Section 6(2) of Statutory Instrument 217 of 2003 read together with section 98(13) of the LA. According to the Conciliation and Arbitration guidelines, a copy of the award must be served on the parties at substantially the same time and within 14 days of the conclusion of the arbitration, provided that this period may be extended by the arbitrator in exceptional circumstances.

<sup>407</sup> In *Durco v Dajen* 1998 (2) ZLR 199 H. It was held that although an arbitral award is final and binding between the parties to the arbitration and although it is in the interests of public policy that there should be finality where a matter has been submitted to arbitration, one of the parties who had acquired rights as a result of the award was free to surrender or waive those rights.

<sup>408</sup> In terms of section 98 (14) LA as read with section 6(5) of Statutory Instrument 217 of 2003. In the case of *City of Harare v Cinamon* 1992 (1) ZLR 36(S), it was held that such registered awards may be executed as civil judgements. A party to whom an award has been made may submit a certified copy of the award in Form LR 9 for registration to the court specified therein having jurisdiction to grant an order equivalent to that contained in the award.

<sup>409</sup> Section 6(5) of Statutory Instrument 217 of 2003.

<sup>410</sup> In *CT Bolts v Workers' committee* LC/H/09/06 it was held that the award should be in writing and signed.

<sup>411</sup> These provisions are found in the Conciliation and Arbitration Guidelines but they have been borrowed from Article 33 of the Model Law contained in the first schedule to the Arbitration Act 6 of 1996.

officer fails to give due consideration to the above requirements, the award will be reviewed.

### 5.3.1 Appeals and setting aside of arbitration awards.

A number of issues arise in relation to mistakes, errors or awards by default.<sup>412</sup> Anyone aggrieved by the decision of the labour officer may approach the Labour Court for appeal against the award.<sup>413</sup> A point of difficulty here arises from the wording of section 97 (2) of the LA.<sup>414</sup> The section appears to inappropriately combine an appeal and a review jurisdiction. This section seems to be blurring the distinction between review and appeal by requiring the Labour Court to address the merits of the determination appealed against and seek a review of the determination on the grounds the High court may review it as well as addressing the merits of the decision appealed against. Whatever the case might be, the Ministry is a statutory body; it therefore follows that it must also act rationally and justifiably. Public law rights demand a special focus where the extra-judicial mechanisms of redressing the improper use of administrative power are not well developed and applied.<sup>415</sup> It is now trite law for which there is no need to cite any authority, that something done by an official in excess of power conferred upon him should be set aside.<sup>416</sup> It follows that if labour officers make irrational decisions they will be set aside. The general rule of the law, as regards irrationality, is that the appellant court will not interfere with a decision of a trial court or administrative body based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial

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<sup>412</sup> Op cit note 374.

<sup>413</sup> Section 6(3) of Statutory Instrument 217 of 2003 read together with section 98(10) of the LA. An appeal on a question of law from any award by an arbitrator shall lie with the Labour Court and shall be made in the form LR 8.

<sup>414</sup> The section 97(2) of the LA specifies that an appeal to the Labour Court may (a) address the merits of the determination or decision appealed against (b) seek a review of the determination or decision on any ground on which the High Court may review it (c) address the merits of the determination appealed against and seek its review on the grounds referred in (b) above.

<sup>415</sup> *Masuka v Chitungwiza Town Council* 1998 (1) ZLR 15 HC.

<sup>416</sup> Ibid.

court, the finding complained of is so outrageous in its defiance of logic.<sup>417</sup> In *Hama v National Railways of Zimbabwe*, it was held that the question whether a decision falls within the category of irrationality is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system.<sup>418</sup> Irrationality by now can stand on its own feet as an accepted ground on which a decision may be attacked by a court.<sup>419</sup>

The party aggrieved by an award made under compulsory arbitration in terms of the LA may appeal to the Labour Court not less than fourteen days from the date from date the appellant became aware of the award.<sup>420</sup> If a party delays or refers the dispute outside the fourteen day period, the Labour Court may condone the application on good cause shown. In the case of *Makuwaza v National Railways of Zimbabwe*, the Labour Court refused an application for condonation on the late noting of an appeal on the ground that, although the delay was entirely excusable, the prospects of success were nil.<sup>421</sup> Such an appeal to the Labour Court should only be on questions of law.<sup>422</sup> Therefore, a notice of appeal which raises no issue of law for resolution is fatally defective so as to constitute a

<sup>417</sup> *PF-ZAPU v Minister of Justice* 1985 (1) ZLR 305 (S).

<sup>418</sup> *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

<sup>419</sup> *Ibid*

<sup>420</sup> The application is also made in terms of section 6(3) (4) of Statutory Instrument 217 of 2003.

<sup>421</sup> 1997 (2) ZLR 453 (S). The labour officer considers the following when deciding whether or not to grant condonation (1) The degree of lateness of the referral (2) reasons for the lateness (3) prospects of success on the merits (4) Prejudice to both parties which includes the importance of the matter to each party.

<sup>422</sup> Section 98(10) states that an appeal on a question of law of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of the LA. Section 14(1) of Statutory Instrument 59 of 2006 provides that a party who wishes to make such an appeal to the Labour Court shall within twenty one days from the date when a party received a certificate of no settlement issued by a labour officer in relation to the dispute in terms of section ninety three subsection three or from the date of expiry of the maximum thirty day period allowed for a labour officer to settle the dispute, where no settlement is achieved and the labour officer did not, for any reason, issue a certificate of no settlement in relation to the dispute to the dispute in terms of section ninety three complete forms in three copies and a notice of the application with the Labour Court

nullity and is thus incapable of condonation or amendment. Although a decision of a labour officer's award can only be brought on appeal on questions of law, its decision on questions of fact can be attacked if there is a serious misdirection of the facts, amounting to a misdirection of law. In *National Foods v Magadza* it was held that while the Labour Court only has jurisdiction to hear appeals on a point of law, where there is a serious misdirection on the facts it amounts to a misdirection in law, the giving of reasons that are bad in law constitute a failure to hear and determine according to law.<sup>423</sup>

What then is a question of law for the purposes of section 98(10) of the LA? Because the term is not defined in the LA, the Supreme Court has since developed a very wide interpretation of what the term means. In *Muzuza v United Bottler* the court interpreted the term question of law to mean:<sup>424</sup>

1. A question as to what the law is.
2. A question which the law itself has authoritatively answered to the exclusion of the right of the tribunal or court to answer the question as it thinks fit and accordance with what it considered to be truth and justice.
3. A question which is within the province of the judge instead of the Jury
4. A misdirection on facts or evidence before the arbitrator that is as outrageous in their defiance of logic as to amount to a serious misdirection.
5. Where the making of an award is in violation of the grounds specified by the Model Law, such violation qualifies the appeal as being a question of law.<sup>425</sup>

In light of the above, any party may appeal to the Labour Court on the grounds specified above. In the case of *Southampton Assurance v Mutuma* a dispute arose as to whether the relationship between the parties was an employer-employee relationship or that of an independent contractor, the labour officer held that the applicant was an employee in

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<sup>423</sup> S-105 95 (unreported).

<sup>424</sup> *Muzuza v United Bottlers* 1994 (1) ZLR 217 (S). It was also held that the term "question of law" includes a gross misdirection on questions of fact.

<sup>425</sup> Article 34 of the Model Law as contained in the first schedule to the Arbitration Act 6 of 1996.

terms of the LA.<sup>426</sup> On appeal the Labour Court held that the respondent was not an employee as has been held by the labour officer and therefore, the labour officer misdirected the facts resulting in her coming to a wrong conclusion.

An award may also be set aside if it is in violation of the grounds set in the Model Law and such an appeal qualifies as being on a question of law as required by the LA. This is clarified in the LA as noted below:

“Section 97 (1) (b) states that any person aggrieved by the conduct of the investigation of a dispute or unfair labour practice by a labour officer may with such time and in such a manner as may be prescribed appeal against such a determination or conduct to the Labour Court. Section 97(2) goes on to state that such an appeal in terms of section 97(1) above may seek a review of the determination or decision on any ground which the high court may review it.”

The other contentious question is whether the legislature intended the Labour Court to conduct appeals on the same grounds as in Arbitration Act<sup>427</sup> and circumscribe the same extent as the High Court had chosen to confine itself when reviewing arbitration awards under the Arbitration Act.<sup>428</sup> In South Africa, it was held that when a replica of section 33 of the Arbitration Act was introduced in section 145 of the LRA, it did not mean that a different legal regime had been introduced.<sup>429</sup> It was held that the only difference lies in that proceedings before the CCMA are not generally speaking voluntary for both parties. From the above assertion, it follows that the grounds of review applicable to the High

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<sup>426</sup> 1990 (1) ZLR 12 (H), the first respondent signed a contract with the applicant to work as an insurance agent. When the applicant sought to terminate the contract, the first respondent referred the matter to a labour relations officer who determined that the first respondent was an employee as defined in the LA. The applicant sought a declaratory order in the High Court to the effect that the relationship between them was not that of employer and employee relationship as has been held by the labour officer but that the first respondent was an independent contractor. The declaratory order was given declaring that the respondent was an independent contractor not an employee as was held by the labour officer.

<sup>427</sup> Arbitration Act 6 of 1996.

<sup>428</sup> Ibid.

<sup>429</sup> *Shoprite Checkers v Ramdau* 2000 (7) BLLR 835 LC.

Court are also applicable to the Labour Court. Applications for review in relation to awards in the High Court are strictly guided by the United Nations Commission on International Trade Law model law (UNCITRAL). This essentially means that the Model Law grounds for review apply in both compulsory and voluntary arbitrations. In terms of Article 34 of the Model Law, contained in the first schedule of the Arbitration Act read together with the LA, an application may be made to the High Court to set aside an arbitration award on the following grounds:<sup>430</sup>

1. Incapacity of a party to the arbitration agreement, for instance an insolvent, alien or mental patient or that the agreement is not valid under the law to which the parties have subjected it, or failing an indication on that, the law in Zimbabwe.
2. Inadequate notice to a party or that a party was unfairly prevented from presenting their case.
3. The arbitrator exceeded their powers under the terms of reference for arbitration or the award is *ultra vires* the law to which the parties subjected arbitration to, that the arbitrator was not properly appointed.
4. The subject matter of the dispute is incapable of settlement by arbitration in Zimbabwean Law.
5. The award is in conflict with public policy. This has been defined under article 34(5) to mean that the making of the award is induced or affected by fraud, corruption or breach of rules of natural justice, including bias.
6. The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law.

