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RESEARCH TOPIC:

THE RIGHT TO STRIKE IN ZIMBABWE'S LABOUR LAW: A LIABILITY OR A TRAP AT WORST?

SUBMITTED BY

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TABLE OF CONTENTS

Approval form	i
Declaration	ii
Dedication	iii
Acknowledgment	iv

CHAPTER 1

1.1. Introduction	1
1.2. Background to Study.....	2
1.3. Statement of the Problem.....	3
1.4. Research Aims and Objectives.....	3
1.5. Literature Review.....	4
1.6. Methodology.....	6
1.7. Summary of Chapters.....	6

CHAPTER 2

2.1.Introduction	8
2.2. Significance of the Right to Strike.....	8
2.3.The Common Law Position on the Right to Strike.....	10
2.4. The Legislative Framework and the Right to Strike.....	11
2.5. Conclusion.....	17

CHAPTER 3

3.1.Introduction.....	18
3.2.Situations where the Right to Strike is precluded.....	18
3.3. Requirements for a lawful strike action.....	23
3.4. The purpose of the Labour Act the Right to Strike.....	27
3.5. Conclusion	28

CHAPTER 4

4.1. Introduction	29
4.2. Right to Strike and Zimbabwe's Socio-Economic Context.....	30
4.3. Remedies against unlawful strike action.....	31
4.4. The Right to Strike, the Constitution and the Constitutional Court.....	33
4.5. Case Law and the right to strike.....	35
4.6. Conclusion	36

CHAPTER 5

5.1. Conclusion	37
5.2. Recommendations	37
Bibliography	41

APPROVAL FORM

The undersigned certify that they have read and recommend to the Midlands State University for acceptance, research project titled THE RIGHT TO STRIKE IN ZIMBABWE’S LABOUR LAW: A LIABILITY OR A TRAP AT WORST? Submitted in partial fulfilment of the requirements for the Bachelor of Laws Honours Degree.

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DECLARATION

I MELUSI MOYO, do hereby declare that this dissertation is a result of my own investigation and research, save to the extent indicated in the acknowledgment, references and comments included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree at any other University.

.....

SIGNATURE

...../...../.....

DATE

DEDICATIONS

To my beloved parents.

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CHAPTER 1

1.1.INTRODUCTION

Strike action, commonly referred to as “strike” occupies a central position in labour relations in that it seeks to strengthen the bargaining power of employees than would otherwise be the case if it were a matter of each employee facing the employer on their own. In other words, strike action is concerned with the need to bring about equilibrium in industrial relations between two competing interests; labour and capital¹. Strike action refers to the collective and concerted withdrawal of labour by workers in support of their interests². Section 65 (3) of the Constitution of the Republic of Zimbabwe, 2013³ (hereinafter called ‘the constitution’) entrenches the right to strike thereby making it justiciable. A strike is a form of collective job action as defined in section 2 of the Labour Act Chapter 28:01⁴, hereinafter referred to as the “Act”.

An analysis of the above definition of strike action brings certain aspects of this right to the fore. Firstly, for a strike to be regarded as such, there must be in existence an employment relationship and one must be in a position to point out who the parties to that relationship are. Secondly, a strike can only be resorted to by employees. In other words, it is one of the ways by which employees can effectively stand their ground in demand of their rights, which rights must be related to the employment relationship. One employee cannot embark on a strike. That there should be more than one employee for a strike to suffice is so because of the inherent inequality in bargaining power between the employer and the employee which inequality ordinarily results in the employer prevailing over the employee concerned. Thus, the idea is to try and strengthen the bargaining power of employees. In other words, the employer has the potential to exploit labour in the absence of some balancing mechanism. Lastly, employees embarking on a strike must be acting with a common purpose: to disrupt production at work place thereby putting the

¹ Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under the Neo Colonial Capitalism*(2007) 344.

² Gwisai op cit note 1 at 1.

³ The new constitution which came into force on the 22nd of August 2013

⁴ Section 2 of the Act defines collective job action as an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment.

employer out of business and in the process, forcing the employer concerned to meaningfully engage with the employees⁵.

In light of the foregoing, the dissertation endeavours to underscore the fact that despite the aforesaid significance of the right to strike, it still remains of little, if any practical value to employees. This is so because the exercise of the right in question is preceded by a number of cumbersome procedures in respect of which the law requires absolute compliance, failing which one's conduct as an employee stands to be condemned as illegal, hence, punishable. Further, it will be argued that it is a right that is given by one hand and taken by the other. The dissertation shall focus on all employees except those in the public service and members of the disciplined forces of the State.

1.2. BACKGROUND TO STUDY.

The right to strike is now constitutionally guaranteed under the Bill of Rights in section 65 (3) of the Constitution of Zimbabwe. This means that the right is now justiciable and principles of constitutional interpretation will be applied if any dispute arises with respect to this right. In contrast, there was no right to strike under common law given that an employee had an absolute duty to provide service. This was evident from the so called 'no work principle'⁶. Thus, embarking on a strike was not only a breach by an employee of his or her duty to provide service, but in fact, a misconduct which entitled the employer to summarily dismiss the employee⁷. With the coming into force of the Labour Act⁸, the right to strike was entrenched in section 104. That however has not meant any meaningful benefit to employees given that the right is exercised 'subject to the Act'⁹. The bone of contention lies in that in terms of the Act;

- a) the right is limited to disputes of interests;
- b) it does not apply to employees engaged in essential services of which the definition of essential services is too wide to cover virtually all services;

⁵Machingambi *A Guide to Labour in Zimbabwe* 1 ed (2007)
204

⁶ Machingambi op cit note 5 at 204.

⁷ Op cit note 5 at 2.

⁸ Op cit note 4 at 1.

⁹ Section 104 (1) of the Act, Op cit note 4 at 1

- c) other categories of employees are prohibited from embarking on a strike action¹⁰;
- d) Various cumbersome procedures also have to be followed for the right to be lawfully exercised¹¹.

The situation is further compounded by the fact that the Act prescribes punishment including a custodial sentence of up to five years for embarking on unlawful strike action¹². This has a chilling effect as employees cannot guarantee absolute compliance with the various cumbersome procedures. In the end, they might end up deciding not to exercise the right for fear of being caught on the wrong side of the law. As a result, one might argue that the change in law allowing for the express provision of the right to strike has not assisted the employees much as the right is still subject to excessive restrictions.

1.3.STATEMENT OF THE PROBLEM

There is a prevailing uncertainty with regards to the nature and extent to which the right to strike is justiciable. As a result, employees are of the view that they can embark on strike as and when they so please. This however places them at the risk of being chastised for exercising a right which is specifically provided for, but for the fact that it was not properly exercised. The assumption therefore is that the right in question is very imprecise and of little practical value to employees.

1.4.RESEARCH AIMS AND OBJECTIVES.

- a) To investigate the Constitutional and Legislative framework on the right to strike in Zimbabwe.
- b) To analyse the extent to which the right to strike is justiciable under Zimbabwe's Labour laws.
- c) To explore possible ways of ensuring that the right to strike is justiciable and easily available to employees.

¹⁰ Members of security services, section 65 (3) of the Constitution, op cit note 3 at 1

¹¹ Section 104 of the Act, op cit note 4 at 1.

¹² Section 109 (2) of the Act, op cit note 4 at 1.

1.5.LITERATURE REVIEW

Legal authorities are generally in agreement that the right to strike is essential to collective bargaining¹³. This enables parties to an employment relationship to come up with a mutually acceptable solution in case of a dispute. However, both Zimbabwean and South African authorities simply analyse the right to strike as provided for in the relevant statutes in their jurisdictions. In particular they analyse the various procedures that have to be complied with for a strike to pass the requirement of legality¹⁴.

Machingambi¹⁵ for instance tries to justify some of the restrictions on the right to strike especially in respect of employees engaged in essential service. However, the author did not comment for instance, on the discretion that is given to the Minister of Labour to declare as essential in some instances, services that are not ordinarily regarded as essential hence, encroaching on the employees' right to strike. In some cases, the authorities have noted that the law has remained virtually the same as it was under common law¹⁶. Gwisai¹⁷ has also observed that the right to strike is accompanied by various prohibitive and repressive rules intended to emasculate precisely those aspects that make the right effective.

Lloyd¹⁸ blames the Labour Act itself, arguing that it 'whittles away considerably the right to strike'. This is so because the right is exercised subject to the Act, which Act prescribes various procedural requirements that ought to be satisfied before the right can be lawfully exercised. Grogan¹⁹ highlighted the employer's right to institute delictual claims against striking employees to recover damages in some instances. Further, the author acknowledges the relative nature of the

¹³ Gwisai op cit note 1 at 1.

Machingambi op cit note 5 at 2. This author pointed out that there can be no guarantee that management would meaningfully engage with employees' representatives over working conditions in the absence of the right to strike, at page 191.

John Grogan *Workplace Law*, 10 ed (2010) at page 367.

Du Toit *Guide Labour Relations Law "A Comparative"* 5 ed, at 291

¹⁴ Machingambi op cit note 5 at 2. The author referred to them as burdensome prestrike procedures: at page 198.

