An Analysis of the Constitutional Protection of the Right to Collective Bargaining in Zimbabwe

Pride P. Dzapasi* and Noah Maringe*

ABSTRACT

From a historical perspective, the right to collective bargaining has often been rendered impotent by an interplay of factors. Before the major reforms introduced by the Labour Amendment Act, the right to collective bargaining was nominally proclaimed but denied in substance. The Constitution marks a pinnacle of the process that stated with the Labour Relations Amendment Act. Section 65 of the Zimbabwean Constitution now unambiguously provides for the right to collective bargaining. This constitutional provision is the fulcrum of collective bargaining laws in Zimbabwe. This is because the constitution lies at the top of the hierarchy of legislation in Zimbabwe. Any legislation that is in conflict with it is invalid. The Constitution is a transformative legal document that is both a backward looking and forward looking document. However, it must be mentioned that the Constitution extends the right to collective bargaining to all but security services employees are excluded from the enjoyment of the right. These are members of state security. They are different from private security employees like security guards. This effectively endorses the view that military personnel, members of the prison service, members of the police force and members of the central intelligence do not enjoy the right to collective bargaining. At the end of the day, they are exposed to the dictates of their employer whose conditions of employment are unquestionable. Apart from the members of security service, the rest of public service employees now enjoy the right to collective bargaining under section 65 of the Constitution.

* LLB (Zimbabwe Ezekiel Guti University), Constitutional and Human Rights Lawyer, pridepdzapasi@gmail.com

* LLD, LLM (UNISA), LLB (University of Zimbabwe), Lecturer of Law, Zimbabwe Ezekiel Guti University.

1. INTRODUCTION

1.1 Unpacking the law of collective bargaining

Zimbabwe's legal system in all its forms is founded in the value of the supremacy of the Constitution.[1] This means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by non-constitutional law, the rule or norm that is contained in the Constitution is to be given precedence by anyone whose duty is to enforce the provisions of the Constitution.[2] For the first time in the history of the existence of independent Zimbabwe, the right to collective bargaining is now enshrined in the Constitution of Zimbabwe.[3] This provision is very important in our labour law jurisprudence considering the fact that the Constitution is the supreme law of the land. The concept of constitutional supremacy is enshrined under section 2 (1) of the Constitution of Zimbabwe. This section provides that 'this Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency.' This is a milestone achievement which deserves commendation especially if one compares the new Constitution and with the old Lancaster House Constitution (LHC) which was a mere dry letter without any explicit labour rights.[4] The current Constitution is a transformative legal document that seeks to transform the lives and create better living conditions for Zimbabweans.

The right to collective bargaining as enshrined in the Constitution forms the heart of Zimbabwe's labour rights. This is so because the right assumes a willingness on each side to abandon fixed positions where possible in order to find common ground. The inclusion of the right to collective bargaining in the Constitution is a direct response to international norms, practices and

1 Constitution of Zimbabwe Amendment (No. 20), 2013, S 2 (1).
2 Admark Moyo, *Basic Tenets of Zimbabwe's New Constitutional Order* (RWI, 2019) 10. See also the case of *Marbury v Madison*, 5 U.S 137 (1803) wherein the U.S Supreme Court held that 'the Congress does not have the power to pass laws that override the Constitution.'
3 Section 65 (5) (a), (n 1).
4 Caleb H. Mucheche, *A Practical Guide to Labour Law, Conciliation, Mediation & Arbitration in Zimbabwe* (2nd edition, African Dominion Publications 2014) 45.

developments in the area of labour law.[5] A critical and legitimate question then follows; does the Constitution of Zimbabwe impose a judicially enforceable duty to bargain on the other party in an employment relationship? This is a question that will be answered as this article unfolds. However, the nature, scope and meaning of this right as provided in the Constitution directly respond to the unique circumstances underpinning Zimbabwe's labour regime and that constantly informs debates and discussions on the right to collective bargaining.