The overriding factor in relation to the Model Law, which forms part of the Zimbabwean law, is that an award must not be contrary to the public policy of Zimbabwe.<sup>431</sup> Decisions of the courts relating to the 1958 New York convention relating to public policy afford persuasive guidance in interpreting the Model law, but in the event of direct conflict, the

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<sup>430</sup> Section 98(10) of the LA and article 34 of the Model Law applies to the review of awards.

<sup>431</sup> *Zimbabwe Electricity Supply Authority v Maposa* 1999(2) ZLR 452 (S).

public policy of Zimbabwe must prevail.<sup>432</sup> What then constitute public policy in Zimbabwe? In answering this question, the court held that an award would be contrary to public policy if it was induced by fraud or corruption and if a breach of natural justice occurred.<sup>433</sup> In *Waste management services v City of Harare* it was held that public policy is a vague and elusive concept and the power of the court to set aside an award as being contrary to public policy should be exercised sparingly and only in the clearest of cases, least uncertainty as to the validity of awards results from an arbitrary and indiscriminate use of power.<sup>434</sup> However, an award will not be contrary to public policy merely because the reasoning or conclusion of the arbitrator is wrong in fact or law. Where the reasoning or conclusion goes beyond faultiness or incorrectness and constitutes a palpable inequality that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold.<sup>435</sup>

Awards have also been set aside on the grounds of misconduct by labour officers. Though misconduct is a ground for setting aside an award, allegations of misconduct have to meet a very stringent test. A bona fide mistake, whether of fact or law, and whether admitted or not, would not constitute misconduct.<sup>436</sup> The mistake would have to be gross or manifest that it could not have been made without some degree of misconduct or partiality.<sup>437</sup> Therefore, even if a labour officer makes a finding that was erroneous or unreasonable, the court would not interfere, it would only do so if there had been gross irregularity or a failure of justice. The law relating to the question of misconduct by an arbitrator was sufficiently dealt with *Mckelvey v Abrahams* and others where the judge stated that:<sup>438</sup>

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<sup>432</sup> Ibid.

<sup>433</sup> Ibid.

<sup>434</sup> 2000 (1) ZLR 172 (H).

<sup>435</sup> Ibid.

<sup>436</sup> *Walenn Holdings v Lloyd* 1996 (2) ZLR 383 (H).

<sup>437</sup> Ibid.

<sup>438</sup> 1989 (2) ZLR 251 (S).

“I consider this judgment to be express authority for the proposition that a *bona fide* mistake made by an arbitrator, whether of fact or law and whether he admits it or not, affords no ground for a court to set aside his award. Such a mistake cannot be construed as ‘misconduct’ But if the mistake is so gross or obvious that it could not have been made without some degree of misconduct the award may be set aside, not on the grounds of mistake but irregularity.”

In *Cone Textiles v Redgement and others*, it was held that it would be a mockery of arbitration proceedings if an arbitrator’s award were to be challenged on the general ground that the arbitrator misconducted the proceedings without establishing that he has been guilty of the grossest carelessness as to lead to a conclusion that the arbitrator was partial in his decision.<sup>439</sup> Therefore, in ordinary circumstances, where an arbitrator has given fair consideration to the matter which has been submitted to him, it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or fact.<sup>440</sup>

## 5.4 Current challenges and weaknesses.

### 5.4.1 Shortage of manpower and ill-qualified personnel

At the centre of the dispute resolution department are labour officers. The LA obliges government to appoint several labour officers and senior labour officers for the purposes of dispute resolution.<sup>441</sup> They enjoy conciliation jurisdiction and act as arbitrators where they are appointed. For that reason, labour officers should be well qualified and able to deal with disputes expeditiously. All a labour officer needs is to have knowledge of labour relations and law. Thus labour officers are described by some schools of thought as paralegals who are trained in labour law and alternative dispute resolution.<sup>442</sup> It is

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<sup>439</sup> 1983 (1) ZLR 88 (S).

<sup>440</sup> *Dickenson and Brown v Fisher’s Executives* 1915 AD 166 at 176 as quoted in *Walenn Holdings v Lloyd* 1996 (2) ZLR 396 (H).

<sup>441</sup> Op cit note 373.

<sup>442</sup> See the Report on stakeholder’s workshop on the recognition of paralegals in Zimbabwe which was held in Harare on the 8<sup>th</sup> and 9<sup>th</sup> of September 2004 where the definition of a paralegal was described wide to include civil servants who do the work which might be included as paralegal such as clerk of court and labour officers.

however unfortunate that there is no specific requirement in the LA that requires labour officers to be legally qualified, which raises questions as to how they will handle some of the complex interpretive issues that will certainly come their way.

The problematic issue here is that most qualified personnel shun the government department because of its poor remuneration. The government acknowledged that it is facing the challenge of attracting and retaining competent officers who understand the dispute resolution system.<sup>443</sup> Presently, there is a growing shortage of professional, technical and administrative skills in the Ministry caused primarily by emigration brought by declining living standards.<sup>444</sup> The widely reported brain drain of experienced professionals in the public sector has particularly become worrisome. In several towns, the pool of labour officers has been reduced below tolerable proportions due to resignation and also due to lack of career prospects.<sup>445</sup> Because of poor remuneration and working conditions, the Ministry is severely understaffed.<sup>446</sup> Lack of staff has now forced even the least experienced and qualified officers to arbitrate disputes and this affects the quality of awards resulting in more successful appeal cases. This problem can be rectified through the massive employment of part time labour officers to overcome an employment problem which has developed in the public service.<sup>447</sup> The government through the Ministry should put in place policy framework for the recruitment and development of staff through the use of seminars to equip the officers with the necessary skills.

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<sup>443</sup> www. Herald. co.zw accessed on 2007-08-16, in this article, the secretary for the Ministry of Youth Development and Employment Creation Mr Prince Mupazviriho acknowledged the shortage of professionals and was quick to mention that the government was to provide incentives to young professionals in a bid to stem brain drain.

<sup>444</sup> Hayden Wetzel *International Market Research Report: Zimbabwe* 2007.

<sup>445</sup> Tayo Fashoyin "Industrial Relations in Southern Africa: The challenge of change Southern African Multidisciplinary Advisory Team" *International Labour Organization Harare Zimbabwe* at 103.

<sup>446</sup> The shortage of staff in the public service has also manifested itself in the Attorney general's office. www. Herald. co.zw accessed on 2007-08-21.

<sup>447</sup> Hananii and Blanpain *Industrial Conflict Resolution in Market Economies* Kluwer and Taxation 1983 at 53.

#### 5.4.2 Procedural Irregularities

As a result of poor qualifications and lack of experience, labour officers often fail to apply their minds to cases and hence cases end up in the Labour Court and Supreme Court. Such awards are set aside by the Labour Court particularly when labour officers fail to apply their minds to the question or totally misunderstood the issue.<sup>448</sup> This essentially means that the Labour Court and the Supreme Court which are the ultimate authority in labour dispute resolution are overburdened by too many pre-mature referrals.

Labour officers also fail to apply their minds to the facts when they overlook points and evidence submitted by the parties.<sup>449</sup> There can be misdirection as to the law applicable to the case being tried, and there can be misdirection as to the evidence.<sup>450</sup> For an appellant to avail himself of misdirection as to the evidence, the nature and circumstances of the case must be such that it is reasonably probable that the officer would not have determined as he did had there been no misdirection.<sup>451</sup> In other words the decision must have been irrational, in the sense of being outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question could arrive at such a conclusion.<sup>452</sup> In *Makuwaza v National Railways of Zimbabwe*, the Labour Court had refused to grant condonation of the late noting of an appeal to the Labour Court because the prospects of success were nil.<sup>453</sup> In support of the labour officer's decision, the Labour Court held that the reason for dismissal was proved in the sense that it was admitted, therefore he concluded that dismissal was unavoidable. The Supreme

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<sup>448</sup> *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) 452 (S).

<sup>449</sup> *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

<sup>450</sup> Ibid.

<sup>451</sup> Ibid, it was further held that the general rule of law as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is outrageous.

<sup>452</sup> Ibid.

<sup>453</sup> 1997 (2) ZLR 453 (S).

Court held that in coming to this conclusion, the Labour Court and the labour officer overlooked the point that the appellant admitted the facts but not the criminal intent.

#### 5.4.3 Shortage of funding and inadequate resources

A major problem within the dispute resolution system is the funding of the department. The Ministry has not been able to resolve disputes within the prescribed time due to financial and human resources scarcity which has caused severe difficulties for the dispute resolution system to operate effectively. The Ministry is funded by the government through its annual budget. Currently; the Ministry does not have adequate resources and stationery due to the acute shortage of funding. The state should ensure that the department is well funded and has adequate resources for the proper functioning of justice.<sup>454</sup> Without enough funding, the department will not have the resources to record cases and to buy stationery for its daily use. Presently, reports of settled disputes are hardly kept, the only time such a record is kept is when a dispute is not settled and had to be referred to the Labour Court. As a result, the Ministry lacks basic statistics on its operation in this area. Furthermore, a problem has arisen out of the petrol shortage that has crippled the Zimbabwean society as a whole. Lack of resources also means that the opportunities for training labour officers are limited. This problem can be rectified if the government allocates more resources to the ministry.

#### 5.4.4 Accessibility of the dispute resolution system

The economic depression which the country is going through potentially increases the number of disputes at work places as the wages cannot match up with the hyper inflation.<sup>455</sup> In order to deal with these disputes expeditiously, the Ministry has to set its offices across the whole country and every worker ought to have access to the dispute resolution system. In doing so, caution should be taken not to set offices in the urban areas only neglecting the growth points and small towns where disputes commonly

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<sup>454</sup> The Ministry of Labour (Bulawayo Province) acknowledged the critical shortage of resources and stationery for its day to day services.

<sup>455</sup> The past decade has been a landmark for Zimbabwe labour law since 1997. The country has been rocked by a series of strikes in all sectors.

occur.<sup>456</sup> Failure to provide adequate offices for labour dispute resolution will lead to labour militancy, tension and violence.<sup>457</sup> Presently, there are no mechanisms to reach communities and unorganised workers in each province. The Ministry faces the challenge of reaching out to its new constituencies especially agriculture and domestic workers who have been previously unrepresented and stay in the farms.<sup>458</sup> This is particularly true given the fact that the most sector hit by disputes and strike action is the agro-industry especially sugar estates.

