The Efficacy of Alternative Dispute Resolution (ADR) in Labour Dispute Resolution: A Critical Comparative Analysis of Botswana, South Africa and Zimbabwe

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Dedication

This work is dedicated to peaceful resolution of disputes.

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ABSTRACT AND KEY TERMS

Abstract

This Master of Laws dissertation is a treatise of "The efficacy of Alternative Dispute Resolution (ADR) in labour disputes: a critical comparative analysis of Botswana, South Africa (RSA) and Zimbabwe." Alternative Dispute Resolution hereinafter referred to as ("ADR") has attracted so much research ado worldwide with policy makers alive to its possibilities in so far as it ought to shed off the burden of the courts in handling disputes. Courts are considered inundated with unresolved cases taking many years to finalise. ADR is therefore touted, not only the panacea, but the cheaper, efficient and effective alternative to normal court process. This study was saddled with the common challenges of definition, scope and methodology as does most scientific studies, especially to locate the concept ADR in the plethora of views from prominent exponent-s of the discipline. This study labored on the considered view that ADR is essentially an 'out of court settlement approach to dispensing with disputes involving an attempt by disputants to rope in an impartial third party to aid finality to the respective wrangle. The lack of a methodological approach to treat this subject matter, made this study more challenging. The study had to therefore rely on a hypothetical model developed after gleaning through various scholarly views[1] that sought to treat the subject of ADR efficacy in labour dispute resolution. The study contented with the strongly held view[2] that ADR is an efficacious approach in resolving disputes outside the court system. As to whether this was the case in Botswana, RSA and Zimbabwe in so far as labour dispute resolution is concerned was the major challenge this study was seized with? A model was formulated which envisaged that efficaciousness of ADR may be achieved if three conditions or criteria are present within a jurisdiction, namely (1) ADR Background Conditions that comprise (a) adequate legislative and political support; (b) Supportive institutional and cultural norms, (c) adequate and competent manpower, (d) sufficient funding support, and (e) power-parity of disputants; (2) ADR Program Design comprising of (a) Planning and preparation and (b) Operations and implementation and finally (3) ADR Measures (a) Client

[1] Brown, Cervenak and Fairman *Alternative Dispute Resolution: Practitioners' Guide* (1998) 10 (See also Kerbeshian (1994) 383 and Love *Settling out of court: How effective is Alternative Dispute Resolution* (2011) 5

[2] Folberg and Rosenberg *Alternative Dispute Resolution: An Empirical Analysis* (1994) 1448

satisfaction; (b) Time efficient; (c) Cost saving and (d) Settlement & enforcement. This study measured the situations obtaining in the three countries using these three-pronged criteria. In all three measures[3] this study found that although all the three countries still have a long way before their ADR became as efficacious as would be reasonably possible, RSA has made many strides such as legislative enactments immediately upon attaining independence that sought to address the injustices of the past and thereby installing structures for enforcing industrial democracy[4], while Botswana and Zimbabwe took 5 years[5] and over 10 years[6] respectively after attaining independence. RSA established an independent body for dispensing with labour dispute settlement[7] while Botswana[8] and Zimbabwe[9] are still reluctant to do so, relying rather on their labour ministries often marinated in bureaucratic bottlenecks hence stalling efficacy of ADR. While RSA makes effort to provide adequate and competent manpower because of sufficient funding, Botswana and Zimbabwe still struggle to dispense with disputes under their labour departments who are either inadequately skilled or also accused of favouritism in the case of Zimbabwe.[10] All the three countries are regarded as unequal societies which tends to sway the power-parity of disputants with capitalists still wielding unbridled powers in dispute outcomes. South Africa enacted section 143 to the Labour Relations Act[11] which empowers the Director of CCMA to certify an arbitral award, giving it the same force as an order of the Magistrate Court. This has cut off the time and administrative burden of having to register an arbitral award with the court so as to obtain writs of executions and enforce it, a practice which is still prevalent in Zimbabwe. The Department of Labour in South Africa has made funding available to the CCMA to assist employees who are not in a financial position to enforce awards in their favour.[12] The funding is aimed at employees who

[3] The three measures comprise (1) ADR Background Conditions; (2) ADR Program Design and (3) ADR Measures as outlined above and in the rest of the report.
[4] Section 115, Act 66 of 1995
[5] Bill of 1985 (See also Sachikonye *Labour Legislation in Zimbabwe: Historical and Contemporary Perspectives* (1985) 7)
[6] Trade Disputes Act 29 of 1982
[7] Section 115 Act 66 of 1995
[8] Section 3 Act 15 of 2003
[9] Sections 93 and 98, Labour Act of 2003 [Chapter 28:01]
[10] Madhuku *The alternative labour dispute resolution system in Zimbabwe* (2012) 31, (See Maitireyi and Duve *Labour arbitration effectiveness in Zimbabwe: Fact or fiction?* (2011) 138)
[11] Act 66 of 1995 (As amended)
[12] Strydom https://ceosa.org.za/amendments-to-section-143-of-the-labour-relations-act-66-of-1995-and-the-implications-thereof/ Date of use: 13th February 2019

are too indigent to afford the costs of enforcement.[13] These employees are deemed to be: (a) Employees who earn below the earnings threshold (currently at R205 433.30 per annum) – proof of income will be required by the CCMA. There is no record regarding enforcement or ease of enforcement of ADR outcomes in Botswana and Zimbabwe or at least this study is aware of. The governments of Botswana and Zimbabwe have been accused of using a heavy hand in determining wages, the right to strike and often curtailing union power through declaring certain sectors essential services. RSA's Commission for Conciliation, Mediation and Arbitration hereinafter after referred to as (the "CCMA")[14] runs an electronic system of case management by which cases are screened and assigned commissioners whereas Zimbabwe and Botswana still rely on manual systems often inefficiently managed especially when it comes to allocating matters to ADR interventionists.[15] In Zimbabwe the challenge of resources is acute often the Labour Officers lacking a simple photocopier and postage stamps to dispense with administration of disputes. This dissertation found that Botswana and Zimbabwe lack publicly available information from which to infer the efficaciousness of ADR practices therein. Measuring client satisfaction, efficiency and cost effectiveness, enforcement and settlement has not been tackled with ease, which was different when it came to RSA. This study argues that RSA's ADR is efficacious rated at 75% attainment of settlement of disputes, despite accusations of failing to offer disputants options and job retention at the end of ADR intervention. Botswana and Zimbabwe on the measures raised above are not yet close to achieving efficaciousness based on the above criteria. The challenges need to be addressed to ensure that in all three measures ADR affords Botswana, RSA and Zimbabwe disputants a cheaper, efficient and effective alternative to dispensing with labour disputes. This study concluded with recommendations arising from the three measures ADR Background Conditions; ADR Program Design and (3) ADR Measures could be implemented towards achieving an efficacious ADR regime for the three countries and beyond.

[13] Strydom https://ceosa.org.za/amendments-to-section-143-of-the-labour-relations-act-66-of-1995-and-the-implications-thereof/ Date of use: 13th February 2019
[14] Section 115, Act 66 of 1995
[15] Madhuku (2013) 35 and Ss 7 and 8 Act 15 of 2003

Key terms

Alternative Dispute Resolution; Labour Disputes, Labour Law, Industrial Democracy; Employees, Employers; Arbitration; Mediation; Conciliation; Litigation; Efficacy; Efficiency; Effectiveness; ADR Background Conditions; Adequate Legislative and Political Support; Supportive Institutional & Cultural Norms; Adequate and Competent Manpower, Sufficient Funding Support, Power-Parity of Disputants; ADR Program Design; Planning & Preparation; Operations & Implementation; ADR Measures; Client Satisfaction; Time Efficient; Cost Saving; Settlement And Enforcement.

List of Acronyms

ADR – Alternative Dispute Resolution

ALM - African Labour Movement (Zimbabwe)

ANC - African National Congress

ASCJGP - Amalgamated Society of Carpenters and Joiners of Great Britain

ARV - Antiretroviral drug

ATUC - African Trade Unions Congress (Zimbabwe)

BC – Bargaining Councils

BCEA - Basic Conditions of Employment Act

BDP - Botswana Democratic Party

BMWU - Botswana Manual Workers Union

BFTU – Botswana Federation of Trade Unions

BOFEPUSU – Botswana Federation of Public Sector Unions

BOPEU – Botswana Federation of Public Sector Unions

BoR - Bill of Rights

BLRAA - Black Labour Relations Regulation Amendment Act

BSAC - British South Africa Company

CoA - Court of Appeal (Botswana)

CAA - Court Annexed Arbitration

CAIB - Conciliation and Investigation Board

CCMA – Commission for Conciliation, Mediation and Arbitration

CC – Constitutional Court

CEAZ - Catering Employers Association of Zimbabwe

CGIT - Central Government Industrial Tribunal-Cum-Labour Courts (India)

CMS - Case Management System

CNLA - Compulsory Native Labour Act

CNLB - Central Native Labour Board

CONETU - Council of Non-European Trade Unions (RSA)

COSATU – Congress of South African Trade Unions

COL – Commissioner of Labour

CPI - Consumer Price Index

DoL - Department of Labour

DLO - District Labour Office (Botswana)

DRC – Democratic Republic of Congo

DoLSS - Department of Labour and Social Security (Botswana)

EC - European Commission

ECC - Employment Code of Conduct

EDR - External Dispute Resolution

ENE - Neutral Evaluation

ESAP - Economic Structural Adjustment Programme

EPI - Environmental Performance Index

FJC - Federal Judicial Center (USA)

GDP – Gross Domestic Product

GNU - Government of National Unity

GNP - Gross National Product

PLB - Provincial Labour Bureaux

HC – High Court

HCA - High Court Act (Zimbabwe)

HCZ - High Court of Zimbabwe

HDI - Human Development Index

HIV/AIDS - Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome

ICA – Industrial Conciliation Act

ICC - International Chamber of Commerce (Italy)

IC - Industrial Court (Botswana)

IDR - Internal Dispute Resolution

ILO – International Labour Organisation

IDPA - Industrial Dispute Prevention Act of 1909

JAE - Juvenile Employment Act

JIC - Joint Industrial Councils (Botswana)

KZN – KwaZulu Natal

LA - Labour Act of 2003 (Zimbabwe)

LAB - Labour Advisory Board (Botswana)

LAC - Labour Appeal Court (RSA)

LAOMA - Law and Order (Maintenance) Act

LBSR - Labour Board of Southern Rhodesia

LRB - Labour Relations Bill (1985, Zimbabwe)

LC - Labour Court

LO – Labour Officer

LRAA - Labour Relations Amendment Act

LRA – Labour Relations Act 66 of 1995

LSSA - Law Society of South Africa

MASASA - Masters and Servants Act of South Africa

MC – Magistrate Court

MLSS - Ministry of Labour and Social Security (Botswana)

MSA - Masters and Servants Act

MoL - Ministry of Labour (Zimbabwe)

M-o-m - month-on-month

MDC - Movement for Democratic Change

MLA - Model Law

MWA - Minimum Wages Act

NAFU National Federation of Unions

NATUC - National African Trade Unions Congress (Zimbabwe)

NEC – National Employment Councils

NEDLAC – National Economic Development and Labour Council

NOCZIM - National Oil Company of Zimbabwe

NP - National Party

ODR - Online Dispute Resolution

PESTEL – Political, Economic, Social. Technological, Ecological and Legislative

PSA - Public Services Act

PSLRA - Public Service Labour Relations Act (1983)

RLC - Romanian Labour Code

RSA – Republic of South Africa

RREA - Rhodesia-Railway Employees Association

SATAWU – South African Transport and Allied Workers Union

SCA - Supreme Court of Appeal

SACP - South African Communist Party

SADC – Southern Africa Development Community[16]

SATUC South African Trade Union Council

[16] SADC stands for Southern Africa Development Community. The countries within SADC comprise Angola, Botswana, Eswathini, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia & Zimbabwe. This study focuses on Botswana, South Africa & Zimbabwe.

SCZ - Supreme Court of Zimbabwe

TRA - Trade Disputes Act (Botswana)

TR - Trade Union

TUCSA - Trade Union Council of South Africa

TUC - Trade Unions Congress (Zimbabwe)

TUCR Trade Union Congress of Rhodesia

UDI - Unilateral Declaration of Independence

UK – United Kingdom

UN – United Nations

UNDP - United National Development Programme

UNCITRAL - UN Commission for International Trade Law

USA – United States of America

UOA - Unlawful Organisations Act

WB - World Bank

WFP - World Food Programme

WCs - Works Councils

Y-o-y - year-on-year

ZANU-PF - Zimbabwe African National Union-Patriotic Front

ZACU The Zimbabwe African Congress of Unions

ZCTU - Zimbabwe Congress of Trade Unions

ZFL - Zimbabwe Federation of Labour

ZHCWU - Zimbabwe Hotel and Catering Workers Union

ZTUC - Zimbabwe Trade Union Congress

CHAPTER 1

BACKGROUND TO THE PROBLEM

1 INTRODUCTION

Broadly construed, the term Alternative Dispute Resolution (hereinafter referred to as ADR), refers to "all forms of dispute resolution other than court litigation or adjudication through the courts,"[17] often touted an "out of court settlement"[18] approach to dispute resolution. Disputes are an intricate, inherent and a natural part of human existence.[19] Various reasons, be it personal or institutional relationships, account for why people find themselves engrossed in disputes. Disputes are also resolved in a variety of ways. Western societies have tended to traditionally resolve their disputes through the courts of law.[20] However, it has been recognised that resolution of disputes through the courts is a complex affair awash with shortcomings and inadequacies that range from costly, time consuming processes, among other things, hence the emergence of alternative ways of doing so, to the satisfaction of the parties.[21] In fact ADR is regarded as an alternative system whose chief aim is 'to ensure accessible and fast dispute resolution'[22] affording the parties more control, confidentiality, and a consensual approach to dispute resolution focusing more on preserving the relationship between disputants at the end of the process.[23] Arguably, court litigation has, for instance, the effect of breaking down relationships that are personal to the parties at the end of the process.[24] Some of the key ADR approaches that enjoy treatise in literature and use in Botswana, South Africa and Zimbabwe are briefly outlined as follows:

[17] Wiese *Alternative Dispute Resolution in South Africa* (2016) 1
[18] Love (2012) 32
[19] Bosch, Molahlehi & Everett The Conciliation and Arbitration Handbook (2004) 2
[20] Wiese (2016) 1
[21] Ramsden The Law of Arbitration (2009) 1
[22] McGregor, Dekker, Budeli, Germishuys, Manamela, Manamela & Tshoose, *Labour Law Rules* (2013) 13
[23] Wiese (2016) 2, See also Lynch *ADR & Beyond: A Systems Approach to Conflict Management* (2001) 213.
[24] Wiese (2016) 2

- Negotiation: this is the process by which disputing parties attempt to resolve their differences by reaching settlement or comprise personally[25] and privately by way of consensus and agreement, thus redefining the manner of their future relationship.[26]
- Conciliation: this is a process in terms of which a third party termed a conciliator serves as a referee between the parties in dispute, for the sole purpose of encouraging movement towards a resolution without necessarily offering any suggestions, personal ideas or judgmental opinion.[27]
- Mediation: This is a process in terms of which parties to a dispute make use of an independent third party to help them reach agreement.[28] Mediation differs from conciliation in that the mediator is an expert in the field or subject at issue enabling him to facilitate dialogue and offer alternative suggestions that enable the disputants to open up, engage in a discussion and move towards a mutually agreeable resolution.[29]
- Fact-finding: this is a non-binding process whereby the neutral third party determines the facts applicable to the dispute[30] after hearing the parties' presentations and in the result submits findings of fact and non-binding recommendations to the disputants in the hope that their adoption of same will resolve the dispute.[31]
- Arbitration: this is a system of dispute resolution in terms of which an independent neutral third party is appointed by mutual agreement of the parties in dispute,[32] who then employs quasi-judicial processes and acts as the decision maker in a dispute,[33] after the parties make their presentations, s/he reaches an arbitration award, which, in general, is final and binding.[34] The parties commit themselves to abide by that person's decision, recognizing it as final and binding.[35] The downside to arbitration is that the parties lose control

[25] Ramsden (2009) 1
[26] Cassim, Hurter & Faris *Civil Procedure Study Guide CIP2601* (2013) (2013) 40
[27] Okharedia *The Emergence of Alternative Dispute Resolution in South Africa: A Lesson for Other African Countries* (2011) 2
[28] Wiese (2016) 5
[29] Okharedia (2011) 2
[30] Wiese (2016) 5
[31] Okharedia (2011) 2
[32] Wiese (2016) 7
[33] Coetzee & Schreuder *Personal Psychology* (2010) 470
[34] Lotter & Mosime, *Arbitration at work* (1993) 2
[35] Okharedia (2011) 2

of the outcome of the dispute resolution process while the advantage is that the dispute is resolved and the determination is binding and enforceable.[36]

- Con-Arb: this is a process whereby the parties to a dispute refer it to a neutral third party who firstly attempts to mediate it, when s/he fails to resolve it through conciliation, the parties immediately agree to reach resolution through an arbitration process[37] on the same day, through the same third party who attempted to have them resolve the dispute through conciliation.[38] Corn-arb can either be voluntary or compulsory, depending on the parties who must apply for this process before it can be employed.[39]

The above processes, either taken as a group or singly, constitute what comprises ADR as a dispute resolution mechanism. It is these mechanisms that are regarded as alternative approaches to resolving disputes without having to rely on the inefficient court system. Essentially, it is important to resolve disputes because unresolved disputes in their nature are often a threat to industrial peace, productivity, organizational progress and the national economy at large.[40] Unresolved disputes have often led to violent outbursts and in certain respects deaths in South Africa[41] and Zimbabwe alike.[42] A case in point is the Marikana[43] mine disaster which led to deaths of miners because a dispute could not be resolved amicably. This makes dispute resolution, let alone ADR, a very important subject of study in the modern-day industrial environment.

The ILO has also acknowledged a dramatic increase in labour disputes in the globe and the importance of a macrolevel response in legislative frameworks of different countries to address these. The number of individual disputes arising from day to day

[36] Wiese (2016) 7
[37] Ibid
[38] Okharedia (2011) 2
[39] Ibid
[40] Betts *Supervisory Studies: A managerial perspective* (1989) 355
[41] Bosch, Deale, Friedman, Levy, Mpedi, Savage & Venter The Dispute Resolution Digest 2013 (2013) 5
[42] Sibanda *State and Industrial Relations in Developing Countries: Focus on Zimbabwe* (1989) 18
[43] Marikana refers to a series of strike actions starting with the platinum industry in the Rustenburg area following by a spread of industrial action into the West Rand gold fields' area beginning September 2012. See also Bosch *et al.* (2013) 5

workers grievances or complaints have been rising across the world.[44] The causes are complex and vary across countries and regions. Common features include an increased range of individual rights protection, a decrease in trade union density and /or collective bargaining coverage; higher risks of termination of employment and unemployment; reduced job quality security due to greater use of various contractual arrangements for employment and other forms of work and increase in inequality as a result of segmented labour markets."[45]

The three countries under review in this study, on paper, have committed to the establishment of industrial democracy through their constitutions. Section B (1) of the constitution of Botswana provides for certain limited rights pertaining to freedom of association.[46] This gives expression to rights to belong to a union of one's choice. The South African Constitution[47] provides for everyone's right to fair labour practice including both the employer and employee. The Zimbabwean constitution provides as follows: "everyone has a right to fair and safe labour practices and standards and to be paid a fair and reasonable wage."[48] The right to 'freedom of association'; fair labour practice and fair and safe labour practices and standards and to be paid a fair and reasonable wage' did not specifically speak to ADR but provided a framework to recognise and enforce industrial democracy in the three countries respectively. These standards found expression in legislative enactments of the Trade Dispute Act,[49] the Labour Relations Act[50] and the Labour Act[51] which directly introduced and entrenched ADR in Botswana, South Africa and Zimbabwe respectively. This study is interested in establishing if such legislative enactments speaking to ADR has led to efficacious implementation thereof.

[44] Ebisui; Cooney and Fenwick Resolving Individual Labour Disputes A comparative overview (2016) v, see also ILO, 2013a; http://www.ilo.ch/global/topics/employment-security/labour-market-segmentation/lang--en/index.htm Date of use: 25 June 2019
[45] Ebisui *et al.* Resolving Individual Labour Disputes A comparative overview (2016) v, see also ILO, 2016; http://www.ilo.ch/global/topics/employment-security/labour-market-segmentation/lang--en/index.htm Date of use: 25 June 2019
[46] Section B (1) The Constitution of Botswana, 1966
[47] Section 23 of the Constitution of 1996
[48] Section 65 (1), The Constitution of Zimbabwe, 2013
[49] Act 15 of 2003 (Amended)
[50] Act 66 of 1995 (Amended)
[51] Act of 2003 [Chapter 28:01]

Alternative Dispute Resolution has generally not enjoyed a smooth passage in the terrain of academic scrutiny especially in so far as its efficaciousness in resolving labour disputes is concerned giving regard to cases such as Bernstein[52] and Bhorat[53] who cast aspersions on its potential for achieving desired outcomes. The concept of ADR is saddled with several challenges ranging from the politics of definition, as there is no universal agreement among scholars as to its meaning, history and origin, to issues of scope of what constitutes ADR, as well as whether the claims to effectiveness vis a vis court litigation can be substantiated with empirical certainty are reviewed later and in chapter 2 of this study specifically.

The three countries under consideration in this study, Botswana, RSA and Zimbabwe, are members of the International Labour Organisation, herein (the "ILO"), a United Nations body that deals with labour issues whose main function is to set international standards and monitoring implementation.[54] The ILO was formed in 1919 after the end of World War 1 and specifically, with the hope of fostering universal peace.[55] The general Assembly of the ILO, the International Labour Conference, meets annually in Geneva. It is attended by representatives or agents of countries which have ratified its conventions, who generally must comply with the Convention.[56] ILO runs a system of international supervision that ensures that member countries that ratified conventions adhere to the provisions of such conventions. Botswana, RSA and Zimbabwe became members of the ILO in 1978,[57] 1919 and 1994[58] and 1980[59] respectively. Within the ILO, labour dispute prevention and resolution are regulated by various Conventions and Recommendations:

- Labour Relations (Public Service) Convention No. 151 (1978);
- Collective Bargaining Convention No. 154 (1981);

[52] McIver and Keilitz (1991) 123
[53] Bhorat, Pauw, and Mncube *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa* (2007) 25
[54] Steadman, Handbook on Alternative Labour Dispute Resolution (2011) 13
[55] Benjamin, International Labour Standards: Labour Notes (1991) 83
[56] Ibid
[57] ILO https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:103303 Date of use: 25 June 2019
[58] ILO https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888 Date of use: 25 June 2019. South Africa was a member of the ILO since its inception in 1919. Due to its apartheid policies, it withdrew and joined again in 1994.
[59] ILO https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:103183 Date of use: 25 June 2019

- Voluntary Conciliation and Arbitration Recommendation No. 92 (1951);
- Examination of Grievances Recommendation No. 130 (1967);
- Labour Administration Recommendation No. 158 (1978).

These conventions and recommendations are designed to provide guidelines for member states to establish labour standards in their countries. The International Labour Standards are therefore either conventions which are legally binding international treaties that may be ratified by member states or recommendations that are non-binding.[60] It is apparent from the above that standards are a creation of the ILO[61] hence the referral to standards under municipal law should derive its definition from ILO definitions.[62]

Before critical resort is had to the analysis of the effectiveness of ADR, it is fitting for this study to consider a brief discussion of the origins of this concept. In fact, Deborah Hensler[63] holds the view that 'no one has yet written a comprehensive history of the dispute resolution movement.' The history of ADR is as controversial as the concept itself for want of agreement among scholars, with some attributing it to the USA and yet others to Europe.[64] There is also no agreement as to whether enquiries about the origins of ADR must focus on the concept itself or its interdependent constituencies vis a vis mediation, arbitration or negotiation among others.[65] Karl Marx provides a more reasoned explanation for the source of conflict between employers (capital) and employees (the proletariat) that possibly points to the inevitable emergence of dispute resolution interventions such as ADR.[66] Karl Marx[67] proffered the foundation for the reasoned source of conflict through his conflict perspective also known as the conflict theory, although he limited it to class conflict.[68] The conflict intensified in the industrial revolution when, what may be termed as class conflict, descended into the arena

[60] ILO, Rules of the Game: A Brief Introduction to International Labour Standards (2009) 14
[61] ILO, Constitution of the International Labour Organisation, Geneva: ILO
[62] Matsikidze Fair Labour Standards Elevated to Constitutional Rights: A New Approach in Zimbabwe Lavour Matters (2017) 26
[63] Shin (2011) 4
[64] Barrett & Barrett (2004) xxvii; (See also Boulle (2005) 1)
[65] Ibid
[66] Marx and Engels *Manifesto of the Communist Party* (1969) 14
[67] Ibid
[68] Ibid

camouflaged in social class struggle in which the owners (bourgeoisie) of the means of production or rather the businesses, factories, and textile mills in which the workers toiled and the providers of labour, rather the workers or proletariat battled for control over their fate or fortune.[69] The power of the owners of capital often found its drastic expression through the common manipulation of the popularised 'carrot and stick' technique and use of the court system, which arguably protected the interests of those that were able to grease the hands of its propagators and those that administered justice.[70] In essence, the court system protected the voice of capitalists undermining that of the providers of labour - the neutrality of law masks the biases and inequalities that underlie and perpetuate laws and social structures in capitalist societies.[71] Modern day versions of Marx's conflict theory to this end posit that domination, coercion and the exercise of power occur to some degree in all groups and societies[72] because they are in the basic social mechanism for regulating behavior and allocating resources.[73] Unionism to some sizeable degree took forms of armed struggle in Botswana (to a lesser degree), South Africa and Zimbabwe by joining forces with political parties as they sought to dispel imperial control that disenfranchised the people[74] and working class included.

In essence, during the apartheid and colonial era respectively, the trade union federations such as the Congress of South Africa Trade Unions (COSATU) in South Africa[75] and Zimbabwe Congress of Trade Unions (ZCTU) in Zimbabwe[76] fought alongside revolutionary parties with the intent of democratising the workplace. At the end of the struggle oppressive labour legislation had to be purged.[77] It is not in doubt however, that much ado in labour disputes gather around the interpretation of the contract of employment and the attendant conditions of employment. This necessitates a framework for resolving resultant differences, disputes, deadlocks or

[69] Marx and Engels *Manifesto of the Communist Party* (1969) 14
[70] Sachikonye (1985) 2
[71] Ibid
[72] Ibid
[73] Marx and Engels (1969) 16, See also Salamon (2000) 9
[74] Botswana, Zimbabwe and South Africa attained independence from colonialism, oppression and apartheid rule in 1966, 1980 and 1994 respectively.
[75] Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* (2007) 127
[76] Sibanda (1989) 11
[77] Makamure *Constitutional Reform in Zimbabwe: Labour, Gender and Socio-Economic Rights* (2009) 35

conflicts that may arise in such negotiations. Alternative Dispute Resolution has been proffered as such a framework or system. Whether or not it is an efficacious system begs answers in this study.

There is nonetheless a long history of use of ADR particularly in collective bargaining and labour-management relations though this study limits the tenuous endeavor to a few instances that could provide pointers to the origins of the concept.[78] Accordingly, in recorded history, ADR is said[79] to have surfaced in a labour dispute in 1866 in the USA, when arbitration, one of its important constituent elements,[80] was factored into employment agreements between former slaves and former [slave] owners, as directed by General Howard.[81] Mediation, an important ADR element was factored into the institutional framework of labour relations as national unions pulled their weight in the late nineteenth century.[82] Mediation was recognised by the U.S. federal government as a method of handling labour disputes with the enactment of the Erdman Act of 1898 into law.[83] ADR has however spread to other fields of human endeavor including contract negotiations, contractual disputes,[84] non-union employment contexts,[85] public policy in environmental disputes,[86] international conflicts, criminal justice cases,[87] divorce, child custody battles, educational fraternity, sexual harassment and small claims courts[88] to name but a few. The above situations have not had reviews conducted to ascertain the efficacy of ADR in resolving the attendant disputes or at least in countries beyond USA such as Botswana, South Africa and Zimbabwe which are of interest to this study.