Buttressing the above views, the right to collective bargaining is of cardinal importance in any democratic society based on social justice and democracy in the workplace. Thus, section 2 of the Labour Act[6] defines a collective bargaining agreement as '…an agreement negotiated in accordance with the provisions of this Act which regulates the terms and conditions of employment of employees.' This definition is very helpful. It unpacks the Labour Act's contemplation of the process of collective bargaining as a negotiation process with a view to agreeing on the terms and conditions of employment.[7] The law of collective bargaining in Zimbabwe is rooted on 2A (1) (c) of the Labour Act which clearly provides that the purpose of the Act is to advance social justice and democracy at the workplace by providing a legal framework within which employees and employers can bargain effectively for the improvement of conditions of employment. This patently shows that the right to collective bargaining is clothed with the force of law. The Labour Act promotes the participation of employees in decisions affecting their interests at the workplace. This is in line with section 65 (5) (a) of the Constitution of

5 Collective Bargaining Convention 154.

6 Chapter 28:01, hereinafter the Labour Act.

7 Lovemore Madhuku, *Labour Law in Zimbabwe* (Friedrich Ebert Stiftung, Weaver Press 2015) 319. See also, J Grogan, *Collective Labour Law* (Juta and Co. Ltd 2010) 263 where it is submitted that collective bargaining is a process in terms of which employers and employee collectively seek to reconcile their conflicting goals through a process of mutual accommodation. The process extends to all negotiations which take place between an employer and employee for determining working conditions and terms of employment, regulating relations between employer and employee, and regulating relations between employers or their organizations and workers or worker's organizations. Accordingly, Caleb Mucheche, in his book, *A Guide to Collective Bargaining Law & Wage Negotiations in Zimbabwe*, (African Legal Resources Dominion, Harare, 2014) 18,' made remarkable contributions wherein he stated that collective bargaining mainly deals with bread-and-butter issues, for instance the battle of the stomach. However, Madhuku, (n 7) 320 goes further when he underscored that collective bargaining must be given a liberal and all-encompassing interpretation. This is because, it covers other issues to do with the terms and conditions of employment. This view was endorsed in the case of *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 at 493 H-1, wherein the court underscored that there is a distinct and substantial difference between consultations and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take.

Zimbabwe.

The parties often refer the result of the negotiation as a collective bargaining agreement or as a collective employment agreement.[8] The main issue in collective bargaining is the motivation to reach an agreement. It fulfills three main roles in labour relations.[9] The first role is that it fulfills economic function. Economic conflict is inherent in any employment relationship. So, collective bargaining seeks to regulate the individual and collective workplace relations. This is followed by a social function role, by establishing an industrial justice system which protects workers from arbitrary action by management and recognizes their right to human dignity.[10] The political function then occupies the third role, in that it promotes democracy in industrial life by giving employees a say in matters which affect their working lives.

The law of collective bargaining is not unique to Zimbabwe alone. It is a global issue. As such, there is an important connection between the domestic legal system and the international legal system in the context of the right to collective bargaining. In Zimbabwe, the law of collective bargaining has been influenced by both regional and international developments.[11] For instance, the concept of collective bargaining was first recognized under the Industrial Conciliation Act, 1934. It was modeled on the South African Industrial Conciliation Act of 1924. However, the most influential developments came from the United States of America through the Wagner Act or the National Labour Relations Act of 1935. The Wagner Act set the foundations for modern collective bargaining law. It provided workers with key rights such as the right to organize, engage in peaceful strikes and to collectively bargain. These rights have now been codified in various International Labour Organization Conventions thereby creating a

8 Caleb Mucheche, *A Practical Guide to Labour Law, Conciliation, Mediation & Arbitration in Zimbabwe* (African Legal Resources Dominion, Harare 2014) 69. During negotiations, the position of the law is that both a single employer and an employers' organization are competent to negotiate with a workers' committee or a trade union. On the other hand, there are two types of representatives for workers in collective bargaining; that is a registered trade union at industry level and a workers' committee at enterprise level. According to Madhuku Lovemore (n 7) 323, the position in Zimbabwe of granting the right to collective bargaining to a trade union merely upon registration is uncommon. WA Joubert, *The Law of South Africa* 1995) Vol 13 (1) observed that there are three types of approaches in determining the representatives of trade unions. These three approaches are the majoritarian, pluralist and all-comers approaches.

9 A Rycroft and B Jordan, *A Guide to South African Labour Law* (Juta and Co. Ltd 1992) 116-117.

10 Lovemore Madhuku, (n 7) at 322.

11 Munyaradzi Gwisai, *Labour and Employment Law in Zimbabwe: Relations under Neo Colonial Capitalism,* (University of Zimbabwe Publications 2006) 89.

definite right to collective bargaining under international labour law.