Any party aggrieved by the decisions of the labour officer or Minister may appeal to the Labour Court.<sup>459</sup> However, workers have a problem in accessing the Labour Court for appeal and review purposes. The Labour Court is not decentralised and only has offices in Harare and also sits in Bulawayo, Gweru, and Mutare. Therefore, workers outside Harare wishing to utilise its services for appeal purposes have problems in accessing the Labour Court. This leads to a delay in the finalisation of the cases and hence it not surprising that matters dealt with by the minister or by the labour officer take long to reach the Labour Court and this brings in a lot of technicalities. This defeats the notion of establishing a speedy resolution of disputes as there are many stages involved before the finalisation of cases.

#### 5.4.5 Ministerial powers and control

The role of the Minister in the dispute resolution process has undermined the independency of the dispute resolution system. The Minister, through the labour officers and registrar of labour relations can impede on the independence of the dispute resolution

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<sup>456</sup> Workers in Harare, Bulawayo, Masvingo, Gweru, Kwekwe, Zvishavane, Mutare and others have access to the Ministry's offices. However, workers in small towns and the growth points like Mataga do not have easy access to the dispute resolution system

<sup>457</sup> Richard Saunders *Striking Back: Worker Militancy in Zimbabwe* Southern African Report Vol 13 No 1 November 1997 at 18 the article further provides that labour disturbances and militancy have continued to roll through the workplaces and sectors across the whole country fuelled by the economic hardships.

<sup>458</sup> Ibid.

<sup>459</sup> Section 98(10) of the LA.

department.<sup>460</sup> Therefore, there is doubt as to the independence and impartiality of labour officers. In *Cargo Carriers v Zambezi* the court discussed the powers granted to the Minister under the LA and the extent to which such powers may be delegated to labour officers.<sup>461</sup> In this case, the court noted that while it is normal for Ministers, to whom statutory powers and duties are given to delegate the exercise of those powers to responsible officials of the department, this does not apply where the Minister is given the responsibility of exercising a discretion which the LA shows can only be properly exercised in a judicial spirit.<sup>462</sup> Within the LA, there are general executive and administrative powers which have been conferred upon the Minister of Labour.<sup>463</sup> The Minister has the power to make regulations on anything concerned with the development of labour relations.<sup>464</sup> The problem here is how to reconcile these wide powers with the

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<sup>460</sup> Section 106 of the LA empowers the Minister of Labour to intervene by issuing a disposal order during a strike and he can also refer a dispute to the Labour Court. Section 25 of the LA also gives the Minister authority to make decisions on his own.

<sup>461</sup> 1996 (1) ZLR 613 (S) In this case, a show cause order was made by a labour relations officer, who after a few days later made a disposal order directing that the lock-out be terminated. The company disputed the officer's show cause order on the grounds that it should have been issued by the Minister; the court had to decide whether the Minister's discretionary power under section 106(1) of the LA to issue a disposal order to resolve a lock-out could be delegated to labour officers.

<sup>462</sup> An examination of section 106 and 107 of the LA showed that a distinction was drawn between the Minister and an appropriate authority (labour relations officer) and gave different roles for each.

<sup>463</sup> Section 17 of the LA states that the Minister after consultation with the appropriate advisory body if any appointed in terms section nineteen make regulations providing for the development, improvement, protection and regulation of employment conditions.

<sup>464</sup> The powers have been exercised by making regulations for termination of employment and making regulations in terms of section 127 of the LA. The constitutional issue which arises from those wide powers relate to the extent at which the Minister and government administrative mechanisms should interfere and prescribe rules of the employer employee relationship? How far should they go? This is based on the view that the relationship between the employer and the employee at both individual and collective levels is traditionally a private relationship in that the parties freely and voluntarily decide to enter into it.

Constitution, with democratic consultation and with checks and balances.<sup>465</sup> Though the Minister's regulatory powers come from the LA, some of these functions which have been delegated are so broad, so general and so-all encompassing that it really amounts to over centralisation of these powers in the hands of the Minister.<sup>466</sup> There are obvious dangers of abuse of powers in such a set-up, the dispute resolution system runs the risk of being transformed into an instrument for the pursuance of political aims. The current political upheaval in Zimbabwe threatens the labour officer's impartiality and objectivity due to political interference by the executive in the dispute resolution function of the Minister. This effectively creates a highly centralised bureaucratic and inflexible system.

#### 5.4.6 Consideration of informality

The very purpose of referring a dispute to arbitration is to try and achieve a quick and efficient resolution of that dispute. Central to that concept are two main features namely, flexibility and informality as well as compliance with the basic tenets of natural justice.<sup>467</sup> However, it seems in my view that the Ministry of Labour and the courts have misunderstood what they were meant to do. Labour officers now think that they are judges and want their awards printed in law reports when what they are meant to do is to produce a simple procedure for the resolution of disputes. This over-proceduralisation of hearings needs to be attended to, as it makes the Ministry inefficient. Though arbitration and conciliation may be conducted in a room set up like a court room they do not follow strict court procedures, they nevertheless does resemble a formal hearing.<sup>468</sup> What this means is that as far as possible labour disputes should be determined on the merits rather than on technicalities as is the case in the Supreme Court and other ordinary courts.

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<sup>465</sup> Shephard Nzombe, "Labour Laws in Zimbabwe: Legal Targets and Reality" *Zimbabwe Law Review* Volume II 1993 -1994.

<sup>466</sup> The Minister is empowered to prescribe, by statutory instrument, the acts or omissions which constitute unfair labour practices.

<sup>467</sup> *ZFC Ltd v Geza* 1998 (1) ZLR 137.

<sup>468</sup> Section 90A of the LA makes it explicit that arbitrators shall not be bound by strict rules of evidence and may where circumstances warrant it, depart from any enactment or rule of law relating to the admissibility of evidence in the proceeding before the courts of law.

Rather, labour disputes should be resolved through alternative dispute resolution mechanisms as they are less confrontational.

#### 5.4.7 Vague provisions of the Labour Relations Act

The whole dispute resolution process is regulated by the LA. It is, however, unfortunate that there are some provisions of the LA that are unclear. Firstly, the Labour Court's powers and the arbitrator's powers are not clear from the LA. Section 89(2) (c) appears to attempt to provide powers to deal with unfair dismissal disputes and unfair labour practice disputes.<sup>469</sup> But this section does not appear to cover all unfair labour practices and unfair dismissal disputes, as it only refers to applications in terms of section 93(7) (ii). These disputes only cover those circumstances in which it is not possible for a labour officer to refer a dispute to arbitration or if a labour officer refuses to issue a certificate of no settlement after conciliation.

To add more to the confusion, section 97(1) (c) allows for an appeal in respect of the conduct of the investigation of the dispute or unfair labour practice by a labour officer.<sup>470</sup> Does this include an appeal against the outcome? (i.e. against any arbitration award). If it is only an appeal into the manner in which the process is conducted, isn't this really a review function? Section 97(2) (a) also suggests that a party may appeal against the merits of any arbitration determination or decision. This seems to cut across the intention behind section 98(10) which only allows an appeal on question of law from an

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<sup>469</sup> Section 89(2)(c) states that in the case of an application made in terms of subparagraph (1) of subsection (7) of section 93, the Labour Court may make an order for any of the following or any appropriate order in the case of an unfair labour practice involving a failure or delay to pay. The Labour Court may also grant anything due to an employee, the payment by the employer concerned to the employee or some one acting on his behalf of such amount, whether as a lump sum or by way of installments as will in the opinion of the Labour Court, adequately compensate the employee for any loss or prejudice suffered as a result of the unfair labour practice.

<sup>470</sup> Section 97 (1) (c) of the LA states that any person who is aggrieved by the conduct of the investigation of a dispute or unfair labour practice by a labour officer may, within such a time and in such a manner as may be prescribed, appeal against such a determination or conduct to the Labour Court.

arbitrator's decision.<sup>471</sup> More so, section 97(2) appears to inappropriately combine an appeal and a review jurisdiction. It is suggested that the appeal jurisdiction in terms of section 98(10), allowing appeals on a question of law only, requires further consideration. Should there be any appeal at all? Furthermore, section 93 (5) of the LA says that a labour officer 'may' refer a rights dispute to arbitration after conciliation, should this not be 'shall.'<sup>472</sup> It is suggested that the referral of a dispute for arbitration should be mandatory not merely permissive especially where conciliation has failed. Consideration should also be given to section 93. The problem with this section is that it is not clear what disputes can be referred to the Ministry or what disputes must be referred. For example, can a retrenchment dispute be referred or what section prescribes that unfair dismissal and unfair labour practices must be referred. A similar concern exists in respect of section 97. It is not clear what may be appealed against to the Labour Court in terms of section 97. Section 97(1) (b) provides for appeals against determinations made under an employment code. This section seems to include a decision to dismiss at a disciplinary enquiry. Surely this should be referred as a dispute in terms of section 93. Given the above uncertainties, consideration should be given to clarify the above provisions.

#### 5.4.8 Long delays in the process

Though the LA has set time frames for arbitration and conciliation, the thirty day period required in conciliation is not enforced. Postponements of hearings and non-attendance by parties have led to protracted delays. The fact that parties are allowed to apply for postponement is against the need to process disputes quickly and effectively without delays. The rule allows parties to intentionally abscond hearings since there is always a second chance after postponement. It is suggested that a through and stringent sanction should be imposed for non-attendance as this will encourage disputants to abide by the set dates.

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<sup>471</sup> Section 98(10) specifies that an appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of the LA.

<sup>472</sup> Section 93(5) provides that a labour officer shall refer the dispute to compulsory arbitration if the dispute is a dispute of interest and the parties are engaged in an essential service.

The LA requires unfair dismissal disputes and unfair disputes to be referred within two years to the Ministry for conciliation from the date the dispute occurred.<sup>473</sup> The date on which prescription is to be counted is when the acts or omissions forming the dispute first occurred.<sup>474</sup> An exception to this rule is where the party cannot reasonably be expected to have known of such acts or omissions at the date when they occurred, in such instances, a dispute can be heard even if it is submitted outside the prescribed time limit.<sup>475</sup> Therefore, the applicant must file the claim within the two years time limit required.<sup>476</sup> Given the motivation behind conciliation which is to resolve disputes expeditiously, it can be argued that the two years time period is too long.

In the arbitration process, parties are given a reasonable and equal opportunity to present their case.<sup>477</sup> Due to the rules of evidence, arbitration is becoming over-formal, with a resultant increase in the time and expense in resolving disputes. The bureaucracy involved in the dispute resolution becomes long and protracted as disputes have to start from the labour officer, to the Labour Court and finally to the Supreme Court. It is desirable that the procedure to be followed during arbitration should be tailor-made for the issues in dispute as opposed to arbitration following some fixed pattern. This excessive emphasis on oral presentation and argument has often unnecessarily prolonged

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<sup>473</sup> Section 94 of the LA.