[78] Barrett & Barrett (2004) xxvii
[79] Ibid
[80] Arbitration is an important constitute elements of ADR
[81] Barrett & Barrett (2004) xxvii
[82] Mareschal *New Frontiers of Alternative Dispute Resolution* (2002) 1256
[83] Mareschal (2002) 1256
[84] Eaton and Keefe *Industrial Relations* (1999) 56
[85] Bingham and Chachere *Dispute Resolution in Employment: The need for Research in Employment Dispute Resolution and Worker Rights in the Changing Workplace* (1999) 25
[86] Baker *ADR Assists Energy Industry Restructuring* (1999) 8
[87] Bercovitch and Houston Why do they do it like this? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts (2000) 170
[88] Wall and Dewhurst *Mediators Gender: Communication Differences in Resolved and Unresolved Mediations* (1991) 63

In the USA it is interesting to note that in the case of *Gilmer v Interstate/Johnson Lane*[89] a USA court endorsed a practice by non-union employers who required their employees to waive their right to have resort at court in their disputes but to resolve their disputes through arbitration.[90] Between 1920 and 1935 alone a myriad of activities that were instrumental to the ADR concept took place.[91] For example, in 1920 the New York state passed its first modern Arbitration Law, which was followed by five other States within a space of five years, and in the same year employers used various tactics to lobby government to reduce 'collective bargaining' and union membership'[92].

In the UK the use of ADR is entrenched in the construction industry and other sectors. A research study[93] of 229 respondents interviewed, revealed that 70% preferred the use of ADR in resolving their disputes as opposed to pursuing same through a court litigation process.[94]

In Cambodia for instance, a country that experienced years of war, civil unrest adopted ADR through the guidance of the International Labour Organisation herein ("the ILO") through its Labour Dispute Resolution (LDR) project in 2002.[95] This was a few years after the collapse of the Khmer Rouge regime and following three decades of civil conflict. The country had been characterized by an absence of effective institutions, basic laws, impartial judiciary or dispute resolution systems.[96] The Arbitration Council was established to administer ADR in labour disputes and it has resolved over 70 per cent of the cases referred to it between its inception and December 2010. It has had a positive impact on overall industrial relations in Cambodia, thereby improving the climate for investment and economic growth.[97]

It is unfortunate that the African continent has not so much as explored the development and use of ADR through existing frameworks especially in war torn crisis

[89] Gilmer V Interstate/Johnson Lane (500 US 20, 1991)
[90] Ibid
[91] Barrett & Barrett (2004) xxvii
[92] Ibid
[93] Brooker and Lavers (1997) 519
[94] ibid
[95] Vargha Reflections on ILO Experience: How Can the Effectiveness of Dispute Resolution Systems Be Assessed? (2015) 7
[96] Vargha (2015) 8
[97] Ibid

contexts such as Sudan, Somalia, the Rwanda's Tutsi and Hutu tribal wars, the sharia law and constitutional crisis and the Ogoni oil crises in Nigeria which could be well resolved through ADR as opposed to court litigation.[98] Regarding the second challenge, there is for instance no agreement as to the specific history of the concept of ADR except that it is an alternative to court litigation as long as it embraces 'informal, voluntary, accessible, and speedy resolution of labour disputes.'[99] Apart from challenges to locate ADR's origins in history the second challenge is that of definition, which is equally critical to this study as it attempts to find answers to its efficaciousness. The framework for determining ADR efficacy presents itself as the third challenge this study must grapple with, as discussed later in this chapter.

Conceptually, though ADR is touted a panacea to the inadequacies of the court litigation approach to resolution of disputes,[100] as to whether ADR is efficacious in so doing remains unknown if not a controversial notion. This is so because studies that have been conducted to substantiate the claims to ADR effectiveness in resolving disputes, let alone, labour disputes are negligible, and those[101] that do attempt to do so are widely disagreed as to its efficacy. This makes the efficacy or otherwise of ADR difficult to ascertain.

There is a dearth of literature that seek to investigate and analyse the efficacy of ADR in labour disputes which is the objective of the present study. Available studies have for the most part focused on either a historical treatise of the use of ADR with negligible success at reaching universal agreement among scholars,[102] a descriptive analysis of the preferred use or otherwise of ADR,[103] or review of other ADR attributes save the efficacy thereof. The only studies that provide impetus for the present study were conducted by Folberg and Rosenberg[104] and Bernstein[105] who reviewed the

[98] Okharedia (2011) 4
[99] Khabo (2008) 40
[100] Wiese (2016) 2
[101] Brooker and Lavers *Perceptions of Alternative Dispute Resolution as Constraints upon its use in the UK Construction Industry* (1997) 519 and Folberg and Rosenberg (1994) 1488
[102] Barrett and Barrett A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement (2004) xxvii
[103] Brooker and Lavers (1997) 519
[104] Folberg and Rosenberg (1994) 1488
[105] McIver and Keilitz (1991) 123, 'Court Annexed Arbitration (CAA) is defined as another type of ADR mechanism designed which involves a diversion of a portion of civil cases from the dockets of

effectiveness of Neutral Evaluation (ENE)[106] and Court Annexed Arbitration herein (the "CAA") which are ADR mechanisms, respectively.

Measured against the following factors:[107] overall cost, fees, savings, satisfaction, pendency time, and neutral adjustment, ENE[108] an ADR system would be regarded as either effective or ineffective. While this study may have produced positive results that go to endorse ADR,[109] it has not escaped the eye of scrutiny, especially that; (1) it seldom preserves the relationship of the parties beyond the dispute; (2) the neutralizing element was too simplistic to assume that all disputants preferred a private process and finally (3) it was confined to one context, North California District and had not been tested elsewhere to be regarded as a universally sound system.[110] On the other hand, Bernstein[111] sought to review the benefits of ADR mechanism terminal Court Annexed Arbitration herein (the "CAA") in which a judge acts as arbitrator. The result was that it did not confer any benefits[112] and further that it did not reduce the private or social cost of disputing.[113] It can be gleaned from the above that while ADR may have worked in other contexts it remains to be tested against different contexts such as Botswana, South Africa and Zimbabwe especially in so far as its ability to achieve efficacious results through applying its use in labour disputes. While these studies have been conducted in the USA it would be important to verify their relevance outside the USA especially in Botswana, South Africa and Zimbabwe's ADR practices in labour disputes. Further, there is no synthesis of universally agreed measures

overloaded state and federal courts into arbitration. CAA as such was coined to variously incorporate, "mandatory", "compulsory", "court ordered" form of dispute resolution approach/

[106] Department of Justice (2016) online, 'Neutral Evaluation (a.k.a ENE) is defined as a dispute resolution technique that stands at midpoint between mediation and binding adjudication – which can be independent or integrated with other ADR techniques. This technique applies with the net result that the parties or their counsel present their cases to a neutral third party (usually an experienced and respected lawyer with expertise in the substantive area of the dispute) who renders a non-binding reasoned evaluation on the merit of the case. This technique integrates features of both a decision-making and a non-decision-making process. During the process, the neutral may be invited to serve as mediator or facilitator'.

[107] Shin, Discussion on the Models of ADR (2011) 4

[108] Ibid

[109] Shin (2011) 4

[110] Ibid

[111] McIver and Keilitz (1991) 123, 'Court Annexed Arbitration (CAA) is defined as another type of ADR mechanism designed which involves a diversion of a portion of civil cases from the dockets of overloaded state and federal courts into arbitration. CAA as such coined to variously incorporate, "mandatory", "compulsory", "court ordered."

[112] US Legal (2016) online

[113] Bernstein *Understanding the Limits of Court-Connected ADR* (1993) 2169

against which the assessment of ADR efficacy can be ascertained. This study attempts to provide such a framework, discussed later in this chapter and the rest of the dissertation.

In RSA, the only study that attempted to provide inroads into the present study was by Bhorat.[114] The study reviewed the effectiveness of Commission for Conciliation, Mediation, and Arbitration (CCMA), a body which was formed at independence in 1994 with the chief purpose of administering ADR as the first line of dispute resolution of labour disputes in the country.[115] The study found both positive and negative outcomes. While the processes were received well however the study decried it for its lack of absolute success in reaching efficiency targets.[116] Some of the main challenges that surfaced in the administration of ADR through CCMA included resource constraints and poor resolution of disputes.[117] Other studies[118] also confirmed Bhorat's [119]' misgivings with CCMA as an ADR system asserting that it is under strain due to its rather very legalistic approach, length delays, and declining settlement and enforcements of cases.[120] Generally, the CCMA has not been able to resolve disputes as expeditiously as was hoped for in certain areas of the country.[121] These are among the issues that casts doubt on the efficacy of ADR in South Africa that preoccupy the questions this study is concerned with.[122]

In Zimbabwe, there is also a general lack of studies that review the efficacy of ADR. An important study that is closest to the aims of the present study was conducted by Madhuku[123] who sought to review ADR in Zimbabwe. The use of ADR is pronounced in Zimbabwe through the enactment of the Labour Act[124] which officially endorsed the use of conciliation and arbitration in resolving labour disputes.[125] The study[126] revealed

[114] Bhorat *et al.* (2007) 25
[115] Ibid
[116] Ibid
[117] Ibid
[118] Mahomed *et al*. (1997) 17 See also (Bendeman (2007) 142)
[119] Bhorat *et al.* (2007) 25
[120] Mahomed *et al*. (1997) 17. See also (Bendeman (2007) 142)
[121] Bhorat *et al.* (2007) 25
[122] Mahomed *et al*. (1997) 17. See also (Bendeman (2007) 142)
[123] Madhuku (2013) 35
[124] Act of 2003 [Chapter 28:01]
[125] Sections 93 and 98, Act of 2003 [Chapter 28:01]
[126] Madhuku (2013) 35

chronic challenges the Zimbabwean ADR is saddled with emanating from lack of resources including lack of skilled staff, bureaucratic inefficiencies of being administered by government operatives, and biases perpetuated by some officers who are not motivated to administer the system[127] among other things. While this study[128] sheds light on the development of ADR as a system and the manner in which it is administered, it is purely theoretical in nature and does not comprehensively factor in an in-depth analysis of the efficacy of ADR. Other studies[129] while providing some light into the ADR practices in Zimbabwe were nonetheless limited to only certain aspects such as arbitration, or conciliation separately and descriptive profiling of ADR and least on its efficacy per se.[130]

In Botswana, a study by Kupe-Kalonda[131] in 2001 touched upon the use of ADR in labour dispute resolution, though the study was primarily conducted to review the contribution of the Industrial Court in labour disputes in Botswana.[132] There is an evident use of ADR through the passing of the Trade Dispute Acts in Botswana.[133] The study[134] pointed out that ADR was constrained by the heavy-handedness with which the government administered ADR.[135] The same sentiment also surfaced in Khabo[136]'s study who pointed out that conciliation, mediation and arbitration were undertaken by the Department of Labour in [Namibia] and Botswana undermining the independence and fairness of their outcomes and inability to foster the tripartite relationship that should [ordinarily] emanate from ADR.[137] The principle of a tripartite relationship between the employer, employee and the State within the dispute resolution regime, should be promoted to foster the independence of ADR system[138] as is the case with

[127] Madhuku (2013) 35
[128] Ibid
[129] Maitireyi and Duve (2011) 138. See also (Mawire Dispute Resolution Mechanisms, with Special Emphasis on Arbitration & Appeal Mechanisms (2009) and Watadza, Mahapa, and Muchadenyika Effectiveness of Conciliation and Arbitration in the FerroChrome Industry in Zimbabwe (2016) 341)
[130] Maitireyi and Duve (2011) 138
[131] Kupe-Kalonda *The Industrial Court in Botswana: An Assessment of Its Contribution to Labour Relations* (2001) 1
[132] Ibid
[133] Trade Disputes Act, 2003 (Act No. 15 of 2004) (Cap. 48:02).
[134] Kupe-Kalonda (2001) 170
[135] Section 3 (1) Act 15 of 2004
[136] Khabo (2008) 40
[137] Ibid A tripartite relation is a relationship between three parties, that is, the employer, the employee and the state. Given that the government also administers ADR, it implies if there is a dispute between the government and an employee the government acts both assailant and referee which tends to undermine the principle of the rule against bias.
[138] Kupe-Kalonda (2001) 30

CCMA in South Africa.[139] The challenges with the two studies, one by Kupe-Kalonda[140] and Khabo[141] is that the first has been overtaken by events as it was conducted in 2001 and that it was not conducted to investigate the efficacy of ADR in Botswana per se while the second was more of a general analysis of ADR in selected countries of Southern Africa. Studies that look closely at ADR efficacy in labour dispute resolution in Botswana are scant. The present study is intended to fill that gap.