The Zimbabwean Industrial Conciliation Act[12] established a solid foundation for collective bargaining in Zimbabwe. However, the Industrial Conciliation Act was largely facilitative and non-interventionist, precisely if compared with the South African Industrial Conciliation Act of 1924 and Industrial Relations Act No. 66 of 1995. It is the Labour Relations Act No. 16 of 1985 which ushered in significant changes to the law of collective bargaining in Zimbabwe. This Act dealt with both individual and collective labour law. It became the spine of post-independence labour law. The Act promoted centralized collective bargaining, with every registered trade union having an automatic right to be recognized by the employer for collective bargaining purposes. Generally, the Act reflected a broadly pro-worker orientation that was condemned by the capitalistic sector.[13] However, the Labour Amendment Act No. 17 of 2002 hit the nail on the head and it remains the chief cornerstone in terms of promoting collective bargaining and the participation of employees in decisions that affect them at the workplace. This speaks volumes on the scope, meaning, content and extent of the right to collective bargaining in Zimbabwe.

2. COLLECTIVE BARGAINING IN TERMS OF INTERNATIONAL LAW

The international legal framework on the right to collective bargaining is premised on that body of law which is international in nature, content and meaning. The main sources of collective bargaining law at the international level are conventions and recommendations adopted by the ILO, for instance ILO Conventions 154, 98, 87 and the Declaration on Fundamental Principles and Rights at Work. Not only that, Madhuku correctly noted that the international labour standards may also be found in other international and regional human rights instruments, such as the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples Rights.[14]

12 1959.
13 Lovemore Madhuku, (n 7) 20.
14 Lovemore Madhuku (n 7) 502.

The ILO was established in 1919 by the Treaty of Versailles[15] and its headquarters are in Geneva, Switzerland. It is the only surviving international body set up at the time of the League of Nations following the First World War.'[16] Its guiding principle is that 'labour is not merely a commodity' to be traded in the same way as goods, services or capital, and that human dignity demands equality of treatment and fairness in dealing within the workplace.[17] The international law has drawn up several conventions on what ought to be fair labour standards and the countries that are party to these conventions are required to abide by them in their own jurisdictions.

2.1 The Creation and Importance of International Labour Standards

The international labour standards are designed to promote fair international competition, achieve social justice, create peace, promote economic development being guided by social considerations and to stand as a source of inspiration for national action.[18] These commitments are aptly captured by the preamble to the ILO Constitution which provides that 'universal and lasting peace can be established only if it is based on social justice…conditions of labour exist involving such injustice, hardship and privation to large numbers of people producing unrest so great that the peace and harmony of the world are imperiled.' These international labour standards[19] may be conventions which are premeditated to create legal binding obligations for countries which ratify them, or they may be recommendations which are designed to encourage countries to conform to the international standards contemplated therein. Recommendations are not intended to create legally binding obligations at law but to give direction as to practice, policy and legislation. To buttress this point, there is a third legal instrument called a Protocol which is created to complement or amend a

15 It entrusted to the International Labour Organization the duty 'to establish everywhere humane conditions of labour and to institute and apply a system of international labour legislation'.

16 Caleb H. Mucheche, (n 4) 68.

17 See Lovemore Madhuku, (n 7) 504 wherein he opines that the main duty of International Labour Organization is to formulate and supervise the enforcement of international labour standards.

18 Lovemore Madhuku, (n 7) 508.

19 They are minimum standards as evidenced by Article 19 (8) of the International Labour Organization Constitution which provides that 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.'

Convention. It is a binding legal instrument.

When a convention is ratified by a member State, it must be then communicated to the Director-General of the ILO. This obligation of a member State does not imply any obligation of the government to recommend ratification or implementation of the instrument in question.[20] The competent authority of each State is determined by the Constitution and any other laws of that State.[21] The supervision of ILO standards is done by the examination of periodical reports on the measures taken to implement the conventions. Secondly, it is done through the complaints procedure wherein a complaint may be filed by one member State against another over non-compliance with a convention, and thirdly, it may be filed by the Governing Body of the ILO *mero motu* or on receipt of a complaint from a delegate to the General Conference.[22]

2.2 Application of International Labour Law in Zimbabwe

The correct legal position is that an ILO convention must first be ratified to become part of Zimbabwe's legal system. Section 327 of the Constitution provides that:

> (1) In this section-
> 'international organization' means an organization whose membership consists of two or more independent States or in which two or more independent States are represented;
> 'international treaty' means a convention, treaty, protocol or agreement between one or more foreign States or governments or international organizations.
> (2) An international treaty which has been concluded or executed by the President or under the President's authority, (a) does not bind Zimbabwe until it has been approved by Parliament and (b) does not form part of the law of Zimbabwe unless it has been incorporated into law through an Act of Parliament,
> (3) An agreement which is not an international treaty but which (a) has been

20 Lovemore Madhuku (n 7) 508. Each State follows its laws and practices. There is no specific procedure to ratify the Convention.
21 Lovemore Madhuku (n 7) 509.
22 Lovemore Madhuku (n 7) 511.