<sup>474</sup> *Chambe v Rufaro Marketing (Pvt) Ltd and another* HH-73 2000 where it was held that there was no prescription of the dispute where there was no suspension of the pay.

<sup>475</sup> In *Kunene v Lobels Biscuits (Pvt) Ltd* HB-62-2003 the plaintiff was injured at the workplace and spent two weeks in the intensive care unit, he issued summons three years later. The court held that there was no prescription because the creditor could not have been in full knowledge of the facts or identity of the debtor as he was unconscious.

<sup>476</sup> Section 94 (2) of the LA which states that the two years period can be lengthened as the prescription period but this shall not apply to an unfair labour practice which is continuing at the time it is referred to or comes to attention of a labour officer.

<sup>477</sup> In the case of *Majora v Kuwirirana Bus service* 1990(1) ZLR 87(SC) it was held that rules of natural justice, in particular, the *audi alteram partem* rule must be observed in the determination of any dispute brought in terms of section 109(2) of the LA which obliges the determining authority to conduct a due inquiry. This means that each party in the arbitration process must be given a chance to cross-examine and give evidence-in-chief.

the hearing as labour officers have often been found flouting the rules of evidence set. In such cases, the courts are reluctant to interfere with arbitration proceedings but if the arbitrator has misconducted the proceedings the courts will interfere.

## **6.2 Conclusion**

Though the government has reformed the legal framework on alternative dispute resolution since independence, work remains to be done to ensure effective implementation of the dispute resolution process. Zimbabwe needs an equitable and efficient dispute prevention and settlement system that has the confidence of all. Without it labour disputes are likely to continue escalating and economic and social progress is unlikely to be sustainable. Strengthening the dispute resolution calls for several measures. These are, drawing up a national dispute prevention and resolution strategy with tripartite involvement and acceptance, fostering workplace level cooperation for dispute prevention and strengthening conciliation and arbitration machinery. It is remarkable that the country is a party to the most important International Labour Organisation conventions. The future challenge is in the interpretation and application of those laws and conventions by courts and other dispute resolution tribunals. Also, the reform of those laws might be necessary in future in order to make them explicit and compatible with international law.

## CHAPTER 6

### INTERNATIONAL LAW AND ALTERNATIVE DISPUTE RESOLUTION: COMPARATIVE ANALYSIS OF COMPLIANCE IN SOUTH AFRICA AND ZIMBABWE

#### 6.1 Introduction

The International Labour Organization was formed 1919, in the wake of a destructive war, to pursue a vision based on the premise that universal and lasting peace can be established only if it is based upon decent treatment of working people. The ILO became the first specialized agency of the UN in 1946. It was devoted to realize opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues. Presently, there exist several international treaties working towards the creation of decent treatment of working people. As of date, the ILO has passed one hundred and eighty two Conventions and one hundred and ninety Recommendations.<sup>478</sup> It is significant to note that both conventions and recommendations are formulated and adopted by the same body which is the International Labour Conference. The conference is constituted by representatives from government, employers and workers with each of the delegates entitled to individual votes. A two thirds majority of the conference is required for the adoption of conventions and recommendations. This shows that The ILO espouses the principle of democracy and the standards are therefore an expression of universally acceptable principles and standards.

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<sup>478</sup> For the purposes of this discussion, Conventions are instruments designed to create international obligations and are legally binding after ratification by the relevant states. In contrast, Recommendations are have no legal force and as such are not binding but are intended to serve as guidelines for government.

## 6.2 Core International Labour Organization Instruments

As stated previously, there are a number of international treaties that are concerned with labour law. Each of these differs slightly in their approach to the issue, with some seeking equal remuneration while others look for the elimination of discrimination and forced labour at work places. Eight ILO conventions have been identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of levels of development of member states. These rights are a pre-condition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work. The Declaration of Fundamental Rights and Principles at Work of 1998, to which South Africa and Zimbabwe are signatories too, codifies the ILO's long understanding of the fundamental human rights contained in its constitution and standards, as comprising freedom of association and the right to bargain collectively, freedom from forced labour, freedom from child labour and freedom from discrimination.<sup>479</sup> There are two conventions on each of these subjects. First, freedom of association and protection of the right to organize is protected principally in the Freedom of Association and Protection of the Right to Organize Convention 87 of 1948 and the Right to Organize and Collective Bargaining Convention 98 of 1949. Freedom from forced labour is covered by the Forced Labour Convention 29 of 1930 and by the Abolition of Forced Labour Convention 105 of 1957. Child Labour, in turn, is covered by the Minimum Age Convention 138 of 1973 and by the Worst Forms of Child Labour Convention 182 of 1999. Freedom of discrimination is the fourth great subject of human rights protection in the ILO. The basic instrument is the Discrimination Convention 111 of 1958 and the Equal Remuneration Convention 100 of 1951 which covers equal remuneration between men and women for work of equal value.

However, since this study deals with alternative labour dispute resolution mechanisms, relevant ILO instruments will be outlined in this chapter. Its focus will particularly be on the conventions/treaties, declarations, rules and even standards and guidelines of good practice in alternative labour dispute resolution that have international, regional and

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<sup>479</sup>

Hereinafter referred to as DFPRW

national acceptance.<sup>480</sup> In that regard, the discussion will be centered on Convention Number 87 concerning the Freedom of Association and the Protection of the Right to organize of 1948, Convention Number 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively of 1948 and most importantly the ILO Declaration on Fundamental Principles and Rights at Work of 1998. These are the conventions that have attracted the most attention in the study of alternative dispute resolution mechanisms.

#### 6.2.1 Convention no 87 Concerning Freedom of Association and the Protection of the Right to Organize of 1948<sup>481</sup>

This Convention was adopted on 9 July 1948 by the General Conference of the International Labour Organization at its thirty-first session and entered into force on 4 July 1950. This convention is normally referred to, for convenience, as the Convention on Freedom of Association, but it goes far beyond the simple right to join a trade union (or an employers' organization). Other important rights included in the convention are the right of workers' and employers' organizations to draw up their own constitutions and rules, to elect their own representatives, to formulate their own programmes, and to join national and international federations.

CFAPRO commits members states to promote the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interest.<sup>482</sup> It lays down a series of guarantees for the free functioning of organizations without interference by public authorities without authorization.<sup>483</sup> What is important to note is that wording of CFAPRO focuses primarily on the rights within countries and only implicitly on the rights to organize internationally. The relevance of CFAPRO to alternative dispute resolution mechanisms emanates from the fact that it

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<sup>480</sup> In this chapter, the generic term legal instruments will be used to refer to international, regional or national levels

<sup>481</sup> Hereinafter referred to as CFAPRO

<sup>482</sup> Article 2

<sup>483</sup> Article 4

recognises trade unions and employers' organisations. These trade unions and association of employers now form part of the negotiation and conciliation process in the dispute resolution process. It therefore implies that when a dispute arises, trades unions, bargaining and statutory council and employers' organisation must first seek to resolve the dispute internally through conciliation. The fact the convention promotes the right of workers and employers to organise also promotes the resolution of disputes through negotiations. Furthermore, the mere fact that CFAPRO observes the right of workers and employers to draw their own constitutions and rules regulating their associations promotes alternative dispute resolution process. This is so because it is in these very same constitutions that trade unions, employment councils, bargaining and statutory councils prescribe their internal dispute resolution process. Therefore, member states to CFAPRO undertake that their national laws shall not impair, nor shall it be so applied as to impair these guarantees. However, the extent to which the guarantees provided for in this Convention shall apply to the armed forces and to the police shall be determined by national laws or regulations.<sup>484</sup>

#### 6.2.2 Convention no 98 Concerning the Application of the Principles of the Right to Organize and Bargain Collectively 1949<sup>485</sup>

Whereas a number of ILO conventions have been adopted, CROBC appears to be the first international agreement to actually attempt to mandate member states to establish alternative dispute resolution mechanisms. CROBC goes further than CFAPRO by ensuring the effective implementation of the right to bargain collectively. The Convention is a pledge among nations to protect workers from employees from victimization from trade union membership or activity.<sup>486</sup> Most importantly, the contracting parties undertake to:

1. To promote joint consultation between workers and employers

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<sup>484</sup> Article 9

<sup>485</sup> Hereinafter referred to as CROBC

<sup>486</sup> Article 1 and 2

2. To promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with the view to the regulation of terms and conditions of employment by means of collective bargaining agreements<sup>487</sup>
3. To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes
4. To recognize the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike subject to obligations that might arise out of collective agreements previously entered into.

From the above provisions, it can be concluded that CROBC provides for protection against anti-union discrimination and for protection of workers' and employers' organizations against acts of interference by each other. In this regard, state parties are obliged to take measures not only to prevent victimization of workers by employers but also to prevent arbitrary deprivation of workers by their own security forces.

#### 6.2.3 The ILO Declaration of Fundamental Principles and Rights at Work 1998<sup>488</sup>

The ILO Declaration on Fundamental Principles and Rights at Work was adopted on 18 June 1998. The central objective of the DFPRW is to stimulate national efforts to ensure that social progress goes hand in hand with economic progress. Under DFPRW, states parties are required to promote and realize, in good faith and in accordance with the ILO constitution the principles concerning the fundamental rights which are the subject matter of those conventions namely:

1. Freedom of association and the effective recognition of the right to collective bargaining
2. Elimination of all forms of discrimination
3. Effective abolition of child labour
4. Elimination of discrimination in respect of employment and occupation

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<sup>487</sup> Article 3 and 4

<sup>488</sup> Hereinafter referred to as DFPRW

The ILO Declaration on Fundamental Rights and Principles at Work of 1998 declares that all members even if they have not ratified the convention in question have an obligation arising from the very fact of membership in the organization to respect, promote and realize, in good faith and in accordance with the constitution, the principles concerning the fundamental rights which are the subjects of the conventions establishing freedom of association and the effective recognition of the right to collective bargaining. In practice therefore, while having ratified neither the Freedom Association and Protection of the Right to Organize convention<sup>489</sup> nor the Right to Organize and Collective Bargaining Convention,<sup>490</sup> South Africa and Zimbabwe will be bound by the Principles of freedom of association and collective bargaining through the supervisory systems established under the declaration which involves periodic reporting to the ILO and through the committees on freedom of association.