It is discernible from the above analysis that CCMA in South Africa is constrained by failure to meet efficiency targets,[142] the lack of resources, legalistic approach, lengthy processes, and poor settlement and enforcement of cases[143] while in Botswana and Zimbabwe ADR is confined to the bureaucratic inefficiencies of the government as the primary administrators of the systems.[144] The efficiency of ADR in labour disputes in South Africa is also undermined by the CCMA commissioners' lack of jurisdiction to determine status disputes such as whether an employment relationship existed between employer and employee before the main issues in dispute are dispensed with as in the Linda[145] case for instance. In this case the applicant, Erasmus Properties Enterprise contended against the referral by first and third respondents of their matter to CCMA, for resolution, a body that did not have jurisdiction over such a matter because there was no employment relationship involved but only that of independent contracting. The efficacy of ADR in all the three countries, Botswana, South Africa and Zimbabwe under review, is constrained by one demerit or the other though studies that investigate the phenomenon in a compresence fashion are negligible. However, the studies referred above in a way point to the issues that are of paramount importance to this study. The identification of factors[146] such as overall cost, fees, savings, satisfaction, pendency time, and neutral adjustment that are required to measure ADR effectiveness; reduction of the private or social cost of disputing[147] as

[139] Bhorat *et al.* (2007) 25
[140] Kupe-Kalonda (2001) 170
[141] Khabo (2008) 9
[142] Bhorat *et al.* (2007) 25
[143] Mahomed *et al*. (1997) 17 See also (Bendeman (2007) 142)
[144] Kalula, Ordor and Fenwick *Labour Law Reforms that Support Decent Work: The Case of Southern Africa* (2008) 13 See also Khabo (2008) 40 and Kupe-Kalonda (2001) 170
[145] Linda Erasmus Properties v Lucky Mhlongo, the CCMA and Janine Beytell, J 1604/04, See also Building Bargaining Council (Southern and Eastern Cape) vs Melmons Cabinets CC & Another (2001) 22 ILJ 120 (LC)
[146] Shin, Discussion on the Models of ADR (2011) 4
[147] Bernstein (1993) 2169

critical issues in ADR effectiveness; the critical importance of reaching efficiency targets[148] in administering ADR processes; overcoming resource constraints and poor resolution of disputes[149] as some of the issues that affect efficacy of ADR. The importance of independence and fairness of ADR processes was highlighted as critical to Botswana ADR. This could be achieved when the heavy-handedness of the government is curtailed and an independent ADR body is established to foster a tripartite relationship between the employee, employer and the state, rather than the present situation where the government tends to be the complainant, referee and decision maker in all disputes. This inadequacy is also obtainable in Zimbabwe where the government is seized with the role of administering ADR and subjecting the discipline into the usual bureaucratic bottlenecks, resource constraints and abuse of the system for personal and financial gain by officers in charge of ADR rendering it inefficient.

This view contends that ADR has not provided the effective resolution of labour disputes in these countries, Botswana, South Africa and Zimbabwe, for many reasons that this study is designed to unearth, one being their bias towards traditional adjudication. The efficacious nature that ADR is touted to be in developed countries[150] does not enjoy the same accolades in Botswana and Zimbabwe. Furthermore, there is still limited research on why this is so. Mahomed[151] is of the considered view that '...ADR-techniques supplementing formal justice systems at different levels work to provide South Africans with an opportunity to establish an acceptable justice system that will be swift and effective [are] required.' (Emphasis mine). This is in tandem with Kupe-Kalonda[152] and Madhuku[153] in Botswana and Zimbabwe respectively. The views[154] sees ADR as only a supplementary dispute resolution system to the traditional court litigation system. This however does not address whether it is an efficacious 'supplementary system' given the challenges such as inefficiency and costly court litigation is already saddled with. If for example disputes requiring determination of

[148] Bernstein (1993) 2169
[149] Bhorat *et al.* (2007) 25
[150] Shin (2011) 4, See also McGuinness, Rickard-Clarke, McAuley, Shanley & O 'Donnell *Alternative Dispute Resolution: Consultation Paper* (2008) 119
[151]Mahomed *et al*. (1997)
[152] Kupe-Kalonda (2001) 1
[153] Madhuku (2012) 32
[154] Mahomed *et al*. (1997) 17, Kupe-Kalonda (2001) 1 and Madhuku (2012) 32

whether an employment relationship does exist between disputants as the Linda matter[155] in South Africa discussed above and Pako case in Botswana[156] come before the so called 'needed supplementary ADR system' takes its course, will efficacious outcomes be guaranteed? It would appear to this study that ADR is saddled with jurisdictional challenges rendering its efficacy challenged. It is for this purpose that this study is designed to fill the knowledge gap within the context of Botswana, South Africa and Zimbabwe by assessing the status or efficacy (effectiveness and efficiency) of ADR and the major factors that are responsible for it.

Alternative Dispute Resolution has generally not enjoyed a smooth passage in the terrain of academic scrutiny especially in so far as its efficaciousness in resolving labour disputes is concerned giving regard to arguments such as those by Bernstein[157] and Bhorat *et al*[158] who cast aspersions on its potential for achieving desired outcomes.

This study attempted to escape the first challenge of definition by providing a working definition to the subject ADR as ''a buffet of processes of settling disputes outside the courts, consisting of an array of methods such as negotiation, conciliation, mediation, arbitration or a combination thereof, affording disputants an 'accessible, informal, private, voluntary, independent, less combative, relationship building, cheaper and speedy, and more satisfactory resolution of disputes enhancing optimal enforcement of awards and outcomes.''[159] This definition is all encompassing capturing the important benefits, as well advantages to be achieved from the use of ADR apart from its inclusiveness of elements that may aid in finding criteria for measuring its efficacy such as accessibility and enforcement. These are also important for selecting a suitable ADR mechanism.[160] It also helps in creating an atmosphere of addressing ADR efficacy around aspects such as 'accessibility, informality, privacy, voluntariness, independence, less combative, relationship building, cheaper and speedy nature ADR is or should be and more satisfactory resolution of disputes in envisages, factored into the definition.

[155] Linda Erasmus Properties v Lucky Mhlongo, the CCMA and Janine Beytell, J 1604/04
[156] Pako *Joseph v General Projects (Pty) Ltd and Xia Fanning UR 52/12*
[157] McIver and Keilitz (1991) 123
[158] Bhorat *et al.* (2007) 25
[159] Cassim *et al.* (2013) 39. See also Love (2011) 1
[160] Khabo (2008) 40

It is however clearly evident in the preliminary review of literature[161] that the general agreement among scholarly opinion that ADR is a departure from the tendency of seeking resolution of labour disputes through courts or adjudication processes is not in dispute. This is in tandem with the chief advocates of the practice[162] who believe it is a great relief to the traditional court system of resolving labour disputes. What is not clear is whether ADR is efficacious in achieving what it is claimed to be able to secure for disputants in regard to fast resolution of disputes and the cost saving nature it is touted to provide.

This study discusses, in a comprehensive fashion, the efficacy (effectiveness and efficiency) ADR in labour matters, with special focus on SADC countries, let alone, Botswana, South Africa and Zimbabwe. The general thrust which prefaces discussions of ADR saddles the concept which accolades it as being a panacea for the overburdened justice system. It is perceived as the cure for time consuming and costly traditional court litigation in finding resolution for disputes, let alone, labour disputes. Ordinarily, courts are overwhelmed by the unending inflow of civil cases to dispense with hence the need for a mechanism to supplement their efforts. Specifically, court litigation challenges drawn include the fact that:

> "the high cost of court litigation, means that access to justice is denied for the vast majority of the population; the long delays inherent in the court procedures often means that relief comes too late-justice delayed is justice denied; the parties to the dispute suffer a lack of control over the dispute resolution process due to the usual representation by attorneys who may not necessarily share or appreciate their real concerns; the rules of civil procedure (used to address labour disputes) are rigid and cumbersome; the adversarial nature of court proceedings often leads to a breakdown of personal relationships that are [often] valuable to the parties; and the court process is limited to that the legal remedies it provides can often produce a 'win-lose' [or lose win] resolution of a dispute (emphasis mine)"[163]

[161] Khabo (2008) 40
[162] Folberg and Rosenberg (1994) 1488
[163] Wiese (2016) 2

Several studies[164] have confirmed that the use of ADR in selected countries is saddled with challenges mainly to do with inefficient or ineffective manner in which labour disputes have been handled.

This chapter particularly introduces the discussion through a background to the study which has already be treated in the foregoing, the problem statement, aims and objectives of the study, justification and the methodology of the study leading to a conclusion. The problem statement outlines the nature of the problem which this study is grappling with especially that ADR is not proving to be as efficacious (effective or efficient) in Botswana, Zimbabwe and South Africa as previously thought. An interrogation of the causes and remedies may ensue in this study. Considered in this section is the point of departure which outlines the reasons why such a study would be necessary. This chapter provides a detailed description of the research methods used to conduct this study in particular the framework for measuring the efficacy of ADR in labour dispute resolution in Botswana, South Africa and Zimbabwe as a critical comparative study. The methodological framework for measuring the efficacy of ADR as used in this study were adapted from the following prominent scholars: Love,[165] Kerbeshian,[166] Brown[167] and Shin[168] to the extent discussed in this chapter. This is followed by a description of the structure through which the dissertation is conducted leading to a summary of the chapter.

1.1 Problem Statement

Despite ADR processes having received so much attention as a panacea to the inadequacies or inefficiencies of court litigation in labour dispute resolution, ADR is still embroiled in controversy[169] especially relating to the question whether ADR is

[164] Love (2012) 32; Khabo *Collective Bargaining and Dispute Resolution – Is SADC meeting the challenge?* (2008) 40; Kupe-Kalonda *The Industrial Court in Botswana: An Assessment of Its Contribution to Labour Relations, Masters of Law in Labour Law Thesis,* (2001); Mahomed, Olivier, Mokgoro, Nhlapo, Gauntlett, Mojapelo and Seedat *Alternative Dispute Resolution: Commission Report* (1997) 1)
[165] Love (2011) 5
[166] Kerbeshian *"ADR: To be or …?" (1994)* in Woodard (1997) 383
[167] Brown, Cervenak and Fairman *Alternative Dispute Resolution: Practitioners' Guide* (1998) 15
[168] Shin (2011) 13
[169] Woodard *Alternative Dispute Resolution Programs, Are They Working? The Case of Travis County Settlement Week Program: An Applied Research Project* (1997) 9. See Yamamoto *ADR: Where have*

efficacious (effective and efficient) in Botswana, South Africa and Zimbabwe as compared to the traditional court process in labour dispute resolution. The controversy is three pronged.[170] As already shown above, first, ADR faces the problem of meaning and history of its origin. The next question is whether it should be called 'alternative' or 'appropriate dispute resolution.[171] The second challenge is around scope of what indeed constitutes ADR.[172] There are inconclusive debates around whether arbitration should be factored into the scope of ADR given its resemblance with the court system (quasi-judicial nature) especially its notion of forcing decisions on disputants.[173] The debate asserts that arbitration is a quasi-judiciary process that takes on the character of court litigation and should not be seen as ADR, which is purely reconciliatory and affords parties the latitude to decide their own outcome.[174] This element is discussed fully in chapter 2 of this study. Third, there is confusion around the efficaciousness of ADR as a dispute resolution mechanism in general, and in particular whether it should be relied upon as an alternative to court litigation.[175] Labour disputes, just like many other disputes whether personal or commercial, have always been resolved through the courts, which approach has been touted, time consuming, adversarial, combative and costly; hence resort to an alternative, ADR.[176] There is a world of difference between those who support ADR as time saving, effective, cost effective and more satisfying than court litigation[177] and those who disparage it as ineffective and delusional.[178] Should ADR be relied upon as a labour dispute resolution mechanism? If ADR is said to be efficacious, would this suggest the need for a departure from the norm, court litigation, in so far as dispute resolution is concerned? Court litigation has always been the traditional way of resolving disputes, let alone, labour disputes.[179] However, court litigation is considered lengthy, costly and tenuous (time inefficient)

the Critics Gone Essay, Santa Clara Law Review 1055 (1996) 1056 and Shin *Discussion on the Models of ADR* (2011) 2)

[170] Ibid

[171] Mahomed *et al*. (1997) 13. See Brown, Cervenak and Fairman *Alternative Dispute Resolution: Practitioners' Guide* (1998) 10. See also Mnookin *"Alternative Dispute Resolution"* (1998) in Shin (2011) 7)

[172] ICC *Guide to ICC ADR*, *Paris* (2001) 3

[173] Ibid

[174] Ibid

[175] Wiese (2016) 2

[176] Bendeman Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience (2007) 142. See also Shin (2011) 6)

[177] Love (2011) 1 See also Shin (2011) 4;

[178] Shin (2011) 13

[179] Ibid (See Mahomed *et al.* (1997) 17; Bhorat *et al.* (2007) 25)

because of the detailed processes[180] required therein such as the pleading stage,[181] where disputants exchange summons, pleas, notices, discovery of documents,[182] and conduct pre-trial procedures[183] to determine the issues that must be before the court and then final trial.[184] Court litigation may take years before a matter is set down for trial. ADR, on the hand presents a shortened process, often lasting days such as 30 days in the case of South Africa[185] Fourth, and finally, but closely related to the third issue is the general dearth in measurement criteria or framework by which the efficaciousness or otherwise of ADR can be ascertained with finality. The incessant claims that court litigation in labour disputes proffers a more satisfying result than ADR would, is contentious and triggers unending debate.[186] This study discusses both views and seeks to find common ground for the contending parties. Whether ADR can be said, with certainty to be producing efficacious outcomes in labour dispute resolution in Botswana, South Africa and Zimbabwe remains uncertain. In light of the foregoing discussion, it is clear that the present study has to inevitably contend with many challenges' vis a vis definitional, scoping and measurement of efficacy framework issues - before proceeding to provide answers to its main aim which is to ascertain the efficacy of ADR in labour disputes in Botswana, South Africa and Zimbabwe.

1.2 Purpose of the study

The purpose of this study is to investigate in a comprehensive manner, the efficacy of ADR mechanism to ensure the effective and efficient resolution of future labour disputes. Pursuant to that, this study seeks to conduct a comparative assessment of the efficacy of ADR in labour dispute resolution in Botswana, South Africa and Zimbabwe. In doing so the study investigates not only the level of effectiveness and efficiency with which ADR resolves labour disputes in the selected countries but also critically assesses its impact on the need to minimise reliance on courts litigation or adjudication.