¹⁵ Supra footnote 4 at page 201.

¹⁶ Op cit note 5 at 2 the author likened the provisions of section 104 (4) of the Act (which relieves the employer of the obligation to remunerate employees for the period on which they were on strike despite the fact that the strike was legal) to the common law principle of 'no work no pay'; at page 208

¹⁷ Gwisai op cit note 1 at 1

¹⁸ Patrick Lloyd *Labour Legislation in Zimbabwe* 2 ed (2006), Legal Resources Foundation; at page 126.

¹⁹ Op cit note 13 at 4.

right to strike, arguing that although it is constitutionally guaranteed, the right to strike may be limited in the interests of some higher values and goals. Commenting on some of the difficulties faced by employees who decide to exercise the right in question, the author observed that the obvious disincentive to strikers is that they must do without their pay for the duration of the strike. Landis and Grossett²⁰ have also aligned themselves with the above observation, adding that should the employer concerned remunerate the striking employees in kind, it can subsequently institute proceedings to recover the monetary value of such remuneration.

Annali Basson, Marylyn Christopher & Christoph Garbers et al²¹ made reference to the various options that may be resorted to by an employer who is faced by a lawful strike. The authors gave as an example the fact that an employer can in some instances; persuade other employees to fill in the gap left by the striking employees thereby undermining the right to strike. In light of the above authors' observations, it is quite evident that the right to strike is not as clear as it ought to be. This project will therefore identify the various problems that hinder the effective exercise of the right to strike and will suggest some recommendations aimed at addressing the problems concerned.

On the international plane, the International Covenant on Economic Social and Cultural Rights does provide for the right to strike in Article 8(1) (d). The right is conferred on condition that it is exercised subject to the laws of a particular country. This therefore takes us back to the provisions of the Act which, as mentioned earlier, also provides for the right concerned on condition that it is exercised subject to its provisions. The International Labour Organisation (ILO) conventions do not specifically provide for the right to strike²². However the right is mentioned in passing for instance in the Right to Organise Convention No. 98/89 as well as the Freedom of Association and Protection of the Right to Organise Convention No. 87/1948²³. Thus it is up to the law makers in various jurisdictions to make provision for the right concerned in a detailed manner.

²⁰Helga Landis & Lesley Grossett *Employment and Labour Law: A Practical Guide for the Work Place* 2 ed (2005) at 366.

²¹Annali Basson, Marylyn Christopher & Christoph Garbers et al *Essential Labour*, 5 ed (2009) at 326

²²Neville Rubin *Code of International Labour Law: Law, Practice and Jurisprudence; Volume 1, Essentials of International Labour Law*(2005) at 203.

²³ Machingambi op cit note 5 at 2

To conclude on this section, note should be taken of the fact that Zimbabwe and South Africa share the same Common law background, both being Roman Dutch jurisdictions. Thus, albeit in passing, reference will be made to the South African position with respect to some aspects surrounding the exercise of the right to strike.

1.6.METHODOLOGY

The research methodology of this dissertation will be restricted to the desktop research. In the circumstances, the following sources shall be used;

- a) Leading textbooks, legislation, journals and scholarly articles
- b) Case authorities, although to a lesser extent given that the right to strike in Zimbabwe is largely governed by legislation
- c) International Conventions
- d) Internet sources

1.7.SUMMARY OF CHAPTERS.

Chapter 1

This chapter gives an introduction and background to the study, statement of the problem, an outline of the research aims and objectives, overview of the literature or current legal framework on the subject, the research methodology as well as a synopsis of chapters.

Chapter 2

This chapter will give an account of the common law position as regards the right to strike. Further, it will briefly look at the importance of the right to strike, evaluating whether the common law position was mindful of such importance. Besides, the chapter will highlight the changes that were effected with the advent of the Act²⁴, and lately, the Constitution of Zimbabwe²⁵.

²⁴ Op cit note 4 at 1.

²⁵ Op cit note 3 at 1.

Chapter 3

This chapter will analyse the various limitations to and the requirements for a lawful strike in Zimbabwean labour law. Besides, the approach will also provide a platform for the analysis of the current position on the right to strike in light of the purpose of the Act²⁶, whether it accords with such purpose.

Chapter 4

This Chapter will analyse the right to strike in light of Zimbabwe's Socio-economic context. The endeavour will be to ascertain whether the provisions on the right to strike are compatible with some government policies. In other words, the Chapter will analyse the right to strike from the government perspective, that is, the light in which the right to strike is seen by the government. More so, it will briefly discuss some of the measures employers can resort to in case of unlawful strikes.

Chapter 5.

This Chapter will conclude the dissertation and advance some recommendations aimed at addressing the problems that militate against the proper and effective exercise of the right to strike.

²⁶ Op cit note 4 at 1

CHAPTER 2

2.1. INTRODUCTION

This chapter focuses on the significance of the right to strike. It further analyses the common law position on the right to strike, highlighting the fact that the right in question was unknown under this regime. Besides, it will discuss the legislative framework with respect to the right concerned, starting with the position under the labour Act and thereafter the Constitutional position. In this respect, regard shall be had to the manner in which the courts used to interpret the right to strike before the advent of the 2013 Constitution, analysing whether such interpretation was in fact compatible with the need to ensure the full realisation of this right. The author will further advocate for the adoption of principles relating to Constitutional interpretation whenever courts are presented with disputes concerning the exercise of the right. This is so because the right to strike is now entrenched in the Constitution under the bill of rights.

2.2.SIGNIFICANCE OF THE RIGHT TO STRIKE

The right to strike is intrinsically linked to collective bargaining which has been defined as a voluntary process for reconciling the conflicting interests and aspirations of management and labour through the joint regulation of terms and conditions of employment²⁷. It enables parties to come up with a negotiated, mutually acceptable solution should any dispute arise. Gwisai²⁸, best summarises the importance of collective bargaining, noting that it serves three main purposes namely;

- Economic: in that it facilitates the regulation of workplace relations and the institutionalisation of industrial conflicts. On the party of employers, it is a charter for

²⁷ Op cit note 1 at 1.

²⁸ Op cit note 1 at 1.

temporary reconciliation, which guarantees production planning, whilst for employees it guarantees the creation of certain generalised standards, in particular, wages and employment security;

- Social; in that it establishes and promotes workplace democracy thereby protecting workers from employers' arbitrary decision;
- Political; in that it brings a measure of democracy to industrial life, allowing workers to effectively speak out on matters affecting them at work place. Thus, for collective bargaining to be effective;

“there is need for relative equilibrium of power between the parties and the use of legitimate economic weapons such as strikes by workers....., Without an effective right to strike, the power of management to shut down the plant would not be met by a corresponding power on the side of labour”,²⁹

In the same breadth, Machingambi³⁰ has also pointed out that there can be no guarantee that management would meaningfully engage with employees' representatives over working conditions in the absence of the right to strike. According to Rubin³¹, the right to strike is an indispensable means for workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions, but also with seeking solutions to the economic and social policy questions, among other issues. On his part, Freund³² has noted that there can never be an equilibrium in industrial relations without the freedom to strike.

²⁹ Op cit note 1 at 1.

See also Machingambi; op cit note 5 at 2

Grogan; op cit note 13 at 4

³⁰ Op cit note 4 at 2.

³¹ Op cit note 22 at 5

See also, report by the Committee on Freedom of Association, one of the ad hoc Committees of the International Labour Organization governing organ, the International Labour Conference: Report 214 on case No. 1081 (Peru)

³² Freund Khan's *Labour and the Law* 3 ed (1983) at page 292, cited in Machingambi, op cit note 5 at 2 .

See also Caleb H Muccheche *A Practical Guide to Labour Law in Zimbabwe* 1 ed (2013) at page 121. The author acknowledged the importance of the right to strike, arguing that it is one of the most formidable and potent weapons at the disposal of employees in the entire global village.

With the foregoing observations, the question then arises; does the Zimbabwe labour law recognise the importance of the right to strike? This then opens the stage for consideration of the common law position on the right to strike.

2.3.THE COMMON LAW AND THE RIGHT TO STRIKE

There is no legal basis for the right to strike under common law given that employees have a duty to provide service to the employer³³. This position was underscored in the case of *Girjac Services Pvt (ltd) v Mudzingwa*³⁴. In this case, the appellant employee had been arrested at the instance of the employer on allegations of theft. He was subsequently acquitted, having been initially released on bail, during which time he did not render his services to the employer. The employee later sought to resume work with full pay from the date he had been arrested up to the date of his acquittal. The High Court had ordered that the employee be reinstated with full back pay and benefits. On appeal to the Supreme Court, it was held that that the employee was not entitled to absent himself from work because he had been arrested. He was not incapacitated from working and should have tendered his services. He could not blame his absence on his employer for having wrongfully caused his arrest, there having been reasonable suspicion that he had committed an offence.