### **6.3 Regional Instruments**

#### **6.3.1 African Charter on Human and Peoples Rights**

The African Charter came into force in 1986, and has been ratified by more than forty African states, thus becoming the most widely accepted regional convention. Just like other ILO Instruments, the Charter contains provisions which seek to establish minimum labour standards in Africa. However, it offers less respect to alternative labour dispute resolution mechanisms as there are no specific provisions dealing with labour dispute resolution. Despite this short fall, the Charter grants the same protection to other labour rights as is found in other regional and international instruments. It includes the right to association and assembly, the right to equal pay for equal work, the right to work under equitable and satisfactory conditions and the right to freedom of association.<sup>491</sup>

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<sup>489</sup> Number 87 of 1948

<sup>490</sup> Number 98 of 1949

<sup>491</sup> See Article 5, 9, 10, 11, 15 and 20 of the African Charter

## 6.4 Application of International Labour Standards: The South African Experience

South Africa was re-admitted as a member of the ILO on 26 May 1994. This followed a period of 30 years of isolation from international labour forums after the country withdrew from the ILO in 1964 as a result of political pressure. Since then, the country has taken important steps to ensure that its labour policies are compatible with the International Labour Organization Standards.<sup>492</sup> To this end, it has ratified seven of the ILO's eight fundamental Conventions.

### 6.4.1 Freedom of Association and Collective Bargaining

South African has ratified both CROBC and CFAPRO regulating freedom of association and collective bargaining. The LRA allows all workers to join trade unions as required by the ILO standards and this promotes collective bargaining. Apart from the recognition of trade unions and collective bargaining, there are also provisions for organizational rights, the registration of unions and employer organizations and mostly for the formation of bargaining councils, statutory councils and workplace forums. It is through these mechanisms that collective bargaining is conducted. The fact that the LRA provides for the formation of such institutions is in line with CFAPRO which calls on member states to promote freedom of workers and employers to form national and international organization. Whilst the creation of these institutions promotes collective bargaining and freedom of association, it also promotes the establishment and use of alternative dispute resolution mechanisms as the institutions are mandated to perform dispute resolution functions.

Pursuant to CROBC, the LRA sets appropriate machinery for conciliation and arbitration. In this regard the CCMA plays a pivotal role as discussed in chapter four of the thesis. Apart from the CCMA, the LRA also creates bargaining councils and statutory councils to assist the CCMA with the dispute resolution process.<sup>493</sup> The reason for establishing such institutions was probably to ease the CCMA's caseload since they can now share

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<sup>492</sup> Hereinafter referred to as ILO

<sup>493</sup> Section 28 (c) and 51 of the LRA.

some of the workplace disputes.<sup>494</sup> Bargaining councils are voluntarily established bodies comprising of registered trade unions and employer organizations and are registered by the Department of Labour in respect of particular sectors and areas.<sup>495</sup> They can be established by one or more registered trade unions or workers' organisation. On the other side, statutory councils are apparently the result of a compromise between government and big unions to satisfy the latter's fear that the bargaining council system would not do enough to promote centralised bargaining.<sup>496</sup> A statutory council can be established in a sector where no bargaining council has jurisdiction and on application by a union or employers' organization that represents a prescribed threshold of membership. Like bargaining councils, they can deal with dispute resolution but must first apply to the governing body of the CCMA to perform dispute resolution.

With reference to the above institutions, it can be noted that the operation of collective bargaining, the right to organise and freedom of association in South Africa is compatible with the ILO standards though some of the workers still do not have the knowledge of labour legislation. South Africa has established the institutional and legislative framework for both alternative dispute resolution and the collective bargaining, what needs to be monitored closely is the implementation exercise. The situation for trade unions has improved since 1994. Unlike during the apartheid era where trade unionists were held in police custody for organising workers strikes, workers and employers can now exercise their freedom of association and bargain collectively in line with the ILO standards.

## **6.5 Application of International Labour Standards: The Zimbabwean Experience**

International standards are primarily tools for governments which, in consultation with employers and workers are seeking to draft and implement labour law in conformity with internationally accepted standards. In that regard, Zimbabwe has ratified seven of the

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<sup>494</sup> Meera I *South Africa's Bargaining Councils and their Role in Dispute Resolution*, paper presented on the 14<sup>th</sup> of February 2003, Development studies seminar Department of Sociology, RAU.

<sup>495</sup> Andre Niekerk *Unfair dismissal* South Africa: Siber Ink 2004 at 106.

<sup>496</sup> John Grogan *Workplace Law* Cape Town Juta 2004 at 352.

eight fundamental Conventions. Through various tripartite activities over the last couple of years ILO has been creating public awareness of the declarations and the importance of the ratification of ILO fundamental conventions. By its membership to the International Labour Organization, Zimbabwe has accepted the fundamental principles embodied in the ILO Constitution and declarations including the freedom of association.<sup>497</sup> The ILO Declaration on Fundamental Rights and Principles at Work of 1998 declares that all members even if they have not ratified the convention in question have an obligation arising from the very fact of membership in the organization to respect, promote and realize, in good faith and in accordance with the constitution, the principles concerning the fundamental rights which are the subjects of the conventions establishing freedom of association and the effective recognition of the right to collective bargaining.

#### 6.5.1 Freedom of Association and Collective Bargaining

Soon after the 1980 strikes, the first Minister of Labour committed the government to the replacement of the hated Industrial Conciliation Act which was regarded by workers as repressive.<sup>498</sup> The new LA was gazetted in 1985 after seven drafts and hailed by the government as a victory for Zimbabwean workers. Furthermore, the LA explicitly regulates the relationship between capital and labour as is demonstrated in its objectives. It declares and defines the fundamental rights of employees and unfair labour practice and regulates conditions of employment and other related matters.<sup>499</sup> Most importantly the LRA took over, renamed and expanded the institutional base of colonial labour relations providing for the formation, registration, certification and functions of trade unions, employer's organizations and the recent establishment of the labour court as well as the functions of the labour officers in labour dispute resolution.<sup>500</sup> The Act thus has

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<sup>497</sup> See International Labour Office, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 4<sup>th</sup> revised edition Geneva 1996 para10.

<sup>498</sup> The then Labour Minister was Kumbirai Kangai.

<sup>499</sup> Part II deals with fundamental rights of employees, Part III deals with unfair labour practices, Part IV contains general conditions of employment and Part V deals with wages and salary control.

<sup>500</sup> Part VII of the LRA regulates the establishment of trade unions while part XI establishes the labour court.

brought under the bureaucratic control the recognition of trade unions and employer organizations as a system of regulating industrial conflict.<sup>501</sup> Though trade unions are provided for in the LA, a relatively small part of the work force is enabled to exercise this right. The government does not recognize trade union rights and this hinders the collective bargaining process as required by the ILO standards. Despite the provision of the formation of multiple national federations, none exist but the Zimbabwe Congress of Trade Union. Due to the political instability currently in the country, trade unions struggle to assemble and exercise their rights as police quash their gatherings. This is in contrary to CROBC/CFAPR conventions which provide for the right of workers to organize and administer trade unions without interference from the government or the employer. The situation for collective bargaining is not improving in Zimbabwe. The right to strike is recognized by the LA but is curtailed by the police arbitrarily as workers cannot exercise their freedom of association freely. This is despite the fact the Constitution expressly guarantees the right to belong to a political party or trade Union.<sup>502</sup>

The LA provides the use of alternative dispute resolution mechanisms though they are complex and bureaucratic.<sup>503</sup> In this regard, the Ministry of Labour has been legislatively mandated to play a pivotal role in the conciliation and arbitration of labour disputes as required by the International standards. However, workers have more confidence in an independent body that is free from governmental interference. The Ministry of Labour does not carry equal representation of employers, employees and the government and lacks resources. To curb this problem, the LA establishes National Employment councils.<sup>504</sup> The primary duty of NECs is to facilitate collective agreements and to

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<sup>501</sup> The Zimbabwe Congress of Trade Unions (ZCTU) was formed after independence after a merger with four other trade unions. The government's policy on competing trade unions was "one country, one federation, one industry, one union" and this resulted in the merger of trade unions leading to one ZCTU.

<sup>502</sup> Section 21

<sup>503</sup> The Act also introduced workers rights, workers committees, and prohibition of unfair labour practices.

<sup>504</sup> Hereinafter referred to as NEC

prevent or settle disputes within its jurisdiction.<sup>505</sup> Through the introduction of NECs, it envisaged that they will play a supportive role both in the collective bargaining process and in the dispute resolution system. The parties to the NEC must be sufficiently representative of the sector and proposed area.

**6.6 Comparison**

From the above discussion, it can be noted that both South Africa and Zimbabwe are all members of International Labour Organizations and have ratified different conventions aimed at realizing the democratic labour rights. However, though Zimbabwe has ratified the core International Labour Organization conventions, the situation in the country regarding the effective exercise of labour rights needs to be reviewed and monitored. Despite this difference in the application of International standards, a comparative examination of the key rules that govern the process through which disputes are resolved in South Africa and Zimbabwe would probably bring to fore a considerable number of similarities. However, if the slant of the comparison shifts from the sphere of the procedural rules to the principles that underpin the administration of the institutional framework, a number of differences can be detected as indicated by the subsequent table on a next page.

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<sup>505</sup> Ibid.