[180] Cassim *et al.* (2013) 39
[181] Faris, Hurter, Cassim and Sibanda Civil Procedure, Module 2 Study Guide for CIP301K, (2011) 47
[182] Faris *et al.* (2011) 81
[183] Ibid 72
[184] Ibid 81
[185] Section 191 (1) (b) Act 66 of 1995
[186] Bhorat *et al.* (2007) 51

To achieve this purpose this study must provide answers to the questions below:

1.3 Research Questions of the Study

By focusing on the objectives set out herein, the study hopes to answer the following questions:

- Is ADR efficacious in labour dispute resolution in Botswana, South Africa and Zimbabwe?
- What initiatives have been undertaken to make ADR mechanism efficacious in labour dispute resolution in Botswana, South Africa and Zimbabwe?
- Are there any challenges faced with the use of ADR in labour dispute resolution in Botswana, South Africa and Zimbabwe?
- How effective are the ADR processes in resolving labour disputes in Botswana, South Africa and Zimbabwe?
- What are the similarities and differences between ADR processes in Botswana, South Africa and Zimbabwe?
- What can be done to improve ADR processes in Botswana, South Africa and Zimbabwe?

1.4 The objectives of the study

To provide answers to the above questions, the specific objectives of the study are to:

- Examine the efficacy of ADR in labour dispute resolution in Botswana, South Africa and Zimbabwe
- Assess the initiatives undertaken to make ADR mechanism efficacious in labour dispute resolution in Botswana, South Africa and Zimbabwe
- Examine the challenges faced with ADR use in labour dispute resolution in Botswana, South Africa and Zimbabwe
- Examine the effectiveness of the ADR processes in resolving labour disputes in Botswana, South Africa and Zimbabwe?
- Establish the factors pertinent to the effectiveness of ADR in labour dispute resolution in Botswana, South Africa and Zimbabwe.

- Compare and contrast ADR processes obtaining in Botswana, South Africa and Zimbabwe.
- Make recommendations for future research in ADR in labour dispute matters.

1.5 Point of Departure

Conducting this study is important for three reasons. First, the study will contribute to the stock of available theoretical knowledge in the subject area of ADR. Although ADR has been the subject of many studies in the developed world, the subject remains under researched in the African and SADC context generally and in Botswana, RSA and Zimbabwe in particular. There exist no studies that the researcher is aware of focusing on a comparative analysis of the status of ADR in the three countries testing its efficacy or otherwise in particular. The only study that comes closest to the subject under review was conducted by Madhuku[187] focusing of the status on ADR in Zimbabwe while theoretically comparing its status to other SADC countries, Botswana and South Africa but did not place much emphasis on developments and efficacy of ADR in the comparator countries. Another important study was conducted by Mahomed and others.[188] Though Mahomed *et al*[189] study touches on ADR it does not single out labour disputes as its primary focus of enquiry but generalises its application to other areas such as family and commercial disputes. It sheds light on the subject under review in that it pointed out the need to continually review dispute resolution mechanisms and provide efficient methods to resolve disputes aside adjudication.[190]

Another important study by Bhorat *et al*[191] is touted a breakthrough study as it provided a rather clinical and non-legalistic interpretation of the efficiency and effectiveness of the CCMA since its inception.[192] It relied on "...advanced statistical techniques and models to analyse labour dispute referral trends and investigated variations in efficiency across regions, sectors and types of disputes."[193] The researcher however acknowledged its limitations, one being that it was purely positivist and further it left

[187] Madhuku (2012) 3
[188] Mahomed. *et al*. (1997) 17
[189] Ibid
[190] Mahomed. *et al*. (1997) 17
[191] Bhorat *et al.* (2007) 50
[192] Ibid
[193] Ibid

out legalistic interpretation of ADR processes, a matter that is important to the present study. Many important questions such as what are the major determinants of effectiveness and efficiency of ADR and what these countries are doing to create an efficacious labour dispute mechanism, thus remain unanswered. First, by assessing the status of ADR including the factors that affect it as well as testing the major factors that are responsible effective labour dispute resolution, this study will contribute to the bridging of this knowledge gap.

Second, the study will generate information (knowledge) that could form the basis for policy formulation in the management of ADR processes in Botswana, South Africa and Zimbabwe to expedite effective resolution of labour disputes. Although initiated primarily for explanation rather than policy purposes, the study will contribute significant knowledge that could become quite useful in the formulation and, above all, the effective implementation of future labour dispute resolution policies in the selected countries being studied. The attitudes and behaviours of policy makers are central to the effectiveness and successful operation of any ADR mechanism as they are primarily responsible for whether ADR policies, financial and other resource support are committed to its development and see to its basic implementation.[194] By understanding the best practices that bolster as well as the particular factors that are considered to be important effectively, utilising ADR will be better equipped to tackle the problem of costly and time consuming resolution of labour disputes. According to Bhorat,[195] because CCMA often relied on part-time commissioners who were paid on an hourly basis it was suspected that they deliberately delayed cases to clock more hours. This however was not supported by empirical evidence. The need to determine whether ADR is effective or otherwise and the factors responsible for its efficaciousness requires answers. It is believed that the findings of this study will form the basis for the formulation of better ADR policies and processes in the selected countries by identifying the important factors that have a bearing on its cost and time effectiveness. This is achieved through an analysis, unearthing pertinent issues and reporting on specific literature, studies, reports, court cases and other documents that

[194] Brown *et al.* (1998) 40
[195] Bhorat *et al*. (2007) 51

have handled the subject of ADR in labour disputes in Botswana, South Africa and Zimbabwe.

Third and finally, understanding what makes an effective ADR or rather effective labour dispute resolution is important in itself because the concept has been said to be a key factor in explaining a departure from court-administered resolution of labour disputes. ADR for example has been touted a major development in labour dispute resolution in developed countries, since 1886 in the USA for instance.[196] Research has also shown that mediation and arbitration as ADR constituent elements often produced better satisfying results than combative, cumbersome and competitive adjudication systems.[197]

1.6 Assumptions of the study

This study makes a number of assumptions. Firstly, it is assumed that ADR is an important development in labour dispute resolution in the three countries under investigation. As such ADR will continue to be important and used in resolving labour disputes in Botswana, South Africa and Zimbabwe. Secondly, it is further assumed that everyone involved in a dispute desires the most effective and efficient approach to resolve it with regards to both cost and time. This is why this study would like to find out if it is indeed efficacious to find resort at ADR in resolving labour disputes in Botswana, South Africa and Zimbabwe. Thirdly, to achieve the objectives of this study it is also assumed that the information targeted by the study will provide relevant information on ADR efficacy in labour disputes in Botswana, South Africa and Zimbabwe especially given that it incorporates a selection from myriads of documents on the subject. However, this will be overcome in this study through ensuring that documents such as court cases, reports and public discourse discussion papers that place ADR in its proper perspective and addresses issues of efficacy are critically selected and analysed.

[196] Love (2011) 5
[197] Bernstein (1993) 2259

1.7 Research Methodology

This section discusses the research methodology followed in this study to both collect, analyse and report its findings. This is against the background that ADR appears entrenched in Botswana, South Africa and Zimbabwe.[198] This study predominately relies on document analysis as its main research methodology. This includes case analysis, review of annual reports on performance of administrators of ADR in the respective countries. Information analysed in this study was obtainable from reports from commissions, and databases as well as reported cases on ADR. According to Eugene Bardach[199] 'when conducting policy research, almost all likely sources of information, data, and ideas fall into two general types: documents and people.'

1.8 Document analysis approach

Document analysis is also going to predominantly encompass this study. In this case documents such as cases from court proceedings, ADR proceedings where available, reports and other material that may aid this study will be analyses.[200] Accordingly, Dvora Yanow[201] holds the view that document analysis can be used in observational studies or an interview-based project, in which background information is obtainable prior to the study. Such document analysis may therefore corroborate or review observational and interview data. The net result is that it all provides the researcher with tools to clarify, or challenge what is being told. In the case of ADR, it is important to review the documents, themes and trends that emanate from the same for further clarity to match with standards derived from literate and evidence elsewhere. Lee[202] suggests that "a document is a durable repository for textual, visual and audio representations." According to Saunders *et al.*[203] the forgoing suggestion by Lee[204] illustrates the availability of a wide range of sources of documents and data that this study immensely relies upon to ascertain the efficacy of ADR in labour dispute

[198] Bendeman (2007) 142 (See also Kupe-Kalonda (2001) 1; and Madhuku (2012) 3)
[199] Bardach (2009) 69
[200] Saunders, Lewis and Thornhill *Research Methods for Business Students* (2016) 183
[201] Yanow (2007) 411
[202] Lee *Using documents in organizational research* (2012) 391
[203] Saunders *et al.* (2016) 183
[204] Lee (2012) 391

resolution in Botswana, South Africa and Zimbabwe.[205] Essentially, this study will review court cases in which ADR cases are dealt with. This assists this study to draw out the main issues around such issues as ADR settlements and awards as well as their enforcements, time and cost saving nature of ADR processes. Court cases by the nature tend to interpret the laws as they are applied in practice.

1.9 Methodological framework for measuring the efficacy of ADR

The lack of a methodological framework for measuring the efficacy of ADR frameworks is however acknowledged by several scholars including Love,[206] Kerbeshian,[207] Brown[208] and Shin.[209] Studies that deal with the effectiveness of ADR, especially outside the United States are negligible. For example, according to Bingham,[210] "most scholars and commentators agree that there is insufficient empirical research about the efficacy and success of ADR as compared to traditional court litigation." One study that laid out a sort of framework which can be used to assess if ADR is effectively structured and in operation was conducted by Brown *et al*[211] which factors what are termed as ADR background conditions and ADR program design. This study will be largely reliant on these three points of analysis, namely ADR Background Conditions; ADR program design[212] then finally ADR Measures.[213] These elements, as illustrated in figure 1, were relied upon as the main measures of efficacy and comparison of the status of ADR in Botswana, South Africa and Zimbabwe in this study. They are briefly discussed below in turn.

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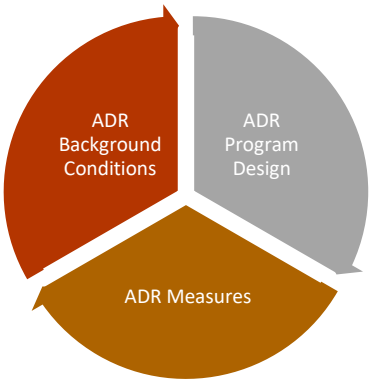
[205] Lee (2012) 391 (Categories of textual documents include:
- Communication between individuals or within groups such as email, letters, social media and blog postings;
- Individual records such as diaries, electronic calendars and notes;
- Organizational sources such as administrative records, agendas and minutes of meetings, agreements, contracts, memos, personnel records, plans, policy statements, press releases, reports and strategy documents;
- Government sources such as publications, reports and national statistics;
- Media sources including printed and online articles and other data.

[206] Love (2011) 5
[207] Kerbeshian *"ADR: To be or …?" (1994)* in Woodard (1997) 383
[208] Brown, Cervenak and Fairman *Alternative Dispute Resolution: Practitioners' Guide* (1998) 15
[209] Shin (2011) 13
[210] Bingham, Nabatchi, Senger and Jackman *"Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes."* (2009) 3
[211] Brown *et al.* (1998) 15
[212] Ibid 40
[213] Kerbeshian (1994) 383

Figure 1 ADR Efficacy Framework



Adapted from Brown *et al*[214] and Kerbeshian[215] and Love[216]

ADR Background Conditions constitute adequate legislative and political support, institutional support, human resource support, financial resource support and parity in the power of disputants[217] on the one hand. The general idea is whether these elements are factored in when ADR is instituted as a dispute resolution mechanism.[218] Some of the main reasons advanced for needing political support for an ADR system are: securing legislative support to establish jurisdiction and authority; obtaining bureaucratic protection from resource cuts; obtaining financial support; building popular acceptance and use and overcoming opposition of vested interests, among others.[219] Aspects such as adequate human resource and financial support will deal with whether or not ADR mechanism is adequately supported by skilled staff and sufficient numbers to handle disputes.[220] Often lack of sufficient staff creates backlogs and delays in resolution of disputes which defeats the very essence of its existence.[221] This factor also addresses issues of power parity in terms of fairness of procedure within ADR system.[222] Typically, informal processes are less able to produce fair outcomes than formal justice systems in cases where there are wide power disparities.[223] Powerful parties such as elites and capitalists retain the ability to

[214] Brown et al. (1998) 15
[215] Kerbeshian (1994) 383
[216] Love (2011) 5
[217] Brown *et al.* (1998) 33
[218] Ibid
[219] Ibid
[220] Brown *et al.* (1998) 33, see also Coetzee and Schreuder (2010) 470
[221] Ibid
[222] Ibid
[223] Ibid

intimidate weaker parties in conciliation or mediation in the result coercing them into accepting unfavourable settlements.[224]

ADR program design[225] considerations on the other hand, **deals with** Planning and preparation and Operations and implementation.[226] It is critical to design the ADR program with consideration to specific steps that ought to be taken to ensure the quality of the procedural components of ADR,[227] the justice to be served in the ADR program,[228] the ADR facilitator, and the screening process of the cases suitable for ADR.[229] An effective program ought to remove traditional obstacles to settlement without substituting new ones.[230] Careful design guarantees that programs and their procedures are not over-formalised or perceived as unfair.[231] Fairness and a degree of informality are necessary to foster settlement.[232] According to Brown *et al.*[233] planning and preparation deals with seeking answers to the following key questions in this regard: What are the needs for dispute resolution in any given country such as Botswana, South Africa and Zimbabwe? What kinds of disputes are going unresolved? Are parts of the population excluded from or underserved by the existing formal structures? Are the costs of the existing system so high that many citizens cannot participate in the use of available ADR processes on the offing? What disputes are considered appropriate for informal resolution?[234] The questions of selection of cases to go through ADR is important. If there is no screening process it may lead to the clogging of the system through frivolity where flimsy cases are brought before the tribunal even those outside its jurisdiction.[235] Some of the major barriers inhibiting disputants may include cost, illiteracy, discriminatory procedures, and perceptions of unfairness, physical inaccessibility, and lack of proximity, or lack of awareness.[236] An