concluded or executed by the President or under the President's authority with one or more foreign organizations or entities, and (b) impose fiscal obligations on Zimbabwe (c) does not bind Zimbabwe until it has been approved by Parliament

(4) An Act of Parliament may provide that subsections (2) and (3) (a) do not apply to any particular international treaty or agreement or to any class of such treaties or agreement or (b) apply with modifications in relation to any particular international treaty or agreement or to any class of such treaties or agreements

(5) Parliament may by resolution declare that any particular international treaty or class of international treaties does not require approval under subsection (2), but such a resolution does not apply to treaties whose application or operation requires (a) The withdrawal or appropriation of funds from the Consolidated Revenue Fund or (b) any modification of law of Zimbabwe

(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.[23]

From the reading and interpretation of these constitutional provisions, it can reasonably be concluded that it is permissible at law for an Act of Parliament to provide that ILO Conventions and any other international treaties shall automatically form part of Zimbabwe law without any prior approval by the Parliament of Zimbabwe. Currently, no such law exists. Both approval and incorporation through an Act of Parliament is required for an international treaty to become part of Zimbabwe's law. Section 327-(2) of the Constitution makes it clear that Zimbabwe is only bound by a convention or treaty after approval by the Parliament. On the same note, Madhuku is of the view that an ILO Convention or an international treaty which has not been ratified is not irrelevant.[24] It may be referred to by the courts of law under the general principles of statutory interpretation.[25]

23 Section 327 (n 1).
24 Lovemore Madhuku, (n 7) 515.
25 Lovemore Madhuku, (n 7) 516.

In connection with the above, customary international law is also crucial on how the international labour law can become part of Zimbabwe's legal system. Section 326 of the Constitution provides that:

> (1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament,
>
> (2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.

If one is to adopt a literal approach of statutory interpretation in the context of these constitutional provisions, the better view of the law is that an international treaty or convention, whether ratified or not ratified may form part of Zimbabwe's law if it is viewed as evidence of customary international law. However, this interpretation does not make international law part of Zimbabwe law ahead of unambiguous provisions of an Act of Parliament. In *Kundai Magodora & Others v Care International Zimbabwe*,[26] Patel JA (as he then was) respectfully submitted that 'I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognizable where it is inconsistent with an Act of Parliament.' This buttresses the view that international legal instruments require domestication by the Parliament of Zimbabwe in order to have legal effect in our jurisdiction.

In terms of the Constitution of Zimbabwe, an Act claiming to incorporate a convention or international treaty must clearly indicate so. In the landmark case of *Communications & Allied Services Workers' Union Zimbabwe v Zimpost & Minister of Public Service*[27], the Labour Court held that 'the legal position is that for International Labour Organization Conventions and other international instruments to be part of our domestic law they need not only to be ratified but be specifically incorporated as part of our domestic law.' The decision of the Court clearly captures this constitutional provision. Further, Zimbabwean courts are

26 SC24/2014.
27 LC/H/180/2004.

legally entitled to refer to interpretations made by foreign courts on similarly worded legislation. Once an interpretation is made by the courts, it becomes law. The authority to this is the case of *S v A Juvenile*[28] wherein Dumbutshena CJ (as he then was) held that, 'the courts of this country are free to import… interpretations of similar provisions in international and regional human rights instruments…in the end international human rights norms will become part of our domestic human rights jurisprudence.' The court will not be incorporating the international legal instrument, but it will be simply interpreting the domestic law.

2.3 The Relationship between ILO Conventions and Zimbabwe Labour Laws on the right to Collective Bargaining

2.3.1 The Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

The Right to Organize and Collective Bargaining Convention is one of the most recognized and ratified ILO conventions. Zimbabwe ratified this Convention in 2003. This Convention provides that member States must promote voluntary collective bargaining, where necessary.[29] Madhuku, noted that this Convention provides for protection against anti-union discrimination and for measures to promote collective bargaining.[30] Article 4 of the Convention states that member States must encourage the system of voluntary negotiations of agreements and autonomy of the bargaining partners. The better view is that the existing machinery and procedures in Zimbabwe in the context of collective bargaining must be designed to facilitate bargaining between the two sides of the employment relationship, leaving them free to reach their own settlement.[31] Collective bargaining has proven to be the only democratic tool at the disposal of workers to negotiate their terms and conditions of employment effectively with their employers.[32] With the exception of workers who may be excluded