### 6.7. 2 Comparison of the various attributes of labour dispute resolution in South Africa and Zimbabwe.

| ATTRIBUTES                                                                   | SOUTH AFRICA                                                                                                                                                                                                                                                      | ZIMBABWE                                                                                                                                                                                                            |
|------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Conciliation by a statutory body or the executive.                           | Yes, by the CCMA, bargaining and statutory council. (section 135 and 51 (3) of the LRA.)                                                                                                                                                                          | Yes, by the Ministry of Labour and employment councils(section 93 and 56 of the LA)                                                                                                                                 |
| Arbitration by a statutory body or the executive.                            | Yes, by the CCMA, Bargaining and statutory council. (section 136 and 51 (3) of the LRA.)                                                                                                                                                                          | Yes, by the Ministry of Labour and employment councils(section 93 and 56 of the LA)                                                                                                                                 |
| Must disputants attempt conciliation before the arbitration hearing?         | Yes, If no attempt is made, the CCMA does not have jurisdiction to arbitrate the dispute, the Labour Court may also refuse to hear the dispute if no attempt to conciliate the dispute has been made(section 136 (1) (a) read together with 157(4)(a) of the LRA) | Yes, A labour officer to whom a dispute has been referred shall attempt settle it through conciliation, however if agreed by the parties, it can go straight to arbitration.(section 93(1) of the LA)               |
| Does the conciliator has have power to impose a settlement?                  | No                                                                                                                                                                                                                                                                | No                                                                                                                                                                                                                  |
| Is the award of an arbitrator reviewable?                                    | Yes, any aggrieved party by the award of the commissioner may apply for review to the Labour Court(section 145 of the LRA)                                                                                                                                        | Yes, the decision of the labour officer can be reviewed by the Labour Court. It also seems as if the Labour Court is vested with appeal jurisdiction.(section 97(1)(c) read together with section 98(10) of the LA) |
| Is there any time limit for conciliation and arbitration?                    | Yes, the commissioner is given thirty days to conciliate the dispute unless the parties agree otherwise section (135(2) of the LRA.)                                                                                                                              | Yes, the ministry is given thirty days to conciliate the dispute unless the parties agree otherwise(section 93(3) read together with section 93(4)                                                                  |
| Is legal representation allowed?                                             | Yes, but legal representation is allowed in certain circumstances and certain processes. It is allowed in arbitration but not in conciliation. (section (135 (4) and 138(4) of the LRA.)                                                                          | Yes, a party to a dispute may be represented by a fellow employee, an official of a registered trade union, employers' organization or a legal practitioner (clause 4 of statutory instrument 217 of 2003)          |
| Can a party whose claim is successful apply for a court order to enforce the | Yes, an aggrieved party can apply to the Labour Court to have the award made an order of that court. (section 157 (3) read                                                                                                                                        | Yes, any party to whom an arbitration award relates may submit certified copies for registration by a court having jurisdiction an order equivalent                                                                 |

|                                                                                             |                                                                                                                                                               |                                                                                                                                                                                                               |
|---------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| judgement?                                                                                  | with section 158 (1) (c) of the LRA.)                                                                                                                         | to that contained in the award(section 98(14) of the LA.                                                                                                                                                      |
| Time needed to complete arbitration.                                                        | 30 days                                                                                                                                                       | 30 days                                                                                                                                                                                                       |
| Workload                                                                                    | In 2006, the CCMA processed over one million cases, ten thousand per month five hundred a day with a combine resolution of seventy percent.                   | There are no readily available statistics on Zimbabwe due to financial constraints.                                                                                                                           |
| Is the statutory body tripartite or bipartite?                                              | Yes, the CCMA is independent of government, political party, trade union or employee organisation. (section 113 of the LRA.)                                  | No, the Ministry is not a tripartite body, it is controlled by the executive and therefore its independence in dispute resolution is questionable.                                                            |
| Do parties pay for the services of the statutory bodies?                                    | No, the services of the CCMA are free of charge                                                                                                               | No, the services of the ministry are free of charge.                                                                                                                                                          |
| Any challenges faced by the statutory body.                                                 | Yes, financial problems, procedural irregularities, long delays in the process, access to the CCMA.etc                                                        | Yes, shortage of funding and staff, ministerial powers and control, procedural irregularities, vague provisions of the LA.etc                                                                                 |
| What are the grounds for review of arbitration awards?                                      | Misconduct, procedural irregularity, exceeding powers (section 145 of the LRA)                                                                                | The section 98(10) of the LA provides for an appeal to the Labour Court on questions of law contained in the award. See Article 33 of the Model Law.                                                          |
| Is the conciliator obliged to issue a certificate of no settlement?                         | Yes, the Commissioner appointed to conciliate the dispute must issue a certificate of outcome(section 136(1)(a) read together with section 135(1) of the LRA) | Yes, if the dispute is not settled within thirty days the labour officer shall issue a certificate of no-settlement(section 93(3)(1) of the LA)                                                               |
| Are there any International treaties which have been ratified                               | Yes, South Africa being a member of the ILO ratified twenty three ILO conventions which are currently in force                                                | Yes, Zimbabwe as a member of the ILO ratified twenty six ILO conventions which are currently in force.                                                                                                        |
| Is there any regulatory framework for dispute resolution despite international conventions? | Yes, there is the Labour Relations Act 66 of 1996 and the Conciliation and Arbitration guidelines as published by the CCMA                                    | Yes, there is the Labour Relations Act 16 of 1985, Statutory Instrument 217 of 2003 and the Conciliation and arbitration guidelines as published by the Minister of Labour in terms of section 127 of the LA. |

Despite the diversity of mechanisms and legal culture that exist in South Africa and Zimbabwe, a consensus exists on the need for common principles setting out the main characteristics of effective dispute resolution. Both South Africa and Zimbabwe have set different systems but with sufficient similarities as indicated by the table above. This relationship between South Africa and Zimbabwe is prominently reflected in the histories of both countries.<sup>506</sup> It is remarkable that each country has enacted comprehensive legal frameworks for alternative dispute resolution and enforcement of arbitral awards.<sup>507</sup> In all jurisdictions, the Labour Relations Act is the principal law governing statutory dispute resolution.<sup>508</sup> Both statutes allow the party with a successful claim to apply for a court order to have the award enforced.<sup>509</sup> More so, the CCMA and the Ministry of Labour have faced the same problems and challenges more in particular the ever increasing case load.

South Africa and Zimbabwe emphasize conciliation as the first step in the dispute resolution system.<sup>510</sup> Conciliation should be attempted prior to the arbitration hearing. In South Africa, the CCMA does not have jurisdiction to arbitrate disputes unless the

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<sup>506</sup> Both South Africa and Zimbabwe are former British colonies and therefore, their laws are formulated from the British system.

<sup>507</sup> Section 98(14) of the LA states that any party to whom an arbitration award relates may submit a certified copy of the award for registration by court having jurisdiction to grant an order equivalent to that contained in the award.

<sup>508</sup> In South Africa the principal law is the Labour Relations Act 66 of 1995(hereinafter referred to as the LRA). On the other hand, Zimbabwe has enacted the Labour Relations Act 16 of 1985(hereinafter referred to as the LA.)

<sup>509</sup> Op cit note 2.

<sup>510</sup> The CCMA does not have jurisdiction to arbitrated dispute unless the dispute has been referred to conciliation. More so, the fact that the Labour Court may also refuse to adjudicate a dispute where no efforts have been made at conciliation is an example of the importance of the conciliation process. See section 157(4) (a) of the LRA. In Zimbabwe, section 93 (1) of the LA provides that a labour officer to whom a dispute has been referred or to whose attention it has come, shall attempt to settle it through conciliation or if the agreed by the parties, by reference to arbitration.

dispute has been conciliated.<sup>511</sup> Similarly, the Zimbabwean LA requires labour officers to first conciliate the dispute before invoking arbitration.<sup>512</sup> This clearly shows the importance of conciliation in both countries. In all countries, parties to the conciliation are not bound by the outcome of the conciliation; they are free to adopt the outcome. The time limits set in both countries are also a striking similarity.<sup>513</sup> Both the LRA and the LA contain time limits which must be observed by the party wishing lodge the dispute.<sup>514</sup> There are also time limits within which commissioners and labour officers must resolve disputes. Time frames are used as means of limiting the time spent on each stage.

Yet another similarity flows from the use of legal representation. In both countries, the right to legal representation is only allowed in certain circumstances. In arbitration proceedings, a party to a dispute may be represented by a fellow employee, an official of a registered trade union or employers' organization or a legal practitioner.<sup>515</sup>

The most notable difference between South Africa and Zimbabwe relates to the institutional framework. South Africa has set a specialised body to resolve labour disputes and is a tripartite body governed by both employers and employees.<sup>516</sup> In some respect, the CCMA and the Ministry of Labour play a similar role in that they all have conciliation and arbitration jurisdiction but their administration and governance are

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<sup>511</sup> Ibid.

<sup>512</sup> Section 93(1) of the LRA.

<sup>513</sup> Section 135 of the LRA states that the appointed commissioner must attempt to resolve the dispute through conciliation within thirty days from the date the CCMA received the referral. However, the parties may agree to extend the thirty day period. In Zimbabwe, section 93(3) of the LA states that if the dispute is not settled within thirty days after the labour officer began to attempt to settle it under subsection (1), the labour officer shall issue a certificate of no-settlement to the parties to the dispute. According to section 93(4) of the LA, parties may agree to extend the thirty day period.

<sup>514</sup> Section 94 of the Zimbabwean LA allows unfair dismissal disputes and unfair labour practice disputes to be referred to the Ministry of Labour within two years.

<sup>515</sup> In South Africa, this is set out in section 138 of the LRA while in Zimbabwe it is regulated by clause 4 of Statutory Instrument 217 of 2003.

<sup>516</sup> Section 112 of the LRA establishes the CCMA.

different. The governing body is the supreme policy making body of the CCMA comprising of state representative, organized labour and organized business.<sup>517</sup> Contrary to South Africa, the Zimbabwean statutory dispute resolution system is dominated by the state via the Ministry of Labour. The Ministry of Labour plays a central role in the dispute resolution system. Officials of the Ministry of Labour act as conciliators and arbitrators and are employees of the government. Unlike labour officers who are government employees, CCMA commissioners are not government employees but are employed by the CCMA.

### **6.7. Conclusion**

From the above considerations, it can be concluded that South African and Zimbabwe have a lot in common. However, Zimbabwe still needs to a lot more to ensure compliance with the International labour standards. In this regard, Zimbabwe can learn a lot from the South African alternative labour dispute resolution especially in its quest to comply with both regional and International instruments. In order to achieve this, the adoption of a memorandum between South Africa and Zimbabwe accompanied by governmental studies of how alternative labour dispute resolution mechanisms can be administered is desirable. This provides a forum for the enlightening of those countries like Zimbabwe which are still struggling to respect and promote labour standards. The adoption of such a memorandum is not only achievable in the two given countries but in the whole of Africa to ensure compliance with international labour standards.

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<sup>517</sup>

Section 113 of the LRA.

## **CHAPTER 7**

### **RECOMMENDATIONS AND CONCLUSIONS.**

#### **7.1 Introduction**

What has been examined in the previous chapters is the statutory labour dispute resolution in South Africa and Zimbabwe. This chapter builds further from the previous chapters by providing measures which the two jurisdictions can adopt to deal with the challenges which they are confronted with.