It logically follows therefore that embarking on a strike amounts not only to a breach by the employee of the duty concerned, but also to a misconduct which entitles the employer to summarily dismiss the employee without incurring any legal liability for such course of action³⁵. This position was evident from the so called no work no pay principle³⁶, relied on by the Supreme Court in the above case, which entitled the employer to withhold an employee's salary should they fail to tender their services. It is also sad to note that despite the fact that the court admitted that the employer's decision to cause the arrest of the employee concerned was wrong, it still thought it wise not to blame the employer.

³³ Gwisai, op cit note 1 at 1

³⁴ 1999 (1) ZLR 243 (S).

³⁵ Gwisai op cit note 1 at 1, Machingambi op cit note 5 at 2

³⁶ Machingambi, op cit note 5 at 2

Regard being had to the above, one would note that despite the aforesaid significance of the right to strike, the common law position was not alive to that fact. The scales were in fact heavily tipped in favour of the employer who, faced with a striking employee had two effective counter measures, that is, in addition to withholding the employee's salary, the employer could summarily terminate the employment relationship. This obviously was a disincentive which discouraged employees from embarking on a strike action regardless of the propriety or otherwise of working conditions. As a result of the above, the employer enjoys inherent superior power in the contract by virtue of it being the owner and controller of the means of production³⁷. The employment relationship was in fact vertical due to the aforesaid superiority of the employer, hence there was no equality as between the parties. Now the question is, is this common law position still relevant in Zimbabwe's labour law? That issue is dealt with below.

2.4. THE LEGISLATIVE FRAMEWORK AND THE RIGHT TO STRIKE

The legislative framework with regards to the right to strike differs from the common law position. In fact, the statutory position brought in fundamental changes with respect to the right to strike. A reading of section 104(1) of the Labour Act shows that all employees, workers committees and trade unions have a right to resort to collective job action in order to resolve disputes of interests. Despite a qualification with respect to the disputes in respect of which strike may be resorted to, the most important issue to note is that the right is now expressly provided for, unlike under common law. This becomes clearer especially if regard is had to the provisions of section 2 of the Act which shows that collective job action includes "strikes". The aforesaid section 104(1) of the Act was brought into effect by section 37 of Amendment Act No. 17 of 2002. It follows therefore that unlike under common law, exercising the right to strike no longer warrants disciplinary action against employees, indeed, one cannot be punished for exercising their right. This of course, as highlighted earlier is conditional upon the right being exercised strictly in accordance with the manner prescribed in the Act.

³⁷ Op cit note 1 at 1.

It is also worth mentioning at this stage that although substantially different from the common law position, the statutory position referred to herein retains some of the fundamental aspects of common law, for instance the “no work no pay principle”³⁸ This is evident from section 108(4) of the Act which relieves the employer of the obligation to remunerate employees for services not rendered albeit during a lawful strike. This essentially is a disguised form of punishment intended to discourage employees from embarking on strike. This is just but one of the major resentments towards the manner the right to strike is treated in Zimbabwe’s labour law, as will be argued later in this research.

With respect to the constitutional position, one would recall that the discarded Lancaster House Constitution³⁹ did not expressly provide for the right to strike. According to Machingambi⁴⁰, the right to strike used to be inferred from the then section 21(1) which provided for freedom of assembly and association. The 2013 Constitution addressed this anomaly by expressly providing for the right to strike in section 65 on labour rights, indeed under the Bill of rights. Section 65(3) specifically guarantees the right to strike, hence making it justiciable. The section reads as follows;

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

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

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

³⁸ Op cit note 5 at 2

³⁹ The one that was replaced by the COPAC (Constitutional Parliamentary Committee) Constitution which came into force on the 22nd of August 2013.

⁴⁰ Op cit note 5 at 2.

consideration of this limitation given that, as indicated earlier, it is one of the highly arbitrary clauses which whittles away considerably the right to strike. The main resentment against this limitation lies in that the definition of essential services is too wide and encompasses almost everything. The right does not also apply to members of the security services, an issue to be dealt with later in this research.

It is also important to note that since the right to strike is now provided for under the Bill of Rights, principles relating to constitutional interpretation will be applied in case of disputes relating to the exercise of this right. In particular, the preamble to the Constitution emphasises the issue of commitment to upholding and defending fundamental human rights. Section 3 of the Constitution contains the founding values upon which Zimbabwe is founded. Fundamental human rights is singled out as one of those principles. Chapter 2 of the same Constitution also outlines what are referred to as national objectives which are intended to guide State institutions and agencies of government at every level. In particular, section 11 talks about the need to foster fundamental human rights and freedoms. The obligation in this last respect being to protect fundamental rights and freedoms contained in the Bill of Rights and to promote their full realisation and fulfilment. Thus, there is a thread of ‘fundamental human rights’ running throughout these provisions. It is not difficult to appreciate how important the aforesaid Constitutional provisions are *vis-a-vis* the right to strike. This is so because they are a constant reminder to Constitutional adjudicators on the need to ensure the full realisation of human rights, of which strike action is one of them.

To further complement the aforesaid important constitutional provisions, our courts have had occasion to develop important jurisprudence on Constitutional interpretation. In the landmark case of *Hewlett v Minister of Finance*⁴¹, Fieldsend C.J (as he then was) noted that the principles governing Constitutional interpretation were not different from those governing the interpretation of any other legislation. He however proceeded to qualify his remarks in that respect by referring with approval to the remarks of Lord Wilberforce in the Privy Council’s Decision in *Minister of Home Affairs (Bermuda) & Another v Fisher & Another*⁴² wherein it was held that;

⁴¹ 1981 ZLR 521

⁴² [1979] 3 ALL ER 21 (PC)

“... , a Constitution ought to be treated *sui generis*, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law...”⁴³

The same sentiments were echoed in the case of *Smyth v Ushewokunze and Another* wherein the court observed that;

“... , in arriving at the proper meaning of a constitutional provision guaranteeing a right, the court should endeavor to expand the reach of the right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of changing conditions, social norms and values. The aim must be to move away from formalism and make human rights a practical reality ... ”⁴⁴

With the foregoing in mind, as the approach to Constitutional interpretation, one that will guide the courts in interpreting the right to strike, it is important that a brief insight be given with respect to the manner in which the right used to be interpreted in Zimbabwe. The case of *Moyo & Others v Cenral African Batteries (Pvt) Ltd*⁴⁵ is instructive in that respect, specifically on the requirement for employees to embark on strike action as soon as the period specified in the notice expires. In that case, the workers had served a notice to embark on a strike action in accordance with the then relevant legal provisions. This was followed by a labour relations officer, issuing a determination. The workers subsequently went on strike a few months later relying on the notice they had issued earlier. The employer successfully challenged the legality of the strike action. It was held that the original notice had been quite specific on the date which the strike would commence. The court further noted that even if the grievance had been the same, as long as the original notice period had expired, there was need to issue a fresh notice of the intended strike.

⁴³ At page 581-582, Hewlett case, supra.

⁴⁴ 1997 (2) ZLR 544 (S)

⁴⁵ 2002(1) ZLR 615 (S)

A clear analysis of the above case shows that there was ample evidence to show that the employer had received knowledge of the intended strike action in the works council meeting. Further, the strike action in question was actually based on the same grievances as those raised in the initial notice. However, due to a rigid approach based on technicalities and unnecessary formalism, employees concerned were dismissed for embarking on the strike action concerned. Such an approach was in fact at variance with the Supreme Court's decision in an earlier case where it had made it clear that it was undesirable to decide labour matters on technicalities⁴⁶.

The case of *Cole Chandler Agencies (Pvt) Ltd v Twenty-Five Named Employees*⁴⁷ further demonstrates how inconsistent the Supreme Court has been in its interpretation of the obligation to give notice by employees. In that case, it was held that the test whether a fresh notice was necessary was whether the collective job action was based on the same issues for which notice had been given previously. If so, then there was no need for a fresh notice. According to Gwisai⁴⁸, this is the approach adopted by the South African Courts on provisions similar to the Zimbabwe ones. The point to note here is that this was in fact the courts' approach as at that time bearing in mind that the right to strike was not constitutionally protected at that point in time. Now that we have the right under the Bill of Rights, it is hoped that courts will move away from that approach to a purposive approach. The approach advocated for herein is one that takes account of the important Constitutional provisions highlighted earlier relating to the need to ensure the full realisation of fundamental rights, including the right to strike. Thus, to ensure this, courts will have to relax some of the technicalities required for the lawful exercise of the right to strike. They must be prepared to outlaw as unconstitutional any law, procedural rule or technical requirement which unreasonably restricts the exercise of the right to strike⁴⁹. Indeed, sentiments have been expressed to the effect that legislation that arbitrarily or excessively invades the enjoyment of a fundamental right lacks the attribute of reasonableness⁵⁰.

⁴⁶ Dalny Mine v Banda 1999 (1) ZLR 220 (S).

⁴⁷ SC-161-98.

⁴⁸ Op cit note 1 at 1

⁴⁹ Muccheche; op cit note 32 at 9 supra has argued that no test case has so far been taken to the Constitutional Court of Zimbabwe challenging the procedural humps to strike. He however expressed hope that if that is done, it is likely that the Court will declare such bridles to the right to strike to be unconstitutional.