[224] Brown *et al.* (1998) 33, see also Coetzee and Schreuder (2010) 470
[225] Pretorius Dispute Resolution (1993) 6
[226] Brown *et al.* (1998) 40
[227] Biachi *"Alternative Dispute Resolution: Is the Jury Still Out?"* (1988) 175
[228] Brown *et al.* (1998) 40
[229] Stallworth and Malin, *"Workforce Diversity."* (1994) 38
[230] Jennings (1991) 318
[231] Ibid
[232] Ibid
[233] Brown *et al.* (1998) 40
[234] Jennings (1991) 318
[235] Animashaun, Odeku and Nevondwe *Impact and Issues of Alternative Dispute Resolution in South Africa with Emphasis on Workplace Disputes* (2014) 680
[236] Jennings (1991) 318

appropriate program design should address these conditions and lead to development of goals to address them.[237]

Operations and implementation deal with how the ADR programs are executed within the three countries under consideration in this study.[238] This aspect deals with establishment of effective procedures for selection, training[239] and reputation of mediators and arbitrators – who have unquestionable credibility and accepted by the people to administer the processes. Giovannucci and Largent[240] suggest that, at a minimum, … training (for mediators) ought to cover: basic mediation skills; the distinction between various types of alternative dispute resolution; the detection and management of mental illness, drug and alcohol issues and intellectual disabilities; an overview of the specific system; an overview of the roles of each possible mediation participant; and effective mediation techniques to deal with impasse or emotionality (emphasis mine).[241] Second, according to Brown *et al.*[242] finding or creating a sustainable source of financial support is crucial for ADR success because many potentially successful ADR initiatives have been crippled by lack of sustainable financial support.[243] All dispute resolution procedures carry transaction costs the time, money and emotional energy expended in disputing the resources consumed and destroyed and the opportunities lost.[244] The cost of operating an ADR system can vary widely. For example, one of the ADR systems considered to be effectively administered is the Mediation Board in Sri Lanka owing to the fact that it operates inexpensively with volunteer mediators.[245] However, the increasing burden on these mediators call into question the long term viability and sustainability of the volunteer system.[246] It is readable from the above that without sufficient funds to administer ADR will negatively affect its effectiveness and render it even more expensive for the common man. This provides insight into ways of enhancing efficacy as far as cost

[237] Jennings (1991) 318
[238] Brown *et al.* (1998) 40
[239] Giovannucci and Largent *A guide to effective child protection mediation: Lessons from 25 years of practice.* (2009) 38
[240] Ibid
[241] Brown *et al.* (1998) 40
[242] Ibid
[243] Ibid
[244] Pretorius (1993) 8
[245] Brown *et al.* (1998) 44
[246] Ibid

element is considered in Botswana, South Africa and Zimbabwe's ADR processes. This study seeks to consider if sufficient funding is a consideration, if at all, in determining the efficiency of ADR in Botswana, South Africa and Zimbabwe, and if it is so to analyse how that is the case and how the authorities therein are handling this aspect. Third, creating an effective outreach and education program to reach users.[247] Outreach and education efforts require innovative techniques, particularly to reach populations with low levels of literacy.[248] Fourth, this calls for the need to create centres near the disadvantaged communities to ensure that they can access ADR services.[249] This study seeks to understand the role of creating such outreach programmes in ensuring ADR is effective and if so how this is obtaining in Botswana, South Africa and Zimbabwe's labour dispute resolution systems.

ADR Measures which constitute *client satisfaction, settlement and enforcement, cost* and *efficiency*.[250] The main goals identified are: minimise costs, resolve quickly, maintain privacy, maintain relationships, involve constituencies, link issues, get neutral opinion, and set precedent.[251] When considering these goals of ADR one would see that Sander and Goldberg's first two measures (minimise costs and resolve quickly)[252] are in synch with Kerbeshian's two measures *efficiency* and *cost*[253] making them important measures in considerations of the efficacy of ADR and widely accepted among scholars.[254] The elements of such as *client satisfaction, settlement and enforcement, efficiency* and *cost*[255] require attention as measures to the degree that they are valued by ADR users' particular disputants.[256]

These measures of ADR Background Conditions; ADR program design[257] then finally ADR Measures[258] will be used as the basis of comparison of the status of ADR in Botswana, South Africa and Zimbabwe in this study leading to a conclusion.

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[247] Brown *et al.* (1998) 44
[248] Ibid 45
[249] Ibid
[250] Kerbeshian (1994) 383
[251] Sander and Goldberg (1994) 49
[252] Ibid
[253] Kerbeshian (1994) 383
[254] Brown *et al.* (1998) 13, Shin (2011) 13 and Law Reform Commission (2008) 117
[255] Kerbeshian (1994) 383
[256] Woodard (1997) 29
[257] Brown *et al.* (1998) 40
[258] Kerbeshian (1994) 383

1.10 Ethical considerations

This study is guided by fundamental ethical considerations that relate to responsible research in human and social sciences. Ethical considerations in research comprise the concerns, dilemmas, and conflicts over the proper way to conduct research.[259] According to Neuman and others, ethical considerations help to define what is or is not legitimate to do, or what "moral" research procedure involves.[260] These views are consistent with those expressed in the Collins Concise dictionary which defines ethical practices as being in accordance with principles of conduct that are considered correct especially those of a given profession or group.[261] The main ethical considerations that will be critical to this study is that it will observe referencing requirements and avoid plagiarism.[262] Plagiarism is described as stealing information from another source and passing it off as your own.[263] In order to successfully conduct this study an ethical clearance was requested and granted from the College of Law's ethical clearance committee.

1.11 Summary

This chapter discussed the background to the problem under consideration in this study. In this chapter, the study found that the concept of ADR, like any other concept, is faced with several challenges including challenges of definition, scope as well as its history. Chapter one introduces the concept around which the study is conducted. This is the chapter that discussed the concept of ADR and the problem statement which prompted this study to be conducted. It also handled the research questions, research methodology, chapters outline, aims and objectives of this study. This study is guided by scientific research principles and conventions in order to produce a sound, objective and valid result. As such, the research philosophy and strategy employed in this study are discussed in this chapter. This chapter also considered how the validity and reliability of findings will be realised as well as the ethical considerations of this study, the assumptions, limitations and delimitations to be observed.

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[259] Neuman *et al.* (2007) 67
[260] Ibid Saunders *et al.* (2016) 110
[261] Neuman *et al.* (2007) 67
[262] Saunders *et al.* (2016) 110
[263] Ibid

Many studies have been conducted to ascertain the cost effectiveness of ADR especially that it reduces the cost of dispute resolution relative to court litigation.[264] Estimates of cost savings vary across different studies depending on the ADR type under review. Very few studies of this nature have been conducted to ascertain the efficacy of ADR in labour dispute resolution, specifically focusing on a critical comparative analysis of Botswana, South Africa and Zimbabwe. This study was conducted to fill that gap. This study also noted that the three countries under consideration are members of the International Labour Organisation (ILO) and have ratified its conventions to implement effective labour dispute resolution regime in respective countries. Remaining to be ascertained is whether such ratification of ILO conventions has contributed to ADR efficacy in labour dispute resolution in the countries.

1.12 Chapters outline of the Dissertation

In its entirety, this study is divided into seven chapters. Chapter 1, as already observed, provides for a general introduction, outlines and research problem, the problem statement, the aims, rationale and scope of the study. It also deals with the methodology, highlighting the main research questions, research objectives and methodological framework adapted from the viewpoints of prominent scholars like Love,[265] Kerbeshian,[266] Brown[267] and Shin.[268] used to tackle the study, before delving into the outline.

Chapter 2 deals with the theoretical background. It defines key concepts used in the study and their relation to the subject matter. These concepts include ADR, disputes, disputing process, negotiation, conciliation, mediation and arbitration. The chapter also considers the theoretical underpin ADR in labour disputes and the measures that are important for analysing the efficacy of ADR.

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[265] Love (2011) 5
[266] Kerbeshian *et al.* (1997) 383
[267] Brown *et al.* (1998) 15
[268] Shin (2011) 13

Chapter 3 deals with ADR in Botswana. It traces the history of dispute resolution in Botswana under the colonial legal order to the present, after a brief outline of the Botswana context. The chapter then conducts an analysis of case law to determine ADR efficacy in labour disputes in Botswana.

Chapter 4 deals with ADR in South Africa. It traces the history of dispute resolution in South Africa under the colonial and apartheid legal order to the present, after a brief outline of the South Africa context. The chapter then conducts an analysis of case law to determine ADR efficacy in labour disputes in South Africa.

Chapter 5 deals with ADR in Zimbabwe. It traces the history of dispute resolution in Zimbabwe under the colonial legal order to the present, after a brief outline of the Zimbabwe context. The chapter then conducts an analysis of case law to determine ADR efficacy in labour disputes in Zimbabwe.

Chapter 6 provide for a critical comparative analysis of ADR in Botswana, South Africa and Zimbabwe. It highlights the points of difference and similarity in the manner ADR processes are administered, leading to the review of ADR efficacy in labour dispute resolution.

Chapter 7 concludes the study. It discusses the challenges ADR processes are faced with in Botswana, South Africa and Zimbabwe as well as the conclusions and recommendations and recommendations for further research on ADR.

CHAPTER 2

THEORETICAL BACKGROUND

2 INTRODUCTION

While the previous chapter provided the context, background and problem of this study, the present chapter deals with the theoretical background to this study. It defines key concepts used in the study and their relation to the subject matter. The concepts include ADR, meaning and nature of disputes, disputing process, negotiation, conciliation, mediation and arbitration, challenges and measures of ADR efficacy. These concepts are interrelated as will be seen throughout the chapter. The chapter also considers the theoretical bedrock underpinning ADR in labour disputes and the measures that are important for analysing the efficacy of ADR.

2.1 The challenge of ADR in labour dispute resolution

It is difficult to define ADR given the lack of a universally accepted definition thereof. The challenge of definition cannot be ignored as measuring efficacy of ADR depends on it. It is important to this study to consider the definition of ADR as a precursor to evaluations of effectiveness and efficiency thereof. This study considered the definition by Zack[269] in which ADR is defined as "… a broader spectrum of processes, other than litigation, used to resolve disputes." The use of the axiom 'out of court settlement'[270] often resonates with the idea of ADR as well.

Failure to reach a universal definition of ADR led this study to adopt a working definition, thus, for the purpose of this study, ADR is ''a buffet of processes of settling disputes outside the courts, consisting of an array of methods such as negotiation, conciliation, mediation, arbitration or a combination thereof, affording disputants an 'accessible, informal, private, voluntary, independent, less combative, relationship building, cheaper and speedy, and more satisfactory resolution of disputes enhancing

[269] Zack *Can Alternative Dispute Resolution help resolve employment disputes? International Labour Review* (1997) 1
[270] Love (2011) 2

optimal enforcement of awards and outcomes.'[271] This definition was adopted because of its all-encompassing nature in which it captures the fact that there is no single ADR approach and then the main attributes which make ADR unique for example accessibility and privacy, among other things. The definition also captures the elements of ADR efficacy such as enforcement. Attempting to define ADR is constrained by other factors such as what ADR really stands for and what constitutes ADR. Alternative Dispute Resolution has been variously accorded myriads of nomenclature including 'ADR'[272] Assisted Dispute Resolution'; and 'Amicable Dispute Resolution.'[273] Recent developments have proffered 'Online Dispute Resolution';[274] 'External Dispute Resolution' and 'Internal Dispute Resolution' as our dispute resolution approaches adding to the ADR confusion.[275] In an attempt[276] to arrest the confusion between 'Appropriate' as opposed to 'Alternative' the Oklahoma Bar Association in the USA, without necessarily using 'Appropriate Dispute Resolution' but rather 'Appropriate alone proffered[277] the most plausible explanation that "alternative" dispute resolution would pertain to any approach that excludes the court process while "Appropriate" dispute resolution factors any responsive option for conflict resolution relevant to each given issue inclusive of the courts. According to Steadman "Alternative dispute resolution' (ADR) is a term that first coined to describe an initiative by litigants, and their representatives, to use innovative ways of resolving disputes other than the typical adversarial process of litigation."[278] The general philosophy towards dispute resolution that ILO shares is in tandem with the UK formulations of it, especially couched around the term 'proportionate dispute resolution herein ("PDR").'[279] PDR is generally a government strategy developed to enhance access to information and a diversity of services needed by people to apprehend their rights and responsibilities, avoid legal problems where possible, and, where inevitable, to resolve their disputes effectively and proportionately. This can be done through:

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[271] Cassim *et al.* (2013) 39, See also Love (2011) 1
[272] Prathamesh http://www.odr.info/unece2003. Date of use: 30 October 2017.
[273] Colombo *ADR in Italy: European Inspiration and National Problems* (2012) 71
[274] Prathamesh http://www.odr.info/unece2003. Date of use: 30 October 2017.
[275] ASIC *Regulatory Guide 139* (2013) 1
[276] Oklahoma Bar Association
http://www.okbar.org/public/brochures/methodsforresolvingconflictsanddisputes.aspx Date of use: 26th October 2017
[277] Ibid
[278] Steadman (2011) 13
[279] Ibid

- increasing advice and assistance to help people resolve their disputes earlier and more effectively;
- increasing the opportunities for people involved in court cases to settle their disputes out of court; and
- reducing delays in resolving those disputes that need to be decided by the courts.[280]

Generally, the above framework to a larger extent is already being applied in South Africa through the CCMA body which was powered by ILO at its inception through training and capacitating its first cohort of workers and commissioners.[281] This would have been ideal for Botswana and Zimbabwe had the government therein set up a structure like CCMA in their respective countries. It would enhance efficaciously dispute resolution.

This study however, rather elects the use of Alternative Dispute Resolution as it gives expression to the above working definition. However, the challenges are still far from over as there is no agreement as to what constitutes ADR given that negotiation, mediation, conciliation are considered consensual approaches reminiscent with its ethos to the exclusion of arbitration.[282] Arbitration is considered to be quasi-judicial especially that the third party decides on the final outcome of a dispute. This disempowers the parties who cannot come to their own decision which is the case with negotiation, mediation, conciliation in which a third party only facilitates dialogue and parties reach their own settlement.[283] The next section considers three important terms, grievances, conflicts and disputes contending that they are intricately related to each other.