##### **7.1.1 Recommendations on areas for future work**

Having recognized the inevitability of labour disputes at workplaces in both South Africa and Zimbabwe, the two governments should work towards the development of a harmonized framework for effective dispute resolution that would apply to both countries. The availability of such a harmonized effective dispute resolution system would increase the employees' trust in the dispute resolution system. The thesis recommends the two governments to consider the following issues in designing best practices in labour dispute resolution:

#### **7.2 South Africa**

##### **7.2.1. Training commissioners**

As noted previously, some CCMA commissioners lack adequate qualifications to handle complex issues. It is submitted that commissioners should have sufficient skills and training to fulfill their functions.<sup>518</sup> The availability of adequately qualified personnel will minimize errors and mistakes there by improving the quality of awards. Qualified commissioners reduce the number of review applications and this serves the time spent on one case. Brands notes that case management staff is often too busy and under-skilled to properly assist workers to channel their disputes into the correct processes and

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<sup>518</sup> Carl Mische "(RE) inventions-Reflections upon entering a new system of dispute resolution" *Labour Dispute Resolution* John Brand 1997 at 22. It is provided that dispute resolvers should be well-qualified, and should have a sound knowledge of the legal framework within which they are functioning.

institutions.<sup>519</sup> Therefore, there is a need to conduct a training needs analysis to identify the specific knowledge and skill gaps needed by commissioners and administrative staff of the CCMA. After that, the CCMA should prepare training materials and evaluate training courses.

### 7.2.2 Removing legal impediments

Though commissioners need a labour law background, they need not be registered practitioners. Registered practitioners complicate the dispute resolution procedures for an ordinary man to understand. Instead, the CCMA should work towards simplifying the procedures by removing legal and practical impediments.<sup>520</sup> In doing so, the CCMA should remove unnecessary and legalistic detail in the filing in of the referral forms. In essence, the procedure should be clear, simple and non-prescriptive. Lawyers tend to be legalistic and raise unnecessary points; they have a limited role to play especially in the conciliation and can be obstructive. More so, lawyers are driven by money and they charge fees which might be out of reach of every worker. The CCMA is meant to be simpler and cheaper for users. Lawyers create complexities and costs for users and hence should be removed from the dispute resolution system.

### 7.2.3 Eliminating unnecessary delays in the process

The CCMA dispute resolution system has also been characterized by long delays. Workers have generally not been able to have their disputes resolved within the

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<sup>519</sup> John Brand 'CCMA: Achievements and challenges—Lessons from the first three years' *Paper presented at the 12<sup>th</sup> Annual Labour Law Conference Durban July 1999.*

<sup>520</sup> Section 135(4) of the LRA states that a party to conciliation proceedings may appear in person or be represented only by a co-employee or by a member, an office bearer or official of that party's trade union or employers' organization and, if a party is a juristic person, by a director or an employee. It should be noted that section 135(4) specifically denies parties to conciliation proceedings the right to independent legal representation there by removing legal representation. The issue of legal representation is a debatable issue in the arbitration process. Section 138(4) of the LRA states that a party to the dispute may at the arbitration hearing be represented by legal practitioners. Legal practitioners make the process legalistic and expansive.

prescribed time limits.<sup>521</sup> This is particularly true in busy regions like Gauteng where the thirty day time limit is often exceeded.<sup>522</sup> It is recommended that complaints should be resolved within the reasonable time set. Commissioners should adhere to the time frames set for both conciliation and arbitration. Long delays results in the piling of cases and creates a back log of cases as more time is spent on one case. To avoid the delays, postponements and condonation must only be accepted under exceptional circumstances as they lead to long and protracted hearings. Time is also wasted on disposing of jurisdictional cases, technical legal points and interpretation. Both conciliation and arbitration proceedings are meant to be relatively informal. However, in the arbitration proceedings, employees are entitled to be represented by a legal practitioner or union official.<sup>523</sup> The presence of legal representation has caused delays in the dispute resolution system. Lawyers are responsible for delaying the proceedings due to their unavailability and the adversarial approach they adopt. The researcher submits that legal representation should not be allowed in the CCMA process. The reason for not allowing legal representation is to allow for speedy resolution of disputes and keep the legal costs at minimal. The CCMA should provide a pro-active and expeditious dispute resolution system.<sup>524</sup> This in essence means that the government should take considerations in relation to the efficiency of the CCMA. Efficiency implies that disputes should ideally be resolved as quickly and informally as possible, with little or no procedural technicalities.<sup>525</sup>

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<sup>521</sup> Op cit note 515.

<sup>522</sup> ibid at 12. The demand for the CCMA services has been constant over the years, with Gauteng responsible for 34.8 percent of cases, followed by Kwazulu Natal with 19.7 percent and Western Cape with 12.7 percent. The rest of the offices each account for less than 10 percent of the national work load.

<sup>523</sup> Section 138(4) allows legal representation in the arbitration hearing. More so, section 149 of the LRA obliges the CCMA to assist a party to a dispute in arranging legal representation.

<sup>524</sup> Robertson B 'Dispute Resolution System in the Draft Labour Relations Bill' *South African Labour Bulletin* 1995 Volume 19 Number 3 at 66-70.

<sup>525</sup> Op cit note 515 at 19.

#### 7.2.4. Educating workers on how to use the CCMA.

The reality of the South African labour market is that the majority of workers are uneducated and not equipped to deal with the sophisticated rules and procedures of the CCMA. The government should develop a dispute resolution system that caters for all workers especially the vulnerable workers. The vulnerable and uneducated workers should be provided with clear and accurate information about the CCMA. Information and communication should be used to disseminate information about the use of the CCMA. It is pleasing to note that the CCMA has modernized the dispute resolution system by providing a website which clearly explains its use including the referral procedure. To cater for the vulnerable and marginalized workers, the CCMA should make sure that it is located in small towns and closer to farms to cater for farm workers. Currently, the CCMA only has offices in each province but they are not enough to cover all the corners of the province.

#### 7.2.5. Increase financial resources

The CCMA has also been hit by shortage of resources and funding. It can be argued that the CCMA has done considerable work given the acute shortage of resources which it has been operating with.<sup>526</sup> This CCMA is currently under strain due to the lack of resources, it can not resolve disputes expeditiously and hence it has a backlog of cases. The government should provide more funding and resources for the CCMA. The case load of the CCMA is increasing every year but its budget allocation is not increasing. In order ease its case load, the CCMA should support employers and employees to resolve disputes in the workplace. The government should challenge all employers and employees to implement and promote early dispute resolution in the form of in house conciliation. The state should concentrate on the grievance procedure that fully channels complaints before they develop into disputes. The fact that so many disputes are referred to the CCMA for conciliation could be an indication that the grievance procedure is properly used. A well functioning grievance procedure should therefore be emphasized to

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<sup>526</sup> D du Toit *et al Labour Relations Law A comprehensive guide* Durban Butterworth 2000 at 43. In this book, it is stated that the CCMA is performing well, but problems have arisen and there are ominous signs with regard to budget and resources.

curd the escalating of disputes.<sup>527</sup> Encouraging internal procedures at the workplace at the earliest possible stages would go a long way in easing the CCMA's case load.

#### 7.2.6 Registering more bargaining and statutory councils

The wide jurisdiction and easy access of the CCMA has vastly exceeded initial projections. In 2005 the CCMA heard an average of 86 000 disputes a year and has had over 700 000 disputes referred to it since its time of inception.<sup>528</sup> On average, 509 disputes were referred to it everyday. In 2006 the CCMA processed over one million cases, ten thousand a month, five hundred per day in every corner of the country with a combined resolution rate of seventy percent.<sup>529</sup> This clearly shows that the CCMA's caseload is ever increasing. To handle this case load, commissioners handle four conciliation and two arbitrations a day. Molahlehi<sup>530</sup> admitted that this was abnormal especially with regard to quality but with pressure on them they had to adopt this approach to resolve disputes referred to them though it over works commissioners. In order to curb this, the CCMA should register more bargaining councils to perform dispute resolution work to ease its work load. The establishment of bargaining councils should be encouraged in sectors where they do not exist. The case load of the CCMA is reduced if councils carry out dispute resolution work in their sector. The CCMA and bargaining councils must co-operate with each other because they both perform dispute resolution work. More so, it is suggested that the CCMA'S case load and effectiveness problems could be largely resolved if dispute were screened before being referred to arbitration. The screening of referrals would eliminate frivolous cases and ease the CCMA's caseload. Currently, these frivolous cases are allowed to progress to arbitration phase and cause unnecessary costs and wastage of time.

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<sup>527</sup> Ibid.

<sup>528</sup> Mokgadi Pela "CCMA's Edwin Molahlehi follows his calling" March 11 2005 accessed on [www. Busrep.co.za](http://www.Busrep.co.za)

<sup>529</sup> Speech by Minister of Labour M. M. S Mladlana on the 27th of November 2006 on celebrating the tenth anniversary of the CCMA.

<sup>530</sup> Edwin Molahlehi is the former CCMA director.

### 7.3 Zimbabwe

It may be recalled that there are quite a number of weakness which have crippled the Zimbabwean dispute resolution system. In order to further develop it, the government must consider a number of issues. Many can be dealt with in rules and procedures, while others require statutory authority. Zimbabwe should review the existing framework to ensure that it provides workers with access to fair, easy to use, timely and effective dispute resolution system without unnecessary cost.

#### 7.3.1 Hiring more staff and increase in house training

Following the shortage of staff that has been identified in the previous chapter, the government should hire additional staff to work as labour officers. Labour officers should be provided with adequate salary, benefits and good working conditions. This will assist in retaining staff and curbing the brain drain which has hit the ministry. More so, labour officers should be impartial and neutral. This can only be achieved if properly qualified personnel are appointed. Government should call for promotion of investment in training of labour officers. With resource constraints in mind, the ministry should continue to explore ways to improve the qualifications of labour officers. In this regard, attention should be given to international and regional cooperation in order to foster the sharing of best practices in the training of labour officers and the promotion of the International Labour Organization Declaration on the Fundamental Principles and Rights at Work. Developing an effective dispute resolution system calls for the government to develop and implement laws and policies for the resolution of disputes and to take steps to ensure that human capital is effectively mobilized. This will reduce the number of procedural irregularities. Performance based contracts and monitoring system should also be introduced to curb the number of mistakes and errors by labour officers.

### 7.3.2 Increase financial resources

With rising inflation and shortage of foreign currency, the Ministry of Labour continues to experience a chronic budget that limits its ability to perform its functions.<sup>531</sup> There is a need for greater financial commitment from the government for obvious reasons of effectiveness and efficiency. The government should play an important role in funding the dispute resolution system, particularly where there are social goods associated with the dispute resolution services. It also appears sensible for the government to apply for financial assistance from the International Labour Organization and the various non-governmental organizations.<sup>532</sup> Adequate and sustainable funding should be allocated to the ministry and this will ensure that the ministry has adequate resources.