⁵⁰ In Re Munhumeso & Others 1995 (1) SA 551 at 562.

It must also be highlighted that the Constitution simply lays down the right to strike in skeletal form. It does not for instance prescribe the manner in which the right should be exercised. It follows therefore that the Labour Act⁵¹ section 104⁵² is the one that gives effect to section 65 (3) of the Constitution⁵³. The problem that we have is that the current Constitution was preceded by the Labour Act which as indicated earlier has various flaws in so far as it unduly restricts the exercise of the right to strike. What therefore needs to be done is to realign the Provisions of the Labour Act with the Constitutional provisions to ensure that the limitations in the Labour Act with respect to the right to strike may not be challenged as ultra vires the Constitution. In fact, limitations to all the rights in the bill of rights will only be tolerated to the extent that they do not contravene the limitation clause in the Constitution.⁵⁴

It follows from the above that the approach should be one of balancing the interests of employees and those of employers, labour on the one hand and capital on the other hand. Thus, inasmuch as Courts should endeavour to expand the meaning of the provision on the right to strike, care must be taken in order to ensure that the exercise of the right will not cripple the economy. Indeed, if employees were to embark on strike action without having to comply with some of the requirements prescribed by legislation, the effects would be highly adverse to the economic good of the State at large. This is so because, production in industries will be halted, shortage of basic commodities will arise and ultimately, the standard of living for the general populace will decrease. This could be the reason why the right is totally excluded in essential services, although as indicated earlier, this provision ought to be revised in order to satisfy the requirements of reasonable limitation. In fact, without unhampered provision of these services, life will be difficult to cope up with.

It is also imperative to highlight the fact that in South Africa, the Constitution also provides for the right to strike⁵⁵. However, the extent to which the right is protected still remains questionable as is the case in Zimbabwe. This is so because when faced with a strike action, the employer in

⁵¹ Op cit note 4 at 1

⁵² Section 104 of the Labour Act which provides for the right to strike.

⁵³ Section 65(3) provides for the right to strike.

⁵⁴ Section 86 of the Constitution. Limitations should be fair, reasonable, necessary and justifiable in a democratic society based of openness, justice, human dignity, and equality, among other factors.

⁵⁵ Grogan op cit note 13 at 4 . See also section 23 of the South African Constitution.

South Africa is not prohibited from employing replacements⁵⁶. Further, the employer is at liberty to dismiss the striking employee⁵⁷. The only obligation on the employer is to prove that although the strike action is protected, its effects justify reducing staff for operational requirements and that the dismissal is for that reason.⁵⁸ It is submitted that this clearly amounts to providing an employer with a ready escape route. This therefore undermines the effective exercise of the right to strike despite it being constitutionally protected.

2.5.CONCLUSION

Having established this essential background on the right to strike, the task now is to ascertain whether or not with the developments alluded to above, the right to strike is better protected, realisable and of practical benefit to employees. In other words, is it now better protected and realisable than ever before? What follows in the next Chapter is an analysis of the various conditions imposed by legislation for a lawful exercise of the right to strike.

⁵⁶ Grogan op cit note 13 at 4

⁵⁷ Grogan op cit note 13 at 4

⁵⁸ Grogan op cit note 13 at 4

CHAPTER 3

3.1. INTRODUCTION.

In Chapter Two, the significance of the right to strike has been discussed. It has been highlighted that the common law position does not recognise the right to strike, hence, it has since been modified by the legislative framework. It has also been indicated that the trend in Zimbabwe has been to narrowly interpret the right to strike given that the right was not constitutionally protected until recently. The author has further advocated for a wider, purposive interpretation of the right to strike, the endeavour being to ensure its full realisation and making sure that its enjoyment is not hampered by unnecessary formalism and technicalities. Against that background, this chapter is going to discuss the various situations where the right to strike is precluded. It will further give a critical analysis of the various requirements for a lawful strike, noting that these invariably stand as obstacles to an effective exercise of the right to strike. The chapter will conclude with an analysis of whether the right to strike accords with the purpose of the Act⁵⁹.

3.2. SITUATIONS WHERE THE RIGHT TO EMBARK ON STRIKE IS PRECLUDED

Given that strikes hit the bosses where it hurts the most – the source of profits⁶⁰, embarking on strike action is prohibited in some cases. The first restriction on the right to strike appears in section 104 of the Act which specifies the nature of disputes in respect of which strikes can be resorted to. The right to strike, which falls under the phrase ‘collective job action’ as defined in section 2 of the Act can only be resorted to for the purpose of resolving disputes of interests.⁶¹

⁵⁹ Section 2(A) provides that the purpose of the Act is to advance social justice and democracy at the work place by giving effect to the fundamental rights of employees provided for under Part 11 of the Act, among other issues.

⁶⁰ Op cit note 1 at 1

⁶¹ Section 104(1) of the Act. See also section 104 (3)(a)(ii) of the Act.

Section 2 of the Labour Act defines a dispute of interest as a dispute other than a dispute of right. The same section defines a dispute of right 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 contract of employment”

In other words, before embarking on a strike action, employees ought to make a distinction between the issues regarding the application of existing rights and those relating to the creation of new rights. In essence, disputes of rights as is evident from section 2 of the Act are those arising from the application of existing law, collective bargaining agreement or an existing contract of employment. On the other hand, disputes of interests are those that arise from failure of collective bargaining, to say, when parties negotiations for the conclusion, renewal, revision or extension of collective agreement end in deadlock.⁶² From the foregoing it can be noted for instance, that it would be unlawful for employees to resort to strike action in order to compel an employer to pay their salaries as agreed in terms of a contract of employment, or as required in terms of section 6⁶³ of the Labour Act should the employer withhold the employees’ salaries. The issue has to be addressed through other channels, which however do not fall within the ambits of this research project.

It is submitted that the above constitutes a technical distinction which requires due care and consideration, otherwise the employees could risk being accused of embarking on illegal strike. Commenting on this restriction, which also appears in the South African Labour Relations Act⁶⁴, Grogan⁶⁵ has indicated that this is the most extensive limitation on the right to strike created by the South African Labour Relations Act. It is therefore submitted that this distinction is not necessary given that it unduly restricts the effective exercise of the right to strike. Employees

⁶² Op cit note 5 at 2

⁶³ An employer has an obligation to pay an employee a wage not lower than that prescribed by law or by any agreement made under the Labour Act.

⁶⁴ Labour Relations Act No. 66 of 1995.

⁶⁵ Op cit note 13 at 4. See also Muccheche; op cit note 32 at 9. The author regarded this restriction as the “most remarkable substantive limitation on the right to strike” .

should in fact be left to decide on their own what means should be resorted to and to resolve what disputes depending on the effectiveness or otherwise of the means concerned. It should be noted however that some authorities are content with this restriction, their argument being that it is in accordance with (ILO) Conventions embedding the right to strike⁶⁶.

Strikes are also prohibited with respect to what are referred to as essential services.⁶⁷ Section 102 of the Act defines an essential service as any service the interruption of which endangers immediately the life, personal safety or health of the whole or any part of the public; and that is declared by notice in the *Gazette* made by the Minister, after consultation with the appropriate advisory council, if any, appointed in terms of section *nineteen*, to be an essential service. The Minister through the Labour (Declaration of Essential Services) Regulations⁶⁸ has since declared essential services for purposes of section 104 of the Act. The definition of essential services includes railway engineers, electricians, transport and communication employees, veterinary services and pharmacies⁶⁹. This definition goes far beyond anything envisaged by ILO Conventions.⁷⁰ Indeed, this definition is too wide and encompassing such that it covers virtually everything⁷¹. In other words, essential service concept is one that is defined in unacceptable sweeping terms such that it unduly restricts the exercise of the right to strike.

The other complaint to note with respect to essential services relates to powers given to the Minister in terms of section 3 of Statutory Instrument No.37 of 2003 referred to above. The section concerned empowers the Minister to declare, in some instances, any non-essential service to be an essential service⁷². This catch all provision strongly interferes with the right to strike given that the Minister's powers are too wide and highly discretionary. In terms of this section, the Minister may exercise his powers where for instance, a strike in a sector, service, industry or enterprise persists to the point that the lives, personal safety or health of the whole or part of the population is endangered. To note however is the fact that such powers would be exercised

⁶⁶ Muccheche, op cit note 32 at 9

⁶⁷ Section 103(3) (a) (1) of the Act.

⁶⁸ Statutory Instrument No. 137 of 2003.

⁶⁹ Section 2 of Statutory Instruments No. 137 of 2003.

⁷⁰ 2007 annual survey of violations of trade union rights, ITUC CSI 1913, available at www.ituc.csi.org

⁷¹ See also Muccheche op cit note 32 at 9. The author castigated the sweeping definition of essential services, noting that the essential services concept can be abused to outlaw strikes by simply designating a sector as essential.