2.2 Grievances, conflicts, disputes and dispute resolution

Understanding the meaning, nature of grievance, conflict and dispute is critical in an enquiry into the issues of dispute resolution. These terms are usually used

[280] DCA www.dca.gov.uk/civil/adr/index.htm Date of use: 25 June 2019 See also Steadman (2011) 13
[281] Steadman (2011) 43
[282] ICC *Guide to ICC ADR*, *Paris* (2001) 3
[283] Ibid

interchangeably.[284] This study seeks to address the various challenges around these terms as they are important for the aim of this study, especially dispute resolution under the auspices of ADR.

2.2.1 Grievances

Generally, the thesaurus dictionary defines a grievance through the use of a number of words such as a complaint, protest, grumble, injunctive, wrong or ill-treatment among others. It is seen as a precursor to a conflict or rather a pre-conflict stage.[285] This is a stage where an individual or party believes that, s/he or its right(s) have been infringed or the aggrieved party has been allegedly wronged or injury has been caused it. Such perception may be legitimate and real or just merely imagined. The perception of injury or prejudice is what is termed a grievance which is a precursor to a conflict. Disputes and conflict emerge from grievance.[286] Miller and Sarat[287] argues that 'it is consequent upon us to look at the incidence of grievance to establish the baseline potential for disputes.'[288] Resultantly, such a line of reasoning presents a conceptual problem in that there is a thin line between concepts grievance, conflict and dispute. This is so because grievance presupposes a composition of concrete events or circumstances which are relatively objective, but they are also composed of subjective perceptions, definitions and beliefs that an event or circumstance is unwarranted or inappropriate.[289] By the same rendering, this study looks at labour disputes per se. What may aggrieve one worker and the other may shrug it off as insignificant. Miller and Sarat[290] warns that 'care ought to be taken to ward off the confusion that often arises between the expressed rate of grievances flowing from their survey and the degree of injury which may be said to have been suffered.' It is at the instance of such realisation that the individual or party elects to either escalate the grievance into a confrontation or otherwise (e.g. walk away (avoidance)).[291]

[284] Patelia and Chicktay Mediation, Negotiation and Arbitration (2014) 7
[285] Nader and Todd (1978) 212
[286] Miller & Sarat *Grievances, Claims and Disputes: Assessing the Adversary Culture* (1981) 55
[287] Ibid
[288] Ibid
[289] Ibid, See also Lippman, *Law and society* (2015) 213
[290] Miller & Sarat (1981) 55
[291] Ibid

The evolutionary steps in the formation of disputes are in the following order starting with (1) conflict, moving to (2) power, then (3) transformation, (4) grievances and then (5) disputes.[292] This study tends to favour the former rather than the latter. The understanding of the progression of conflict from grievance and then to a dispute stage is also corroborated by Bosch[293] who holds the view that 'the root cause of a dispute is the underlying conflict between the parties.[294] The conflict and conflict stage is discussed next.

2.2.2 Conflicts

There is no general agreement as to a universal definition of conflict as there are many definitions as those[295] seeking to define it. According to Bosch[296] "conflict exists 'where two or more parties with perceived or real differences over values or goals (often as an inherent consequence of structural differences in society) engage each other either over scarce resources, or control over resources. Such engagement in the workplace is sometimes referred to as a power struggle." This definition of conflict touches upon important issues both that conflict is not always a concrete hegemon. It can be subjective given the element of perception that a conflict actually exists and underneath it may then emerge that it does not while in certain respects it may actually be real and existing over concrete issues.[297] This definition however tends to be skewed towards resources and control over resources as the only engagement from which conflicts derive. The aspect of power struggle however borrows from Marx's[298] conception of class struggle over control of human behavior by masters over the servants whereat resources get to be used as tools to control the latter. In that light one group (capitalists) seemed to gain an advantage, especially capital or the employer, it would of necessity use it to dominate and oppress the other group (workers) thereby enhancing its own position. Wiese provides a short definition, which states the following: "conflict is an inherent part of human relationships. A conflict

[292] Miller & Sarat (1981) 55
[293] Bosch *et al.* (2004) 2
[294] Ibid
[295] Bosch *et al.* (2004) 2; Wiese (2016) 3; Pretorius (1993) 12 and Patelia and Chicktay (2014) 6
[296] Bosch *et al.* (2004) 2
[297] Ibid
[298] Marx and Engels (1969) 14

arises when parties perceive a divergence in their needs and interests."[299] This definition is favourable to this study in that besides being concise it acknowledges that human society has divergent needs and interests and when those needs and interests are deprived or frustrated, conflicting responses may arise. Another plausible way to look at conflict was put forward by Puttman and Poole[300] who defined conflict as "the interaction of interdependent people who perceive opposition of goals, aims, and values and who see the other party as potentially interfering with the realisation of these goals." The definition highlights three general characteristics of conflict, namely: incompatible goals, interdependence and interaction between the parties as prerequisites of a conflict situation between the parties. These are an intricate part of a conflict situation in that it is never isolated from interaction and an interdependent relationship of some sort especially in labour disputes and somehow involves goals, whether they are met or otherwise. This study adopts a working definition of conflict after review of the above highlighted definitions. Accordingly, a "conflict exists when one party has a need dependent on another with whom they interact and share an interdependent relationship and that need is unmet for some reason or the other giving rise to a claim or battle over incompatibility of goals." This definition is favourable to this study in that it makes use of unmet needs and goals, acknowledging that they are as diverse as conflict situations. Further, this definition brings in the aspect of the existence of an interdependent relationship between the parties in conflict, occasioned by a contract of employment between employer and employee in the case of labour disputes.

Conflicts can exist in a labour relationship where subordinates feel superiors have not distributed resources fairly. From another angle, value conflicts pertain to differing ideologies; religious beliefs; cultural norms and ethnicity such as those between Muslims and Hindus in Pakistan and India; Muslims and Jews in the middle east, Zulus and Xosas in South Africa, the Shonas and Ndebeles in Zimbabwe and the Ngwato and Kalangas in Botswana, Tamis and Sinhalese in Sri Lanka and competing nationalist groups in Eastern Europe to mention a few.[301]

[299] Wiese (2016) 3
[300] Putman and Poole (1987 (cited in Miller Organisational communication approaches and processes (2012) 162
[301] Pretorius (1993) 13

The conflict stage is regarded as the second stage after a grievance has been experienced.[302] The party which feels aggrieved or wronged (from the grievance stage) may elect to confront the party that offended it at which stage it does communicate its feelings of injustice or perceptions thereof.[303] This study however favours the view[304] that argues that disputes start as grievances that escalate to conflicts and then become disputes (unresolved conflicts). The view has gained more support than the one which suggests that grievances result from conflict. However, once conflict is realised what is left is to have it resolved within the organisation. When it failes to be resolved, it degenerates into a dispute, roping in an independent third party to aid in resolving it. This is the subject of the next sub-section.

It is discernible from the foregoing discussion and views that once an aggrieved party lays a claim, a conflict is declared and requires resolution or relief. This is that stage when an attempt is made by both parties to settle conflicts by reaching compromise through negotiation within the confines of the firm before seeking outside influence or before conflicts become disputes.[305] This is the approach termed internal conflict management where grievance procedures and conflict management systems developed within the organisations are used to resolve grievances and conflicts between the employer (management) and employees (unions). This is the approach that advocates for a systems approach to conflict management which fosters more of what Czech Republic[306] and Romania[307] call 'amicable dispute resolution' aimed at relationship preservation between disputants. Internal dispute resolution as such presupposes that organisations should depart from *ad hoc* approach by which matters are resolved on a case by case basis towards one by which focus is rather placed on a systematic integration of conflict management approaches into its day to day business practices.[308] The view was motivated by Rowe[309] who conceived and tendered what became known as an "integrated conflict management system" as being part of the leading-edge-developments in dispute settlement and taking center

[302] Nader and Todd (1978) 212
[303] Ibid
[304] Nader and Todd (1978) 212; Miller & Sarat (1981) 55; Lynch (2003) 99 and Lippman, *Law and society* (2015) 213
[305] Bendeman (2007) 143
[306] REDICT (2013) 3 (See Colombo (2012) 71)
[307] Roşioru (2017) 20
[308] Lynch (2003) 99
[309] Ibid

stage as organisational development strategies.[310] The idea that seems to permeate the thrust of integrated conflict management is preventative management of conflict so that it does not result in dysfunctional disputes within organisations.[311] As such the former traces the sources of disputes and envisage a proactive but strategic approach to anticipate them and formulate approaches to prevent them.[312] Such a view is always going to be at loggerheads with what is termed as the "choice theory" requiring the making of important decisions to be solely guided by the good of their firms based on an objective and definable "big picture." This supposes that organisations would install grievance and conflict management policies and procedures to enable parties to a grievance to attempt resolve them through internal structures and mechanisms within the establishment. As such, management, on behalf of the employer, ought to make decisions that promote the best interest of the firm (big picture and choice theory), even if it means trampling the rights of a worker who is considered unruly or disturbing such bests interests. In that light, the focus proposes a somewhat less likely attitude to negotiate with a party or conduct perceived to be acting without interest on the good of the organisation.[313] Such an approach would tend to be lopsided focusing on the needs of the employers while restricting or constricting those of employees, as Karl Marx's[314] put it, rendering any attempt at reaching a negotiated settlement by the two opposing groups near futile. Understandably, from the foregoing, when conflicts are not resolved internally or at least to the satisfaction of either party they may be escalated to the courts or ADR as the case may be, for resolution, settlement and enforcement.

Courts or ADR as dispute resolution mechanisms, are considered later in this study. By its nature, this study is not focused on conflict management per se but on dispute resolution, the efficacy or otherwise thereof in resolving labour disputes in Botswana, South Africa and Zimbabwe. The fact of the interrelated nature that conflict is with grievances and disputes necessitated the treatise of conflict in this study, though briefly so, but will not be considered further in this study. The next section deals with

[310] Lynch (2003) 99
[311] ibid
[312] Morrill "*The Customs of Conflict Management among Corporate Executives"* (1991) 872
[313] Ibid
[314] Salamon *Industrial Relations, Theory and Practice* (2000) 10

disputes, paying special attention to the meaning, causes, nature and resolution of disputes.

2.2.3 Disputes

There is no straightforward and universally endorsed definition of the concept dispute just as the challenge already been seen with ADR above. This is so because there are as many definitions as those that seek to define it.[315] This makes dispute a complex concept to define. Generally, according to Thesaurus dictionary of English language the term dispute refers to 'any argument, disagreement, quarrel, difference of opinion, heated discussion, clash, or raw between two or more persons about matters of interest between them'. The etymology[316] of the term dispute is traceable to 1300 century from the Old French term *disputer* which is also traceable to the 12th century meaning to 'dispute, fight over, contend for, discuss.' It is also attributable to the Latin term *disputare* which means to "weigh, examine, discuss, argue, and explain."[317] The term *disputare* is derived from to words *"dis"* and *'putare'* whereat *dis* means "separately"; *putare* means "to count, consider," which originally meant "to prune" or "to cut, strike, stamp"). When used in Vulgate the sense "to argue or contend with words or to stand out.[318] Other related terms used alongside dispute are 'disputable; disputed and disputing.' The most concise definition[319] of a dispute, defines it as 'a disagreement between two or more individuals or groups.'[320] These definitions while shedding light on the subject but do so generally without contextualising a dispute at the workplace.

A more precise definition categorised as legal disputes involves "conflicting interests in which case one person usually has something the other person wants and both parties make claims of entitlement. Both claims as a rule cannot be satisfied and as a

[315] Lippman *Law and society* (2015) 212 (See Zack (1997) 1 and Nader and Todd (1978) 14)
[316] Etymology Online Dictionary https://www.etymonline.com/word/dispute. Date of use: 26th October 2017
[317] Ibid
[318] Ibid
[319] Lippman (2015) 212
[320] Etymology Online Dictionary https://www.etymonline.com/word/dispute. Date of use: 26th October 2017

result there is a 'true conflict.' [321] According to Wiese[322] a conflict arises when parties perceive a divergence in their needs and interests.

However, the forgoing does not seem to resolve the quagmire that usually collects around the lack of clarity of the difference between a dispute and a grievance on one hand and conflict on the other.[323] Two studies that attempted at resolving this challenge were conducted in 1978[324] and 1981,[325] respectively. Miller and Sarat[326] tendered the view that 'a dispute begins as a grievance'. In this case 'a grievance proceeds from an aggrieved party's belief that s/he (or a group or organisation) is entitled to recourse which may have someone grant or deny.' It can be gleaned in this rendering of a dispute that it escalates to float as a dispute but on its bottom, it is founded on a grievance. However, Nader and Todd[327] had earlier perceived 'conflict' as the missing piece between a grievance and dispute, as discussed below. This study tends to see a dispute as the tipping point of a conflict and grievance in which a third party is roped in because the two parties failed to resolve their differences amicably while they were still grievances and conflicts. This is the rendering of a dispute in tandem with Miller and Sarat's[328] conceptions of it. It underscores the fact that grievances and conflicts happen within an organisation and could be resolved through existing policies and procedures, if any, and in the process avoiding the hanging of an organisation's dirty linen[329] in public which is essentially what disputes and dispute resolution does through roping in an outside third party. The approach sees grievance and conflict as those ADR levels that are controlled by the parties within the organisation while at the dispute level a third party is roped in because the internal systems within the organisation have supposedly failed to achieve settlement. It can thus be concluded that a dispute is a manifestation of an unresolved grievance and conflict which requires the involvement of a third party to reach resolution. Before discussing the resolution of disputes, it is important for this study to consider the types and nature of industrial disputes,

[321] Lempert & Sanders *An invitation to Law and social science* (1986) 137
[322] Wiese (2012) 3
[323] Wiese (2012) 3
[324] Nader & Todd *The Disputing Process: Law in Ten Societies* (1978) 14
[325] Miller & Sarat *Grievances, Claims and Disputes: Assessing the Adversary Culture* (1981) 52
[326] Ibid
[327] Nader & Todd (1978) 14
[328] Ibid
[329] Dirty linen simply means an organization exposing its internal inadequacies to third parties through lack of internal systems of resolving grievances and conflicts.

considering disputes of rights, disputes of interests, individual and collective disputes, and genuine disputes.