28 1989 (2) ZLR 61 (S).
29 Lovemore Madhuku (n 7) 508.
30 Lovemore Madhuku (n 7) 512.
31 Caleb Mucheche (n 4).
32 Tavonga J Zvobgo, 'Collective bargaining and collective agreements in Africa, Comparative reflections on SADC' (2019) 32.

from the scope of this Convention, namely the armed forces, police and public servants directly engaged in the administration of the State, the right to collective bargaining covers all other workers in public and private sectors who must benefit from it.[33]

2.3.2 The Collective Bargaining Convention, 1981 (No. 154)

This Convention was adopted by the ILO in 1981. With its accompanying Recommendation (), they are both crucial in the promotion and implementation of the basic principles of Convention No.98. The convention is promotional in nature. Thus, it is very flexible. Countries that ratify this Convention must take measures to promote collective bargaining. States should try to facilitate the process and must not unreasonably interfere with how the process operates. Sadly, Zimbabwe has not ratified this Convention. However, this Convention is not irrelevant. It may be referred to by the courts under the general principles of statutory interpretation as respectfully submitted by Madhuku.[34] Thus, it is not a travesty of justice to conclude that Convention No. 154 is not irrelevant in Zimbabwe in the context of collective bargaining.

2.3.3 Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

This Convention provides for protection against anti-union discrimination and for protection of workers' and employers' organizations against acts of interference by public authorities.[35] This Convention was ratified by Zimbabwe on 09th of April 2003. One of the objectives of workers in exercising the right to organise as guaranteed by the Convention is to bargain collectively[36], for instance through workers' organizations, their terms and conditions of employment,[37] to the extent that these are not fixed by law or improving on legal minimum standards.[38]

33 Tavonga J Zvobgo (n 32) 32.
34 Lovemore Madhuku (n 7) 508.
35 Lovemore Madhuku (n 7) 511.
36 *In Re Retail Wholesale Union and Govt. of Saskatchewan* (1985) 19 DLR (4th) 609 (Canada).
37 International Labour Office, *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association* (6th ed, Geneva) para 1234. See also Tavonga J Zvobgo (n 32) 6.
38 Fact Sheet No.1, Collective Bargaining International Labour Office (2015) 6.

2.3.4 International Labour Organization's Declaration on Fundamental Principles and Rights at Work 1998

The ILO Declaration on Fundamental Principles and Rights at Work was adopted in June 1998 in Geneva, Switzerland. It states that all member States have a duty to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant conventions. The right to collective bargaining is included as an example of fundamental rights. Article 2 (a) of the Declaration expresses 'freedom of association and the effective recognition of the right to collective bargaining' as essential rights of workers. In terms of this Declaration, the right to collective bargaining is universal and applies to all people, regardless of the level of economic development of their respective countries. In order to monitor compliance with the contents of the declaration, review of annual reports from States that have not yet ratified one or more of the ILO conventions that directly relates to the right to collective bargaining is the first weapon available at international law. Global reports on the right to collective bargaining is also another strategy available to monitor the effectiveness of the Declaration. They provide a dynamic global picture on the current situation of the right to collective bargaining and other fundamental rights and principles. This is followed by technical cooperation projects as a third technique to give effect to the declaration. It is intended to address distinguishable needs in relation to the declaration and hence decoding principles and fundamental rights into practice.

3. THE CONSTITUTIONAL FRAMEWORK IN ZIMBABWE

From a historical perspective, the right to collective bargaining has often been rendered impotent by an interplay of factors. Before the major reforms introduced by the Labour Amendment Act,[39] the right to collective bargaining was nominally proclaimed but denied in substance. The Constitution marks a pinnacle of the process that started with the Labour Relations Amendment

39 No. 17/2002.

Act.[40] The Zimbabwean Constitution now unambiguously provides for the right to collective bargaining. Section 65-(5)-(a) reads, 'except for the members of the security services, every employee, employer, trade union and employer's organization has the right to engage in collective bargaining.' This constitutional provision is the fulcrum of collective bargaining laws in Zimbabwe. The constitution lies at the top of the hierarchy of legislation in Zimbabwe. Any legislation that is in conflict with it is invalid. The Constitution is not only a superordinate law or statute, but is the supreme authority at the apex of the legal order.