⁷² Muccheche op cit note 32 at 9. The author has advocated for the establishment of an independent committee to determine what constitutes essential services rather than just leaving it to the Minister to decide; at page 128.

regardless of the legality of the decision by employees to embark on strike in the first place. In other words, employees cannot be heard to say that the strike is legal by virtue of it being in compliance with the relevant provisions of the Act. This clearly shows how arbitrary the aforesaid provision is. Indeed, employers, knowing that the Minister might exercise his powers would be reluctant to meaningfully engage with employees, thus ensuring that they continue to wallow in poverty. It is for this reason, among others, that one cannot be faulted should they conclude that the right to strike is one that is given by one hand and taken by the other.

It should be noted however that although unpleasant in several respects, the provision on essential services is indeed critical. As highlighted in Chapter 2, it is impractical to advocate for a situation whereby employees would embark on strike action without having to comply with some of the prescribed requirements and with no limitations as to who can resort to strike action. Indeed, if left at the discretion of employees, strike actions have the potential to cripple the economy. What needs to be done therefore is to precisely define services that can properly be regarded as essential. More so, although giving the Minister some latitude in the exercise of his discretion in deciding what constitutes essential services, there must be a mechanism to ensure that the Minister's powers are exercised judiciously, in a manner that does not prejudice the employees' right to strike.⁷³

Strikes are also banned in situations where a dispute has been referred to arbitration either voluntarily or compulsorily.⁷⁴ The case of *Chisvo and others v Aurex (Pvt) (Ltd) and Another*⁷⁵ is quite instructive to this effect. The case involved a number of workers including the chairman of the workers committee who had gone on strike in defiance of the labour relations officer's directive referring the matter to compulsory arbitration. The company then obtained a show cause order requiring the employees concerned to show cause why the strike should not be terminated and that pending its determination, the strike be declared unlawful. The employees concerned were subsequently dismissed, which dismissal was upheld on appeal with the court noting that they should have abided by the labour relations officer's decision as well as comply

⁷³ See also Muccheche; op cit note 32 at 9. The author pointed out that the definition of essential service should not be too broad to create a blanket ban on the right to strike for certain category of employees who ordinarily cannot be construed as essential service employees, at page 123.

⁷⁴ Section 104(3) (a) (iii) of the Act.

⁷⁵ 1999(2) ZLR 334 (S)

with the show cause order. According to Mucche⁷⁶, once a dispute is referred to compulsory arbitration, the door for the right to strike is firmly shut.

In addition to the above restriction, it is also unlawful for unregistered trade unions and other employers' organisations to engage in collective job action, including strikes or to recommend one⁷⁷. This of course cannot be heavily queried given that there is always that need to prove one's standing whenever there is dissatisfaction with respect to decisions affecting one's rights by any authority. In any case, there is need to ensure accountability in the event that something wrong happens in the course of a strike action. Thus, with unregistered trade unions, there is nothing in that case to prevent them from denying responsibility if something amiss happens.

Another situation where the right to strike is absolutely prohibited include those where there is in existence a registered trade union which represents the interests of employees and that trade union has not approved or authorised such kind of collective job action⁷⁸. It appears this restriction is meant to ensure that the right to strike is exercised in an orderly manner, than would otherwise be the case if employees were to do it on their own. Provision should however be made to cater for situations where the employees' representatives unreasonably refuse to approve the employees' decision to embark on strike action. In most cases, the representatives are not the ones directly affected by whatever grievances employees might have against their employers. It is therefore submitted that the ultimate decision on whether to or not to embark on strike action should in fact lie with the employees.

Lastly it is prohibited to embark on strike where there is in existence a union agreement which provides for or governs the matter in dispute, and such agreement has not been complied with or remedies specified therein have not been exhausted as to the matter in dispute⁷⁹. Whilst this prohibition could be hailed in so far as it seeks to protect the sanctity of the parties' agreement with respect to what they would have agreed, it is the failure to qualify that position which is being queried herein. Indeed, exhaustion of local remedies concept should not be strictly adhered

⁷⁶ Mucche op cit note 32 at 9

⁷⁷ Section 104(3) (c) of the Act.

⁷⁸ Section 104(3) (b) of the Labour Act, supra.

⁷⁹ Section 104(3) (d) of the Labour Act, supra.

to save in situations where such exhaustion would yield an effective remedy. There is no point in pursuing any such specified remedies where indications are that no positive result will be achieved.

It should also be noted that embarking on strike in defiance of these provisions is a punishable offence in respect of which one can be sent to prison for up to five years⁸⁰. This then goes a long way to show that the right to strike in Zimbabwean labour law is very restricted. With the above observations, the next step forward is to look into those situations where the right to strike is not prohibited and ascertain the requirements for its lawful exercise. It will also be shown in what respects these requirements render the right to strike nugatory.

3.3.REQUIREMENTS FOR A LAWFUL STRIKE ACTION

“Although forced to recognize the right to strike, the ruling class have since tried their best to limit the actual extent of the right through various methods, direct and indirect ..., the right to strike is accompanied by various prohibitive and repressive rules intended to emasculate precisely those aspects that make this right truly effective”⁸¹

The above observation best summarises the legal position with regards the right to strike in Zimbabwe’s labour laws, which position the author of this dissertation aligns himself with. Below is the justification.

A party intending to embark on strike is obliged to give fourteen days⁸² written notice stating the grounds for resorting to strike to a party against whom the action is to be taken, the appropriate employment council and the appropriate trade union, among others.⁸³ This requirement is set in peremptory terms, that is, use of the word ‘shall’, meaning that it is mandatory to comply with it,

⁸⁰ Section 109 (1) of the Act.

⁸¹ Gwisai, op cit note 1 at 1.

⁸² Mucheche, op cit note 32 at 9. The author argued that the fourteen days written notice to go on strike is too excessive and will only serve to deflect and deflate the right to strike and thus undermining that right and this runs counter to the ILO requirements on the right to strike.

⁸³ Section 104 (2) (a) of the Act.

otherwise any attempt to resort to a strike action without compliance thereof would be illegal, hence punishable⁸⁴. To further compound the situation, the law requires that the strike be carried out immediately after the expiration of the fourteen days' notice, otherwise, undue delays after the expiration of the period concerned would render the notice invalid.⁸⁵ In other words, employees would, in that case, be obliged to issue a fresh notice. It is submitted that these are just but unnecessary technical requirements calculated to confuse the employees and discourage them from exercising their right. This is so because in most cases, the employer would have been apprised of the employees' grievances such that to require a notice in the manner prescribed does not really serve any purpose. In any case, the requirement to issue a fresh notice should not apply especially where the strike action is based on the same grievances as those outlined in an earlier notice.

The law also requires that before embarking on strike, there must be a thirty – days attempt to conciliate the dispute in question, failing which a certificate of no settlement should be issued relating to that dispute.⁸⁶ It is however sad to note that despite imposing such a requirement, the Labour Act does not define conciliation, neither does it prescribe guidelines to be followed in the conciliation procedure. Besides, the absence of an independent panel of conciliators⁸⁷ coupled with uncertainty with regards the competency and scope of powers of such conciliators further complicates the whole process⁸⁸. In fact, it is difficult to imagine how employees could have faith in such an incomplete process. All these government imposed delays prevent employees from ever declaring legal strikes⁸⁹. In the premises, it would not be exaggerating to say that indeed, “the right to strike in Zimbabwe’s labour law is restricted, it is a liability or a trap at the

⁸⁴ Section 109 of the Act.

See also the case of Moyo and others v Central African Batteries Pvt Ltd 2002(1) ZLR 615 (S). In this case, a notice which was not reduced to writing was held to be defective.

⁸⁵ Moyo and others v Central African Batteries Pvt Ltd 2002(1) ZLR 615 (S)

⁸⁶ Section 104 (2) (b) of the Act.

⁸⁷ Legal advice, Trade Unions, Strikes and the Law; available at www.mywage.org/Zimbabwe.

See also Mucheche; op cit note 32 at 9. The author expressed dissatisfaction on the use of Labour Officers in conciliation proceedings given that these are employed by the State and as such, they might employ tactics designed to frustrate the right to strike.

⁸⁸ Mucheche; op cit note 32 at 9 .page 127 has also noted that the fourteen days conciliation period coupled with fourteen days' notice period in the event that conciliation fails has the effect of compromising the momentum for a strike. Indeed, it effectively dilutes it.

⁸⁹ Legal advice, Trade Unions, Strikes and the Law; available at www.mywage.org/Zimbabwe

worst. This is so because in as much as the right is there and may be exercised, doing that is not as easy as it ought to be.