There may be a role for government in providing alternative dispute resolution awareness programs. Due to lack of resources, the ministry has not been able to reach peripheral workers. Some workers are not well equipped with the dispute resolution system. Greater use of technology will facilitate the dissemination of information. Communication should be used to change the quality of delivery and dissemination of information taking advantage of technology. Workers should be provided with clear, comprehensible and accurate information on the procedure including the process of initiating a complaint. For those in urban areas, the ministry should provide a website that explains the dispute resolution system. Special needs of the disadvantaged or vulnerable should also be considered by taking into account the need to improve awareness through public seminars. This will ensure that the dispute resolution mechanisms are sufficiently accessible and easy to use. In line with the ministry's vision and mission of improving its customer service, the government should provide a call center. Call centers merge

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<sup>531</sup> Figures from the Zimbabwe's central statistical office reveal that inflation has now reached seven thousand six hundred percent signaling that the government cannot fund its ministries' adequately. [www.telegraph.co.uk/news/main/jntm](http://www.telegraph.co.uk/news/main/jntm). Accessed on 24-08-2007.

<sup>532</sup> Ibid. Zimbabwe is in a state of free fall. It is embroiled in the worst economic crisis since its independence in 1980. This crisis has negatively affected virtually every ministry and every population.

information and telecommunications technology, allowing clients to talk to knowledgeable representatives who have speedy access to information.

### 7.3.3 Eliminate unnecessary delays and reviewing the time limits

The dispute resolution system has not been able to resolve disputes expeditiously. Disputes are not resolved within the stipulated time.<sup>533</sup> The government should review the existing framework to ensure that workers are provided with timely and effective dispute resolution system without unnecessary delays. Postponements of hearings and condonation have delayed the process.<sup>534</sup> In order to avoid delays, labour officers should resolve disputes within the thirty day time limit and postponements of hearings should be limited. All labour officers should be reminded to be more vigilant in controlling the lengthy of trials and to minimize the number of postponements. There is a need to process disputes quickly, effectively and with minimum delay, for these reasons, labour officers should avoid postponements of hearings. Consequences of not attending a hearing should be stringent and strictly adhered to so that disputants are encouraged to attend hearings and consequently avoiding non-attendance. The rule that labour officers should wait for the absent party to arrive delays the proceedings.<sup>535</sup> Problems also arise with regard to the time limit which must be observed by a party wishing to lodge the dispute. The LA allows unfair dismissal disputes and unfair labour practice disputes to be

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<sup>533</sup> Op cit note 515.

<sup>534</sup> A postponement may be granted without the need for the parties to appear if all the parties to the dispute agree, preferably in writing and if the request for postponement is received by the arbitrator more than seven days prior to the scheduled date of the arbitrator, provided that this requirement may be waived by the arbitrator. Irrespective of whether there is an agreement between the parties to postpone the hearing, an arbitrator should only postpone a hearing in special circumstances.

<sup>535</sup> Rule 8.1 of the Arbitration Guidelines states that if a party is not present at that the date and time advised for the arbitration, the labour officer should wait a short period to give the party an opportunity to arrive. However, Clause 7 of statutory Instrument 217 provides for a labour officer to proceed in the absence of a party. This is not included in the Arbitrations guidelines; it needs to be considered whether it is appropriate to include this in the guidelines.

referred within two years.<sup>536</sup> This period is too long and should be reduced as it delays the finalization of cases. The whole process can be expedited by prompt oral rulings during conciliation or even during arbitration. For example, the issue of proceedings against the employer's correct names raises jurisdictional cases which might have been resolved by an oral hearing during conciliation. Instead, the reluctance of labour officers to make provocative oral rulings by reserving them for written award has increased writing burden, mislead parties and extended cases unnecessarily.

#### 7.3.4 Development of a new institution independent from the government

An independent alternative dispute resolution institution is a fundamental element of industrial democracy. The institution must be independent of the state, workers and trade unions and must be operated by reputable parties. The state should not have direct interest in the institutions. There is doubt as to the independence and partiality of the Ministry of Labour which is controlled by the Minister of Labour. The framework, process and standards for the dispute resolution system should be independent, with clear delegation from the necessary authority. Currently, the Zimbabwean political landscape is dominated by ZANU-PF and therefore the potential for authoritarian rule and the abuse of powers by the Minister of Labour becomes a potential threat. It is recommended that the Zimbabwean government should work towards the establishment of a statutory body that is independent of the government but administered by state representatives, organized labour and organized business. This however does not mean that the Ministry of Labour does not have a role to play in the establishment of this body. The ministry should coordinate with trade unions and employers' organizations to seek an agreement and criteria for the establishment of the new institution. In this regard, the government should work with the International Labour Organization in establishing this institution. In 1995 the International Labour Organization worked with South Africa to set up the CCMA which is the largest institution in South Africa for dispute resolution. Based on the lessons learnt from South Africa, Lesotho has also built the Directorate for Dispute Prevention and Resolution, so also is the position in Botswana and Namibia. Following

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<sup>536</sup> A dispute may be referred to the labour officer in terms of section 93(1) only if the referral is within the two years time period prescribed by section 94 of the LA.

from this, Zimbabwe should also follow suit and work with the International Labour Organization for the establishment of an independent institution that has the confidence of all the parties. Government as the primary user should demonstrate by example, its financial commitment should drive and motivate other partners to the new system.

#### 7.3.5 Recognize collective bargaining and trade union rights.

To foster the current dispute resolution system, I would encourage the government of Zimbabwe to reinforce collective bargaining. Collective bargaining should not be an alternative to dispute resolution but it reinforces the dispute resolution system. In democratic societies where trade unionism is active, the proven process for dealing with disputes which arise at workplaces is collective bargaining. It provides a process for bringing a measure of democracy to industrial life by giving workers a voice in decisions which vitally affect them. The government should therefore recognize trade union rights so as to promote the process of collective bargaining. Although the LA allows for the formation of multiple national federations, none but the Zimbabwe Congress of Trade Union exists.<sup>537</sup> Currently trade unions struggle to assemble and exercise their rights as the police quash their gatherings.<sup>538</sup> The LA requires too much government intervention in the collective bargaining process.<sup>539</sup> Trade union gatherings are suppressed by

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<sup>537</sup> Section 27 of the LA states that everyone has the right to form trade unions and employers' organization.

<sup>538</sup> [www.ICFTU.org/](http://www.ICFTU.org/) disposal document. On 13 March 2007 the headquarters of the Zimbabwe congress of Trade Union was raided by government security forces as part of an effort to try and crash all civic organizations and trade unions. In practice, members of the independent trade union face harassment and intimidation from the government forces. It is difficult for trade unions to carry out trade union activities

<sup>539</sup> Section 25(2) (c) and 25(4) of the LA suggest too much government intervention. Section 25(2)(c) states that where a collective bargaining agreement which has been negotiated by a workers committee contains any provision which is, or has become unreasonable or unfair, having regard to the respective rights of the parties, the Minister of Labour may direct the parties to the agreement to negotiate, within such period as he may specify, an amendment to the agreement in such a manner or to such an extent as he may specify and he may give such other directions relating to the operation of the agreement pending its amendment as he may deem fit, and such directions shall be binding on the parties. Section 25(4) provides that the Minister of Labour may,

government and this hinders the collective bargaining process which is an integral principle in settling collective disputes.

#### 7.3.6 Amend vague provisions of the LA.

There is a need to amend some sections of the LA which are vague and confusing. A government study commission must be set to develop a wide range of proposals. Confederation of trade unions, employers' federations and government must meet and advocate for legislation that has little governmental involvement. It is suggested that consideration should be given to streamlining a number of sections within the LA. It is forwarded that appeal jurisdiction in terms of section 98(10) allowing appeals on questions of law only requires further consideration.<sup>540</sup> Should there be an appeal at all or a review, such issues need to be clarified. More so, section 105(2) refers to a section that does not exist.<sup>541</sup> There does not appear to be a definition of unlawful collective action as contemplated by section 105(2) and hence this section is unnecessary and should be deleted. The LA provisions are fraught with conceptual and drafting problems and constitute bad law. I therefore call upon the government of Zimbabwe to review the LA without delay and to take necessary steps to introduce disputes procedures consistent with the International Labour Organization. The government of Zimbabwe may wish to consider working with the CCMA on developing best practices in labour dispute resolution

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after considering any report submitted to him amend the collective bargaining agreement concerned in accordance with the report of the parties or in such a manner as he may deem necessary in the national interest.

<sup>540</sup> Section 98(10) of the LA states that an appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator.

<sup>541</sup> Section 105(2) provides that no employer or employers' organization or federation, or official or office-bearer of such employers' organization or federation shall threaten, recommend, encourage, incite, organize or engage in an unlawful collective job action referred to in paragraph (b) of the definition of that term in section. Section 105(1) paragraph (b) referred to above does not define collective job action as contemplated by section 105(2). There is no link between the two sections and hence section 105(2) should be deleted.

## **7.4. Conclusion**

### **7.4.1 The future for South Africa and Zimbabwe**

Though conflicts are an inevitable part of the employer-employee relationship, it is possible to eliminate unnecessary disputes and to assist parties in managing conflicts effectively. The dispute resolution system must be pro-active rather than reactive. In this sense, the dispute resolution system must be managed in a way that makes it possible to prevent disputes instead of only focusing on resolution. Attention should be given to both dispute resolution and dispute prevention. The thesis specifically recommends that South Africa and Zimbabwe should develop mechanisms to prevent conflicts from transforming into disputes. The two governments should focus on building the capacity of employers and employees to prevent and resolve labour disputes. In that regard, strengthening the two dispute resolution systems calls for the exchange of information on progress and experiences regarding the dispute resolution system. In addition to that, South Africa and Zimbabwe should draw up a national dispute prevention and resolution strategy with tripartite involvement and acceptance. Improving workplace cooperation between workers and management is also a vital part dispute prevention which the two countries must work on. A model grievance procedure must be developed, to assist in solving problems and addressing complaints before they harden into formal disputes. More so, the countries in the region should work in an univocal fashion to modernize their conflict resolution mechanisms in the area of labour relations recognizing that disputes should not be seen foreign to labour relations but rather as manifestations of their nature

It can be concluded that the dispute resolution system in South Africa and Zimbabwe is basically the same. This is particularly true when one compares the procedural framework. South Africa and Zimbabwe have each reformed their legal framework to encompass alternative dispute resolution system. However, few differences exist in the institutional framework. There are differences between the CCMA and the Ministry of Labour in Zimbabwe.

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