The Constitution is a transformative legal document that is both a backward looking and forward looking document.[41] The people of Zimbabwe designed it to address both the injustices of the past and to create a better future for all in the context of the enjoyment of human rights. The Constitution seeks to transform the lives of the general populace and create better working conditions for all. The right to collective bargaining is enshrined under section 65-(5)-(a) of the Declaration of Rights. However, it must be mentioned that the Constitution extends the right to collective bargaining to all but security services employees are excluded from the enjoyment of the right. According to Mucheche, these are members of state security. They are different from private security employees like security guards. This effectively endorses the view that military personnel, members of the prison service, members of the police force and members of the central intelligence do not enjoy the constitutional right to collective bargaining. The rationale behind this exclusion is that the state security service is an exceptionally sensitive area which should be jealously guarded like gold dust.[42] According to Mucheche, whatever justifications are given for a blanket ban on the right to collective bargaining in the state security sector, the bottom line is that this is a naked form of arbitrary denial of rights to a layer of employees who fall within that bracket.[43] At the end of the day, they are exposed to the dictates of their employer whose conditions of employment are unquestionable. Apart from the members of security service, the rest of public service employees now enjoy the right to collective bargaining under

40 Ibid.
41 Admark Moyo, (n 2) 32.
42 Caleb H. Mucheche, (n 4) 5.
43 Caleb H. Mucheche, (n 4) 6.

section 65 of the Constitution.

3.1 Locus Standi, Equal Access to Courts and Enjoyment of the Right to Collective Bargaining

The Zimbabwean Constitution broadens the number of persons who can bring cases for determination in a court of law. Section 85 of the Constitution provides that, 'any of the following persons, namely- any person acting in their own interests, any person acting on behalf of another person who cannot act for themselves, any person acting as a member or in the interests of a group or class of persons, any person acting in the public interest and any association acting in the interest of its members, is entitled to approach a court, alleging that a fundamental right of freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.' These aforementioned group of persons may approach a court alleging that a fundamental right or freedom enshrined in the Constitution has been, is being or is likely to be infringed.

The principle that a person may approach a court for relief only when they have direct and substantial interest in the case makes it impossible to challenge the infringement of the right to collective bargaining. This view was embraced by Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd*[44], wherein it was stated that 'it would, in my view be a grave lacuna in our system of public law if a pressure group, like the federation or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.' Thus, the court took the position that locus standi should be liberalized. It is a position that is worth following in Zimbabwe. In Zimbabwe, this view found home in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe NO. and Others*[45], wherein the court held that, 'certainly this Court does not expect to appear before it only those who are dripping with

44 1992 AC 617.
45 CCZ 1/2013.

the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to starve the threat, more so under the liberal post-2009 requirements.' The court was concerned with the fact that a narrow approach to locus standi only served a litigant who had suffered a direct infringement of their rights or who had faced an imminent threat to their rights. The approach adopted by the court broadened the concept of legal standing.[46]

On a different matter, in *Mudzuru v Minister of Justice, Legal and Parliamentary Affairs*[47], the Constitutional Court of Zimbabwe extended the right to institute and defend proceedings in a court of law even when a litigant has a direct or indirect interest in the outcome of the dispute. The Court further held that while the applicants had failed to fulfill the prescription of the law for standing under section 85-(1)-(a) of the Constitution, they could still benefit from section 85 (1) (d) of the same Constitution which allows public interest litigation. The Court clearly put it that, 'the Constitution guarantees real and substantial justice to every person, including the poor, marginalized and deprived sections of the society. The fundamental principle behind section 85 (1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the State. The right of access to justice, which is itself a fundamental right, must be availed to a person who is able, under each of the rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.'[48] This represents a clear departure from the traditional approach. The emphasis on the existence of a link between a challenger of a particular law and the law is no longer applicable. Individuals and organizations now have the right to challenge the infringement of the right to collective bargaining in any court of law.

46 See also *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs and Others* 79/14 (2015) ZWCC 12.
47 Ibid.
48 Ibid.

3.2 The Duty to Bargain and the Constitution

In terms of section 65 (5) of the Constitution, 'every employee, employer, trade union and employee or employer's organization has the right to…engage in collective bargaining.' This provision is similarly worded with section 23-(5) of the Constitution of the Republic of South Africa, 1996. The South African Supreme Court of Appeal in *South African Defence Force v Minister of Defence and Others*[49] succinctly underscored the deep-rooted legal position that the South African constitutional provision does not impose a judicially enforceable duty to bargain.[50] It merely creates a freedom that no law of the land may prohibit collective bargaining. On appeal, the South African Constitutional Court left the question open on whether a right to collective bargain entail a duty to bargain on the other party. Interpreting the constitutional provision to mean a legally enforceable duty to bargain could draw the courts into a range of controversial industrial relations issues.[51] The South African Constitutional Court followed the international labour law jurisprudence which does not impose a duty to bargain on parties. Since Zimbabwe is a party on important Conventions on freedom of association, it should also follow the South African approach. Section 65 of the Constitution of Zimbabwe recognizes the right of parties to an employment relationship to collective bargaining. The better view of the law favours the submission that the Constitution of Zimbabwe does not create a judicially enforceable duty to bargain on the other party of the contract but requires the State to create a framework conducive for collective bargaining.