In terms of section 104 (3) (e) of the Act, no strike may be resorted to in the absence of an agreement by a majority of the employees voting by secret ballot. Section 8 of statutory instrument Number 217 of 2003 specifies the requirements for conducting a secret ballot, for instance, the fact that it must be conducted before the expiration of the fourteen days' notice referred to earlier. According to Gwisai⁹⁰ the requirements are vague and badly drafted meaning that they must be read robustly, the guiding principle being whether a substantially free ballot has been conducted. He further noted that:

“The balloting requirement is modelled on colonial legislation and is meant to individualise workers and give bosses, the media, the state and such other ideological instruments of the employer class, full opportunity to intimidate the workers from going on strike...”⁹¹

It is also difficult to understand the logic behind this secret ballot requirement given that it assumes that minority employees enjoy no right to strike. Indeed, it is highly unjust to prohibit a strike simply because the majority of the employees are against it⁹². The minority should in fact enjoy the same right as the majority and should be allowed to embark on strike as long they believe it is necessary in the circumstances⁹³.

The situation is further exacerbated by the fact that union approval, of a registered trade union is required in order for the strike to proceed⁹⁴. It is because of all these difficulties that Machingambi⁹⁵, has referred to the foregoing requirements as “burdensome prestrike procedures”. Others have also noted that these excessively complicated mechanisms for organising a lawful strike means that many unions give up trying to organise a legal strike and

⁹⁰ Op cit note 1 at 1.

⁹¹ Gwisai; op cit note 1 at 1.

⁹² Muचेche; op cit note 32 at 9. The author attacks this requirement on the basis that it is ultra vires section 65 (3) of the Constitution which confers the right to individual employees not a group or a majority of them.

⁹³ Muचेche has also noted that since the Constitution confers rights on individuals, it is now possible to have a one man strike action unlike under the previous position, supra at page 127: op cit note 32 at 9.

⁹⁴ Section 104(3)(b) of the Act.

⁹⁵ Supra, at page

instead resort to illegal stoppages or stay aways.⁹⁶ This then brings the aspect of liability for engaging in these unlawful activities. This is so because once they embark on unlawful strikes, employees cannot claim the protection accorded to those engaged in a lawful strike, one which fully complies with all the requirements discussed above. They cannot for instance claim the protection provided for in terms of section 108 (2) of the Act which makes it clear that it shall constitute neither a delict nor a breach of contract to engage in a lawful strike. Instead, the employer can subject them to disciplinary action and possibly dismiss them or simply replace them with scab labour⁹⁷, thus diluting the effect of any such purported strike. Additionally, those taking part in an illegal strikes face harsh prison sentences of up to five years⁹⁸.

It is submitted that the above concerns have a chilling and discouraging effect given that employees cannot guarantee full compliance with the aforesaid requirements. Thus, instead of taking the risk, employees would rather pretend they are satisfied with whatever working conditions the employer might impose. This then goes a long way to show how difficult it is for workers to effectively exercise their right to strike.

To further demonstrate how difficult it is for workers to embark on strike action, attention may be drawn to the provisions of section 108 (4) of the Act, which absolves the employer from the obligation to remunerate employees who would have embarked on a lawful strike for the period for which they were on strike. This to some extent shows that although statute law has tried to modify common law in many respects, it still retains some of its precepts, in this case, “no work no pay principle”⁹⁹. In the event that the employer remunerates the employees concerned in kind, the law entitles it to institute civil action in order to recover the monetary value of anything the employee might have benefited from the employer during their lawful strike. In other words, the moment one embarks on strike, they automatically parte with their salary or other benefits to which they may be entitled to in terms of the contract. This therefore becomes a liability for exercising one’s right. Indeed, the employee is meant to believe they can exercise their right, when to do so brings enormous adverse consequences.

⁹⁶ 2007 annual survey of violations of trade union rights, ITUC CSI 1913, available at www.ituc.csi.org

⁹⁷ Section 108 (5) of the Act.

⁹⁸ Section 109 (1) of the Act.

⁹⁹ Machingambi; op cit note 5 at 2.

More so, a consideration of all the hurdles presented above with respect to the exercise of the right to strike shows that indeed, the right to strike is a liability or a trap at worst. In particular, it is submitted that the requirements for a lawful strike as presented above are couched in a manner designed to make sure that any attempt to organise a lawful strike will in most cases, end up degenerating into an unlawful strike. This then will result in criminal liability for the employees concerned. The harsh sentences imposed for such unlawful strikes are in themselves highly discouraging¹⁰⁰. Employees should not go on strike action with the idea of pitfalls that will befall them if they fail to do it legally. With the foregoing analysis, the question which then arises is whether the provisions on the right to strike accord with the purpose of the Labour Act¹⁰¹.

3.4.THE PURPOSE OF THE LABOUR ACT VIS-À-VIS THE RIGHT TO STRIKE.

Section 2A of the Labour Act provides as its ultimate objective, the promotion of social justice and democracy in the workplace¹⁰². It aims to do this by, among other things,

- Providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment¹⁰³;
- Securing the just, effective and expeditious resolution of disputes and unfair labour practices¹⁰⁴.

It goes on to stipulate that the Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection 1¹⁰⁵.

With respect to the first issue highlighted above, it is submitted although the Act advocates for a legislative environment that provides a conducive environment for effective collective bargaining as between employees and employers, the situation on the ground shows otherwise. This is so because as indicated in chapter 2, it is not feasible to imagine collective bargaining in its truest sense in the absence of economic weapons for employees, such as an effective right to

¹⁰⁰ Op cit note 79 at 22, section 109 (1) of the Labour Act, supra

¹⁰¹ Opo cit note 4 at 1

¹⁰² Section 2A (1) of the Labour Act

¹⁰³ Section 2A (1) (c) of the Labour Act

¹⁰⁴ Section 2A (1) (f) of the Labour Act

¹⁰⁵ Section 2A (2) OF the Labour AcT.

strike.¹⁰⁶ In other words, the right to strike is an ultimate weapon in persuading the other party to bargain¹⁰⁷. It is against this background that one can note that with the right to strike in its current form, it is unlikely that the Labour Act will succeed in its purpose.

It is also a fact that strike action is a form of dispute resolution mechanism¹⁰⁸. As indicated above, the Labour Act also aims to attain its purpose by securing the just, effective and expeditious resolution of disputes and unfair labour practices¹⁰⁹. An examination of the various prestrike procedures discussed above shows that this is highly misleading. It is submitted that the sum effect of the various technical and cumbersome prestrike procedures is to hinder rather than promote dispute resolution by way of strike action. Mucheche¹¹⁰ shares virtually the same sentiments as those discussed above. The author has noted that within the Zimbabwean context;

“The right to strike exists on paper but its practical realization is a moot point particularly given the artificial ‘Berlin wall’ that exists between private sector and public sector employees and essential and non-essential employees as well as a myriad of restrictions of the exercise of the right to strike itself”¹¹¹

3.5.CONCLUSION

On the basis of the foregoing considerations, it can be noted that the current restrictions, and requirements for a lawful exercise of the right to strike have the effect of rendering the right to strike a *brutum fulmen*. In as much as it may be necessary to regulate the exercise of the right to strike, the regulation should not amount to wresting away the right from employees, as the current provisions do. It has also been highlighted that the current legislative provisions on the right to strike are at variance with the purpose of the Labour Act as prescribed in section 2A (1).

¹⁰⁶ Gwisai; op cit note 1 at 1.

¹⁰⁷ Lovemore Madhuku *The Right to Strike in Southern Africa’s International Labour Review* (1997) Vol. 136

¹⁰⁸ Section 104 (1) of the Labour Act.

¹⁰⁹ Supra, footnote 91.

¹¹⁰ Mucheche; op cit note 32 at 9

¹¹¹ At page 121; op cit note 32 at 9

CHAPTER 4

4.1. INTRODUCTION

In chapter 3, arguments have been presented to the effect that even though the right to strike is fully recognized by the Zimbabwean legislative framework, exercising the right is not as easy as it ought to be. In particular, the research unpacked the various situations where the right to strike is totally unavailable, for instance, in relation to members of the security service, employees engaged in essential services, disputes of rights, among other situations. The dissertation proceeded to give a categorical outline of the various requirements for a lawful strike, highlighting the fact that the law requires absolute compliance with those requirements. In other words, there is no such thing as ‘substantial compliance’ with the requirements when it comes to the right to strike in Zimbabwe. Employees cannot be heard to say that they should not be held criminally liable if they fail to fully comply with the said requirements on the basis that they would have tried to do so, though not to the extent required by the law.

Against the above background, Chapter 4 will briefly analyse the right to strike in light of the Zimbabwe’s socio-economic set up. It will be argued that the provisions on the exercise of the right to strike are pro-government, the idea being to try and promote government policies. In particular, the provisions on essential services and those that prohibit strikes in respect of members of the security services are intended to safeguard the social and economic well-being of the State. Regard shall also be had to employers’ recourse in case of an unlawful Strikes given that attempts to organize lawful strikes will normally be met with very little success. More so, an attempt shall be made to ascertain whether employees can pin their hopes on the fact that the right is now constitutionally protected in the Bill of Rights. It will be highlighted, with reference to some cases, that although the Constitutional Court is indeed a judicial institution, it may, in some cases, as it has done before, disregard individuals’ right for the good of the country’s socio-economic well-being.

4.2. RIGHT TO STRIKE AND ZIMBABWE'S SOCIO-ECONOMIC CONTEXT

It has been argued that the use of economic power (strike action) should be the last resort because of its adverse effects on the economy¹¹². Thus, before embarking on strike action, parties are enjoined to pursue other avenues available to them with a view to amicably resolve whatever disputes they might have. It is because of its perceived threats to the economic and social interests of the State that the right to strike in Zimbabwe is preceded by the various procedural requirements discussed in Chapter 3. This is particularly true in respect of essential services. Precluding the right to strike in respect of employees engaged in essential services is intended to safeguard the socio-economic pillars of the State. Essential services employees include those engaged in the supply and distribution of water, those engaged in health services as well as transport and communication services, among others¹¹³. One would agree that indeed, the supply of water for instance need not be interrupted for the maintenance of proper sanitation. Any interruption in the provision of such services might lead to the outbreak of diseases like cholera, hence adversely affecting the social fabric of the State. The same can also be said in respect of employees engaged in health services.

It should also be noted that the prohibition of strikes in relation to employees engaged in essential services is not an issue that is peculiar to the Zimbabwean jurisdiction alone. In fact, the concept is recognised in many jurisdictions and is also sanctioned by ILO Conventions¹¹⁴. Essential services are defined as services whose interruption would endanger the life personal safety or health of the whole or part of the population¹¹⁵. Thus, the definition of Essential services in Zimbabwean legislation is modelled along this definition. It is however pro-

¹¹² Collective Bargaining and Labour Dispute Resolution – Is SADC meeting the challenge? Issues Paper No. 30, available at www.ilo.org.

¹¹³ Section 2 of Statutory Instrument No. 137 of 2003, Labour (Declaration of Essential Services) Notice.

¹¹⁴ Supra, footnote 111.

¹¹⁵ ILO, Freedom of Association and Collective Bargaining, Report of the Committee of experts on the application of Conventions and Recommendations, Report 111 (Part 4b), available at www.ilo.org.

government in so far as it gives the Minister some powers to declare as essential, in some cases services that are not ordinarily regarded as essential. The idea here is to try and ensure that industrial production is not affected, among other issues. In other words, Zimbabwean labour laws clearly show that the government is much concerned about uninterrupted industrial productivity and pays little regard to employees' rights.

Recently, the government has been advocating for a situation whereby employees' remuneration determined on the basis of productivity¹¹⁶. A call has been made for amendments to the Labour Act to ensure alignment of wage adjustments to labour productivity¹¹⁷. This clearly confirms the fact that strike actions are viewed by the government as counterproductive. This possibly could be the reason why the right to strike is provided for subject to the various prohibitive and restrictive requirements discussed in Chapter 3. In other words, if left at the discretion of employees, the right to strike has the potential to prejudice the economy.

More so, the prohibition of strike actions in respect of members of the security forces is pro-government given that it seeks to safeguard the security of the state albeit at the expense of the members concerned. Again this exclusion of the police, armed forces and department of correctional services from the exercise of the right to strike is common in many jurisdictions and also permissible under ILO Conventions¹¹⁸. Unfair as it may be to the employees concerned, this prohibition is arguably justified to some extent. This is so because the defence and security of the State as well as the observance of laws are matters of public interest. Thus if these employees were to be allowed to embark on strike actions, the effects would be highly adverse to the state at large.

4.3. REMEDIES AGAINST UNLAWFUL STRIKE ACTIONS

Section 106 of the Labour Act empowers the Minister¹¹⁹, whenever a party threatens or engages in an unlawful collective job action to issue what is referred to as a show cause order calling

¹¹⁶ www.theindependent.co.zw, labour law relaxation antiworker, 01/03/2014.

¹¹⁷ Op cit note 116 at 31

¹¹⁸ Supra, footnote 111.

¹¹⁹ The Minister may not delegate the powers to issue such an order to any other person. See the case of Cargo Carriers (Pvt) Ltd v Zambezi & ors 1996(1) ZLR 613. Minister means the Minister of Public Service, Labour and

upon the responsible person to show cause why a disposal order should not be issued in relation thereto.¹²⁰ The order may be issued by the Minister on his own initiative or upon an application being made by any person affected or likely to be affected by the unlawful collective action. The order will specify, among other things a date, time and place on which parties would appear before the Labour Court and show cause why a disposal order should not be issued in relation to the matter concerned. The Minister also has powers to grant interim relief pending the issuance of a disposal order, meaning that even if employees attempt an unlawful strike, they can easily be countered. In other words all avenues to force the employer to bargain in good faith are effectively shut.

On the date specified by the Minister in the show cause order, the Labour Court has powers to issue a disposal order disposing of a show cause order issued by the Minister¹²¹. Parties will be afforded an opportunity to make representations and thereafter the court may direct that the unlawful collective job action, in this case, strike action be terminated, postponed or suspended, among other things¹²². Clearly, the impetus to force the employer to bargain will be automatically diluted at this time¹²³.

Note should also be taken of the fact that section 109 (6) permits a party to claim punitive damages arising from loss as a result of unlawful collective action, strikes included. Liability attaches in respect of death, loss of or damage to property or other economic loss including perishing of goods caused by employees' absence from work, among other issues¹²⁴. The only defence would be to show that such person did not realise or lacked subjective intention to participate in the unlawful collective job action.¹²⁵ Criminal sanctions are also provided for in terms of section 109 of the Labour Act. Under this, one can be imprisoned for up to five years

Social Welfare or any other Minister to whom the President may assign the administration of the Act: section 2 of the Labour Act, supra.

¹²⁰ Section 106 (1) of the Act

¹²¹ Section 107 of the Act.

¹²² Section 107)2) (a) of the Act

¹²³ The Court may also authorize the institution of disciplinary action against certain categories of unlawful strikers, see *Wingate Farm v Wingate Farm Employees LC/H/144/2004*. It may also order that the unlawful strikers should not be remunerated for the period for which they were on unlawful strike, see the case of *Border Timbers (Pvt) Ltd v Employees LC/MC/O7/04*.

¹²⁴ Gwisai; Op cit note 1 at 1. See 372.

¹²⁵ Gwisai; Op cit note 1 at 1. See page 372.

for taking part in an unlawful strike action¹²⁶. The convicting Court is also empowered to make an order directing the convict to compensate any person who might have suffered personal injury or loss in respect of any right or interest in property of any description. After analysing the above grave consequences of engaging in unlawful strikes, Gwisai¹²⁷ came to the conclusion that; *“The law on strikes in Zimbabwe remains draconian and heavily loaded against the working class in a manner inconsistent with the principles of collective bargaining and pluralism underlying the Labour Act and Declaration of Rights¹²⁸”*

It is on the basis of the above considerations that one can conclude that indeed the right to strike in Zimbabwe is too restricted, and is regarded by the government as a liability. For careless striking workers, it is in fact a trap as evidenced by the foregoing considerations.

4.4.THE RIGHT TO STRIKE, THE CONSTITUTION AND THE CONSTITUTIONAL COURT.

In chapter 2, it has been indicated that entrenchment of the right to strike in the Constitution means that the right to strike is now justiciable¹²⁹. In other words, any unwarranted interference or violation with this right may be challenged in the Constitutional Court which can then authoritatively adjudicate on such matters. Interference with a constitutionally guaranteed right might be by way of legislation which unjustifiably interferes or impedes the exercise of the right concerned. In that case, the provision concerned will be ultra vires the Constitution, hence, void to the extent of such inconsistency.¹³⁰ In the context of the right to strike, arguments presented in Chapter 3 have shown the Labour Act is the one that prescribes requirements for a lawful exercise of the right to strike. It has further been argued that the said requirements are couched in a manner designed to stifle the environment so that employees will not resort to the right to strike. The question now is whether the Constitutional Court can be absolutely relied on to protect the employees’ right to strike. A look at some precedents will show that although the

¹²⁶ Section 109 (2) of the Act.

¹²⁷ Op cit note 1 at 1

¹²⁸ Gwisai; Op cit note 1 at 1. See page 374.

¹²⁹ See Mucheche; op cit note 32 at 9

¹³⁰ Section 2 of the Constitution which talks about the supremacy of the Constitution. It makes it clear that any law, custom conduct or practice inconsistent with it shall to the extent inconsistency be void.

Constitutional Court is ordinarily expected to protect rights of individuals against violations, in some instances, it has disregarded such rights in the interests of some other values, such as State policies.

The case of *Nyambirai v National Social Security Authority*¹³¹ is authority for the above position. The court was called upon to decide whether or not compulsory monetary contributions to the NSSA scheme could be regarded as in violation of the provision on the protection of property, then section 16 of the discarded Constitution. The court decided that such compulsory contributions were not in any way unconstitutional as long they had been imposed by the legislature or other competent authority. It was the court's finding that the contributions concerned were meant to benefit the public through the provision of a public service. Further, it was noted that national authorities were better placed than the courts to decide what was in the public interest. It should be recalled that in this case, the right to property was specifically guaranteed by the Constitution and the Applicant was also entitled to that right. However, due to the importance attached to State interests, the right was disregarded.