4. ADVANTAGES AND DISADVANTAGES OF ELEVATING A LABOUR RIGHT INTO A CONSTITUTIONAL RIGHT

The Constitution is the supreme law of the Zimbabwe as provided under section 2-(1). This is so because it is the voice of people. Constitutional order is derived from the people of Zimbabwe. The concept of supremacy of the constitution is about conferring the highest authority to the Constitution in a legal system of a

49 (2006) 27 ILJ 2276 (SCA).
50 Lovemore Madhuku (n 7) at 506.
51 See *South African Supreme Court of Appeal in South African Defence Force v Minister of Defence and Others* (2007) LLR 785 (CC).

country.[52] The sovereignty of the people is invoked to confer moral authority on the constitution to explain its binding force as the supreme law of the land. There are basically three traits that primarily characterize the principle of supremacy of the constitution. Firstly, the possibility of distinguishing between constitutional and other laws; secondly, the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and lastly, an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.[53]

Accordingly, section 2-(1) of the Constitution holds that 'This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.'[54] This provision explains that anything done *ultra vires* the Constitution of Zimbabwe is null and void. Modern constitutions derive their legitimacy from the basic principle that they are a word of the people. Section 3-(1) of the Constitution provides for the supremacy of the Constitution as a key founding value and principle. Without any doubt, this should influence the constitutional interpretation on the right to collective bargaining. Hence a value laden or teleological approach which places the Constitution on its climax position is imperative.[55] A Constitution is law made by the people, for the people, unlike other laws made only by parliament, individual companies or entities.[56] As an embodiment of the collective voice of Zimbabweans 'we the people', as provided for in the preamble of Constitution and it being a product of public and expert consultations and referendums, it codifies the people's social contract with the state and its agents, defining rights and duties.[57] It derives its superiority

52 See generally *Marbury v Madison* (n 2). It must be submitted that Constitution is a higher law, that need not to be made everyday. It's not like any other laws. It is holy and precious. The constitution forms the foundation of any modern and functional democratic society and the principles that are put in that constitution ought to live beyond generations. They out to outlive generations. The constitution is not a simple legal document that can be amended at will. It must be somewhat sacred. It must be a fairly respectable document. Whenever, you want to amend it, you must involve the people.

53 Lovemore Madhuku, *Introduction to Zimbabwean Law* (Weaver Press, Harare, 2010) 57.

54 See generally *Ian Douglas Smith v Didymus Mutasa* 1989 (3) ZLR 183. In this groundbreaking case the Parliament of Zimbabwe had denied Smith of his salary as he had breached a rule of parliament. Smith approached the Supreme Court of Zimbabwe, which held that the Parliament's decision was inconsistent with the provision of section 16 of the Lancaster House Constitution. Mutasa, as the then Speaker of Parliament had vowed not to pay Smith 'even a cent'. The supreme court took occasion to remind him of the supremacy of the Constitution. Mutasa thought that the court should not interfere with the internal affairs of the Parliament forgetting the supremacy of the Constitution of Zimbabwe.

55 Lourens du Plessis, *Re-Interpretation of Statutes*, (LexisNexis 2002) 93.

56 Lovemore Madhuku, (n 53) at 58.

57 Rais A. Khan and James D. McNiven, *An Introduction to Political Science* (Dorsey Press, 1984).

from the people, who are its architects and commissioners. The voice of the people prevails over anything and is so loud to silence any other choral discords to the contrary.[58] The Constitution as the supreme law of the land, can invalidate anything inconsistent with it. For instance, should the Labour Act contradict any provision of the Constitution, it is null and void. The Constitution is the standard litmus to test the constitutionality of the law of collective bargaining.

On the contrary, it has been mooted that elevating a labour right into a constitutional right maybe disadvantageous considering the fact that it is not easy to amend a Declaration of Rights. The Declaration of Rights is a Chapter in the Constitution of Zimbabwe setting out the rights and freedoms which the people are entitled to. The Declaration of Rights is an epitome of the constitutional revolution that took place during the time of the inclusive government.[59] Section 328-(5) of the Constitution provides that 'a constitutional bill must be passed, at its last reading in the National Assembly and the Senate, by the affirmative votes of two-thirds of the membership of each House'. The correct interpretation of this constitutional provision is that, fifty percent or fifty plus one percent of the affirmative votes of the membership of each House is not enough to amend the Constitution of Zimbabwe. Not only that, section 328-(6) of the same Constitution reads that 'where a Constitutional Bill seeks to amend any provision of Chapter 4 or Chapter 16-within three months after it has been passed by the National Assembly and the Senate in accordance with subsection (5), it must be submitted to a national referendum and if it is approved by the majority of the voters voting at the referendum, the Speaker of the National Assembly must cause it to be submitted without delay to the President, who must assent to and sign it forthwith'. This section puts everything into perspective.

Not only that, the fact that a referendum is a prerequisite to amend the right to collective bargaining as enshrined under Chapter 4 of the Constitution must not be taken lightly. Conducting a referendum is costly, be it in developed or in developing countries. However, the situation is more difficult in countries like Zimbabwe. This to some extent may delay the process of amending a Bill of Rights. This delay is not palatable in any working and functional democracy. In any event the health or wellbeing of the people must be the supreme law. This

58 Lovemore Madhuku, (n 53) at 59.
59 Lovemore Madhuku (n 7) at 517.

is the case for the application of the *salus populi suprema lex esto* principle. In *Stringer v Minister of Health and Sakunda Holdings*[60], Zhou J correctly held that 'the principle is the foundation of every modern constitution, including the Constitution of Zimbabwe which is the supreme law (Constitution of Zimbabwe, section 2). …The maxim "*salus populi suprema lex*" translates to "the health (or welfare, good, salvation, felicity) of the people is the supreme law" or "let the welfare of the people be the supreme (or highest) law ...' This legal reasoning by Zhou J is highly commendable at law. It must not be so difficult to amend laws as a country. One may argue that developing countries like Zimbabwe may consider not to elevate labour rights in general and the right to collective bargaining in particular into a constitutional right(s).

5. CONCLUSION

This paper provides a conceptual framework on the effect of constitutionalizing the right to collective bargaining in Zimbabwe. The right to collective bargaining is now a fundamental constitutional right which derives its life and existence from the supreme law of Zimbabwe such as to render any law, custom or practice that is inconsistent with that right to be null and void to the extent of its inconsistency. It is enshrined under section 65 of the Constitution of Zimbabwe. However, the Constitution extends the right to collective bargaining to all but not to security service employees. The term security service employees must not be interpreted to mean private security employees, for instance security guards but to members of state security. Security guards enjoy the right to collective bargaining but members of the state security do not enjoy this right. This exclusion of members of the security services from enjoying the right to collective bargaining can be criticized as manifestation of state corporatism.

However, those who justify this exclusion may raise the argument that state security service is a sensitive area which should be jealously guarded. If members of the state security were to be allowed to go on strike as a tool to force collective bargaining, the nation's security can be under serious threat. Whatever justifications given for a blanket ban on the right to collective

60 HH 259/20.

bargaining in the state security sector, the bottom line is that this is a plain form of arbitrary denial of rights to a layer of employees who fall within that bracket. They are also exposed to the dictates of their employer whose conditions of employment are unquestionable. However, the rest of public service employees now enjoy the right to collective bargaining and its logical corollaries like the right to organize and the right to strike under section 65 of the Constitution. Under the old constitutional dispensation, the public service employees did not enjoy the right to collective bargaining. By and large, this old way of doing things was assigned to the scrap heap by the promulgation of section 65 of the current Constitution of Zimbabwe.

Secondly, it has been highlighted that the Constitution of Zimbabwe has broadened locus standi with the effect that a wide range of persons are able to enforce the right to collective bargaining in courts of law. This is a positive development in the enforcement of this important right.

Thirdly, the Constitution of Zimbabwe and the Labour Act do not create a judicially enforceable duty to bargain on the other party of the employment contract but requires the State to create a framework conducive for collective bargaining. These laws favour voluntarism during the process of collective bargaining. This is in line with ILO jurisprudence on the law of collective bargaining. Interpreting these laws to mean a legally enforceable duty to bargain could draw the courts, members of the academia, legal pundits and lawyers into a range of controversial industrial relations issues. The cardinal rule is that any meaningful labour law interpretation and reforms should not erode the right to collective bargaining but ensure that the right is brought to fruition.

Lastly, there are clear advantages which can be tapped from elevating the right to collective bargaining into a constitutionally protected right. The State and individuals have extra responsibilities to ensure that the rights that are contained in the Declaration of Rights, which include the right to collective bargaining, are promoted and protected. It is a milestone achievement for Zimbabwe with a potential to alter labour relations in Zimbabwe for the better.