Another case in point is *Minister of Lands and Others v Commercial Farmers Union*¹³². In this case, land belonging to white commercial farmers was being compulsorily and unlawfully acquired. Farms were being invaded in a haphazard manner. The white commercial farmers challenged the invasions on the basis that they constituted a violation of their right to property as well as a violation of their right to protection of the law, which rights were guaranteed by the discarded Constitution under the bill of rights. In fact, the Court had ruled in an earlier case involving the same parties that the manner in which the whole case was being carried out was a complete defiance of the rule of law concept. Instead of ordering that such invasions be stopped, and that the illegal occupiers be evicted, the court gave the government two options, either legalise the unlawful occupations or to evict the unlawful invaders. The government chose the former, with the result that the law was enacted to legalise and legitimise past illegal events¹³³. The law was in fact following the events instead of it being the other way round. The court decided that it could not stop a legitimate government policy on the basis of the illegality that

¹³¹ 1995(2) ZLR 1 (S).

¹³² 2001 (2) ZLR 457 (S)

¹³³ The Rural Land Occupiers (Protection from Eviction) Act.

had occurred. The land reform programme, in the Court's view, was a necessary evil given that it was legitimately intended to redress past colonial imbalances in terms of land ownership and bring about social transformation.

4.5. CASE LAW AND THE RIGHT TO STRIKE

As can be noted from the above cases, property rights of individuals were disregarded not because there was no law which adequately protected such rights. Rather, the Court took the stance that in as much as the individuals concerned had valid claims, their rights were in fact outweighed by some higher values whose pursuance was in the public interest at large. In other words, the Court was prepared to disregard individuals' rights in favour of social interests. The same can also be said in relation to the right to strike. It is unlikely for instance that employees will be able to persuade the court to strike as unconstitutional, provisions relating to essential services. This is so because in as much as they unduly restrict the exercise of the right to strike, indications are that such services, as pointed out earlier are necessary for the proper functioning of the State. The Court will therefore weigh the harm likely to be caused by the State if it allows essential services employees or members of the security services to embark on strike action against the prejudice likely to be suffered by the employees concerned if they do not embark on strike action. In most cases, especially in light of the cases above, the Court will find in favour of the State.

The same can also be said of the various prestrike procedures discussed in Chapter 2. Admittedly, these restrict the exercise of the right to strike. However if they are to be relaxed, strikes will be resorted to frequently thereby hampering production in industries. Thus, in the same manner the court was prepared to uphold the Rural Land occupiers (Protection from eviction) Act in the CFU case discussed, despite the fact that it was in fact a violation of individuals' property rights, it may also uphold the various provisions of the Labour Act which seemingly hinder the exercise of the right to strike. The justification, as was noted in the cases above, will be, pursuance of what is in the public interests. The above cases therefore are authority for the position that it might be too early for employees to raise hopes on the basis that the right to strike is now constitutionally protected. The situation on the ground shows that although the Constitutional Court is there as a judicial institution, it also enforces and gives

effect to government policies, which policies might be at cross purposes with rights of individuals, such as employees.

4.6.CONCLUSION

It is apparent from the above discussion that although we have had a lot of progress with regards to efforts aimed at ensuring the effective exercise of the right to strike, especially given that the right is now constitutionally protected, it still remains to be seen whether the right will be fully realised. This is so because there are some other interests which may be preferred at the expense of this right. In fact, the Constitutional Court has done that before and as such there is nothing to suggest that it will not do the same with respect to the right to strike.

CHAPTER 5

5.1. CONCLUSION.

At the beginning of the research project, a proposition was made to the effect that the right to strike in Zimbabwe's labour laws amounts to a liability or a trap at the worst. An outline as to how the propriety or otherwise of that notion would be explored was given. In Chapter 2, the project proceeded to explore the legal regimes governing the right to strike action in Zimbabwe, viz, the Common law and the legislative framework. Common law was depicted as a failure in so far as it does not provide for the right to strike. It has been highlighted, that the unsatisfactory common law position was subsequently modified by the legislative framework through the Labour Act which ushered in the express provision of the right to strike action. Chapter 3 of the dissertation then proceeded to outline the requirements for a lawful exercise of the right to strike as prescribed in the Labour Act. It was highlighted that the limitations and restrictions that came with the legislative framework render the right to strike nugatory, indeed, justifying the proposition earlier highlighted. In Chapter 4 an analysis of the right to strike in light of Zimbabwe's socio economic context was given. It was highlighted that strike actions are viewed by the government as counterproductive, indeed, liabilities on the part of the government.

Cumulatively, the foregoing issues, it is submitted, strongly underpin and justify the research topic. Simply put, it is submitted that the right to strike action does exist, but only on paper. To put it bluntly, it is a fallacy. It is in light of such resentments that the author proposes some recommendations set forth hereunder to try and address the said anomalies in the law relating to strike actions in Zimbabwe.

5.2 RECOMMENDATIONS.

a) The Constitution and the Constitutional Court

As rightly pointed out in Chapter 2 and 3, the right to strike is now constitutionally guaranteed. This means that its interpretation and application is now a matter within the province of the Constitutional Court as the supreme Constitutional adjudicator. In this respect, it is recommended that the Constitutional Court should adopt a wide, purposive interpretation of the right to strike, one that makes this right a reality and best promotes the purpose which the right is meant to serve that is, effective collective bargaining, among other things. It should be prepared to strike off as unconstitutional, any law or conduct which unreasonably restricts the effective exercise of the right to strike. This means that the Court should be prepared to relax and or disregard all technical requirements that hamper an effective exercise of the right concerned. These include, among other issues;

- The requirement to give 14 days' written notice before embarking on strike action. The form of the notice, that is, the fact that it should be a written notice, should not be overemphasised. All that should be considered is objective proof that adequate notice has been brought to the attention of the other party.
- The fact that employees should embark on strike action as soon as the fourteen day period expires. As regards this, the Court should adopt the stance that as long as the employer has been adequately notified, in writing or otherwise, employees should be allowed to proceed with a strike action. It should not be an issue that they did not do so as soon as the fourteen days' period expires. This should be the case especially in those cases where the dispute is based on grievances that would have been articulated in an earlier notice.
- Prohibition of strike action where the purpose is to resolve disputes of rights. As regards this, it is recommended that employees should not be dictated to as to what remedy can be used to resolve what type of disputes. In fact, they should be left at liberty to utilise a remedy which best addresses their concerns. In other words, the effectiveness or otherwise of the remedy should be the overriding consideration.

b) Alignment of the Labour Act provisions with the Constitution.

Some provisions of the Labour Act, for instance, section 104 (3) (e) which prohibits strike actions where the majority of employees have not agreed by way of a secret ballot to embark on a strike action have become irrelevant. It should be noted that the current Constitution came into force recently when the Labour Act was already operational. The Constitution now accords the right to strike to individual employees. The aforesaid Labour Act requirement has therefore been overtaken by events, hence irrelevant and should be repealed. In other words, unlike before the advent of the new Constitution, a single employee can now embark on strike action given that the right as contained in the bill of rights attaches not to a group of employees but to individuals.

c) Requirement that conciliation should be resorted to first before embarking on strike action.

In chapter 3, it has been shown that despite imposing this requirement, the Labour Act does not prescribe the formalities or procedures to be adopted in the conciliation process. The author of this dissertation recommends that the clear procedures and formalities should be put in place so that there are no delays in the conciliation process. More so, it has been highlighted that currently, we do not have an independent panel of conciliators whom employees can trust to effectively resolve their disputes. Thus, a panel of independent conciliators who are not subject to the control of the government must be established. For instance, employers and employees representatives in different sectors should be allowed to nominate individuals who will act as conciliators as and when disputes arise.

d) Essential services

It has been demonstrated that the Minister of labour has very wide discretionary powers in the determination of what constitutes essential services. The definition of essential services itself has been shown to be too wide such that it covers virtually all services. To address, this issue and as a way of ensuring that the Minister does not abuse his powers, it

is recommended that an independent Committee on essential services, as advocated for by Muccheche¹³⁴, be set up. This will then have the task of redefining essential services.

e) Penalties for embarking on unlawful strikes

These have been shown to have a chilling and discouraging effect due to their severity. Indeed, five years imprisonment for embarking on an unlawful strike action is unduly harsh. Legal authorities are silent on what possibly could be the appropriate penalty, if need be, in cases of unlawful strikes. It is therefore recommended that the penalties in question should be done away with so that employees do not organise or embark on strike actions with the wary of consequences that will befall them if they fail to do it legally. In fact, it is highly undesirable to create an offence from what is purely a private contractual arrangement between parties to an employment relationship. The matter should in fact be addressed by civil remedies if and only if a party suffers prejudice as a result of what are allegedly referred to as unlawful strikes.

The foregoing suggestions may, if properly considered, go a long way in ensuring that the right to strike exists and is practicable. Without a new constitutional interpretation approach that is suggested in this work, the right remains nothing more than a paper weapon, a fallacy or a trap for workers in Zimbabwe.

¹³⁴ Op cit note 32 at 9.

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