2.2.3.1 Types and Causes of industrial disputes

Essentially five types of disputes have been identified, namely, (1) dispute of right[330] and (2) dispute of interest,[331] (3) individual, (4) collective disputes[332] and genuine disputes. Lotter and Mosime[333] warn that the distinction drawn between what is termed 'dispute of right' and 'dispute of interest' is 'somewhat controversial' particularly in so far as a differentiating line is inscribed between them.[334] Dispute of right[335] entails a dispute that arises when a party to an employment contract is attempting to enforce rights enunciated by a contract of employment or conditions of employment.[336] A dispute of right will therefore arise from (1) a contract of employment, (2) legitimate expectation, (3) recognised agreement, (4) negotiated settlement, (5) statutory provision and (6) any other reasonable ground that may be relied upon.[337] On the other hand, a dispute of interest is an attempt by a party to create and enforce new rights that do not yet exist. Individual disputes arise when individual employees attempt to negotiate for better conditions of employment either in the form of dispute of right or dispute of interest.[338] Collective disputes on the other hand are disputes that arise when a collective such as a union fights for the rights of its members to have better conditions of employment either in the form of dispute of interest or dispute of right.[339]

In *Trans-Caledon Tunnel Authority v CCMA & others*[340] matter, the court provided for a clear distinction between disputes of right and dispute of interest. The learned Judge specifically proffered that 'disputes of interest' claims are limited to situations where

[330] Dingake *Individual Labour Law in Botswana* (2008) 119
[331] Ibid
[332] Steadman Handbook on Alternative Labour Dispute Resolution (2011) 13
[333] Lotter and Mosime *Arbitration at work* (1993) 3
[334] Ibid
[335] Dingake *Individual Labour Law in Botswana* (2008) 119
[336] S 2, Act 15 of 2003 [Chapter 48:02]
[337] Dingake (2008) 119
[338] Roşioru *Labour dispute mediation in Romania: an alternative way?* (2017) 17, See Law No. 62 of 2011, Romanian Labour Code
[339] Roşioru (2017) 17
[340] Paragraph 152, JR 3009/11

employees are intent at establishing a new right or benefit not presently enjoyed.[341] In the result, the attempted use of unfair labour practice provisions to pursue such ends as occasion to assert an entitlement to new benefits, new forms of remuneration or new policies not previously provided by the employer will not be tenable. The court further ordered that where a claim about the unfair conduct by an employer is made in relation to the existing employment structure or conditions of employment, existing policies or past practice, it could be referred to the tribunal CCMA as an unfair labour practice relating to existing benefits hence qualifying as a dispute of right.[342] Another view of disputes is proffered by Benjamin and Gruen[343] who conceived the concept by the use of the phrase genuine disputes. Benjamin and Gruen[344] identified four main disputes which they term "*genuine disputes*", namely: unfair dismissal disputes, unfair labour practice disputes: mutual interest and severance pay. This study seeks to ascertain if the ADR disputing process produces efficacious outcomes – time saving, cost saving, client satisfaction, fast settlement and enforcement. This is the subject of the next section.

2.3 Alternative Depute Resolution

This study has already noted the challenges around ADR, especially challenges of definition, scope, framework for measuring the efficacy thereof. The study for instance holds the view that arbitration ought not to be incorporated into the scope of ADR given that it is a quasi-judiciary process that does not afford the parties control over the outcome. However, for purposes of this study arbitration will be analysed alongside other approaches given their usage as such in the countries under review. This study analyses dispute resolution around two main perspectives, namely, consensual driven approaches and command approaches if arbitration is to be considered as an ADR process with respect to the latter. As noted in chapter 1 and earlier in this chapter, ADR is any attempt to resolve disputes without resort at court litigation. In Wiese's[345] words ADR are "all forms of dispute resolution other than the litigation or adjudication through the courts." The goals of ADR are essentially "relieving court congestion and

[341] Paragraph 152, JR 3009/11
[342] Ibid
[343] Benjamin and Gruen (2006) 10
[344] Ibid
[345] Wiese (2016) 1

reducing undue cost and delay; enhancing community involvement in the dispute resolution process; facilitating access to justice and providing more effective dispute resolution.[346] Several ILO Conventions and Recommendations deal with dispute prevention and dispute resolution. The main principles set out in these instruments are as follows:

- As directed by Convention No. 154 concerning the Promotion of Collective Bargaining (1981)[347] bodies and procedures for the prevention and settlement of labour disputes should be designed to also promote collective bargaining;
- In terms of Recommendation No. 163 concerning the Promotion of Collective Bargaining (1981),[348] procedures for the settlement of labour disputes should assist the parties to find a solution to the dispute themselves.
- As directed by Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (1978),[349] disputes in the public sector should be settled through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration.

It is perceptible from the foregoing that the ILO is interested in dispute resolution should place more focus on dispute prevention and if disputes arises the first port of call is to attempting resolving them through ADR processes especially the Promotion of Collective Bargaining (1981).[350] According to the ILO it is incumbent upon member states to take initiative to design their own dispute resolution systems as directed by the following general imperatives:[351]

- Recommendation No. 92 concerning Voluntary Conciliation and Arbitration (1951),[352] governments should make available voluntary conciliation machinery,

[346] Goldberg, Green, and Saunder, *Dispute Resolution* (1985) 4
[347] Article 5, paragraph 2(e), Convention No. 154 concerning the Promotion of Collective Bargaining (1981)
[348] Paragraph 8; Convention No. 154 concerning the Promotion of Collective Bargaining (1981)
[349] Article 8, Procedures for Determining Conditions of Employment in the Public Service (1978)
[350] Article 5, paragraph 2(e), Convention No. 154 concerning the Promotion of Collective Bargaining (1981)
[351] Steadman (2011) 16
[352] Paragraphs 1 and 3, Recommendation No. 92, Voluntary Conciliation and Arbitration (1951)

which is free of charge and expeditious, to assist in the prevention and settlement of industrial disputes.

- Recommendation No. 92 concerning Voluntary Conciliation and Arbitration (1951),[353] the parties to disputes should be encouraged to abstain from strikes and lockouts while conciliation or arbitration is in progress;
- Recommendation No. 92 concerning Voluntary Conciliation and Arbitration (1951, agreements reached during or as a result of conciliation should be drawn up in writing and accorded the same status as agreements concluded in the usual manner.

It is as a result of the foregoing that, in practice many countries which employ ILO recommended dispute settlement approaches favour conciliation/mediation (which may or may not be differentiated), arbitration; and adjudication.[354] More or less these are the ADR dispute settlement mechanisms used in the three countries[355] under investigation in this study. According to ILO All of these dispute resolution procedures find expression in statutory enactments and operate through the involvement of independent and impartial third parties who essentially assist in the resolution of disputes. It is important to this study for member states to design their own ADR processes given the differences of context - politically, socio-economically or other factors that make countries unique. The general guideline however is to ensure that such ADR processes are efficacious in terms of settlement of disputes and enforcement of resolutions, cost, time and client satisfaction and acceptance, among other things. South Africa with the guidance of ILO has successfully establish a free, and somewhat efficacious dispute resolution system to be emulated by Botswana and Zimbabwe in terms of this study. Conciliation/mediation, arbitration and hybrid procedures such as conciliation and arbitration (conarb) are sometimes also established under the terms of collective agreements.[356] This study is interested in ascertaining whether the use of these procedures is achieving efficacious outcomes in labour dispute settlement in Botswana, South Africa and Zimbabwe. Nonetheless,

[353] Paragraphs 4 and 6, Recommendation No. 92, Voluntary Conciliation and Arbitration (1951)
[354] Steadman (2011) 16 see also ILO www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm Date of use: 28 June 2019
[355] Section 7 (1), Act 15 of 2004 (Amended); S 7 Act 66 of 1995 and S 81 (4) of the Labour Act [chapter 28:01] (amended 01-02-2006)
[356] ILO www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm, Date of use: 28 June 2019, See also Steadman (2011) 16

much ado has already been given to the definitional issues of ADR in the introduction section to this chapter. The focus now is on the various elements of ADR and the efficaciousness in labour dispute resolution in Botswana, South Africa and Zimbabwe.

It is observed[357] that learned Anthropologists named Nader and Todd developed a three-stage typology of the disputing process, containing (1) the pre-conflict or alternatively the grievance stage; (2) the conflict stage and, finally (3) the dispute stage. This view suggests this as the process through which disputing goes through leading to dispute resolution.[358] However, it also stands to reason that the grievance may not go strictly through this process. An aggrieved person may straight away go to the dispute stage after they are aggrieved. This study is however mostly concerned with the dispute process especially the use of ADR in resolving labour disputes, hence the scant treatise of grievance and conflict management processes in the foregoing discussions.

2.3.1 Consensual ADR Processes

A consensual process is an ADR approach by which the net result in a dispute resolution endeavour boils down to a shared agreement between the disputants often reduced to writing.[359] The outcome in the consensual process is not imposed but it is achieved by an agreement mutual to all parties involved and it is not forced under the sanction of the State. Examples of consensual process in ADR are negotiation and mediation as discussed below.[360] In Italy for instance consensual processes in resolution of consumer disputes were emphasised in a commission's recommendation[361] leading to a drop of arbitration from the out-of-court principles.[362] This marked a shift to a consensual approach to dispute resolution where negotiation is a greater part.

[357] Lippman (2015) 212
[358] Ibid
[359] Cassim *et al.* (2013) 39
[360] Ibid
[361] Commission *Recommendation 2001/310/EC of 04th April 2001*
[362] Ibid

2.3.1.1 Negotiation as an ADR Process

Negotiation is regarded[363] as a dispute resolution option and probably the first strategy that parties will resort to use to resolve disputes before they reach deadlock. Negotiation is thus an ADR process commonly used to resolve disputes.[364] It is likely to even be used within all other ADR processes such as conciliation, mediation and arbitration included. Negotiation is one among the most common forms of resolving disputes. The approach is alternatively defined as a method by which disputes get to be resolved which is as much private as it is voluntary and consensual. Negotiation works where two or more disputants seek to resolve their differences personally by way of consensus and agreement, thus redefining the manner of their future relationship.[365] In negotiation, the focal point is the preservation of disputants' continued relationship as opposed to the carving of scientific legal rules which is typified in litigation on the other hand.[366] The purpose of reaching the agreement is essentially to regulate the future of the relationship shared by the disputants rested on the respect for their commonly shared interests which often supersede the ugly enforcement of legal rights.[367] The negotiation process goes through the following successive stages.[368] First stage is termed the *orientation* at which disputing parties get to access each other and come into formal attention with the issues under consideration in the negotiation. The second stage is *positioning* at which information regarding the issues in contention is gathered and fixed positions on the issues in dispute is tabled. The third stage is *bargaining* at which the issues contended about are narrowed while concessions made either in agreement or a failure to agree. The fourth stage is *close-out-stage* at which the process of negotiation often terminates either with the net result being an outright failure to agree on anything or alternatively an agreement is cut out, which is often reduced to writing. If an agreement is reached it follows that measures for the enforcement of same are cut out as well at this stage.[369] However, the challenge is whether negotiation can achieve efficacy in respect to cost,

[363] Cassim *et al.* (2013) 40, see also Wise (2016) 5
[364] Wise (2016) 5
[365] Cassim *et al.* (2013) 40
[366] Ibid 41
[367] Ibid
[368] LawsHelf https://lawshelf.com/videos/entry/alternative-dispute-resolution-methods-negotiation Date of use: 27 November 2018
[369] Cassim *et al.* (2013) 41

time, satisfaction, settlement and enforcement. While it spells advantages that matters can be settled with least cost there are also downsides to negotiation especially because there are no prescribed rules to its use.[370] A negotiator for instance may engage in competitive bargaining style for the sole purpose of achieving his or her own goal without consideration of the impact caused the other side. This is because the intentions of the negotiator are to force the opposing party to a settlement that is favourable to it and to win as much as possible.[371] The competitive negotiator may attempt to convince the other party that his or her cause is weak and should seek a resolution as quickly as possible. In the end it may end up a zero-sum game with a win/lose situation where one party wins and the other loses.[372] The ability to achieve efficacy in terms of time, cost, satisfaction, settlement and enforcement is curtained by the many disadvantages associated with negotiation. The section considers mediation as an ADR process.

2.3.1.2 Mediation as an ADR process

According to Online Etymology Dictionary[373] the term mediation is traceable to the 14th century Medieval Latin term *mediator* which means "a division in the middle." In that light mediation is defined to mean "the process of bringing about agreement or reconciliation between opponents in a dispute. Mediation implies deliberation that results in solutions that may or may not be accepted by the contending parties."[374] In mediation parties make use of an independent third party to assist them in coming to an agreement[375] but the third party has no decision making power and the aim is to direct and assist the disputants to find their own mutually and voluntarily reached acceptable solution.[376] This is quite different from a judge or arbitrator in that in the

[370] LawsHelf https://lawshelf.com/videos/entry/alternative-dispute-resolution-methods-negotiation Date of use: 27 November 2018
[371] Ibid
[372] Ibid
[373] Online Etymology Dictionary https://www.dictionary.com/browse/mediation Date of use: 27 November 2018
[374] Online Etymology Dictionary https://www.dictionary.com/browse/mediation Date of use: 27 November 2018, see also Patelia and Chicktay (2014) 16
[375] Wiese (2016) 5 See also Coetzee and Schreuder (2010) 470
[376] Coetzee and Schreuder (2010) 470 "The primary objective is to assist the parties to settle their dispute, but mediators also endeavour to:

- remove specific obstacles that are hampering progress;
- reduce tension between the parties;

case of a mediator s/he is denied the power to impose any solution on the disputants but instead, the mediator ought to assist them shape out a solutions that qualifies as the mutually acceptable resolution in the best interests of the parties.[377]

Radford and Glaser[378] argue that in the 'psychology of mediation perspective, the crux of the mediation process revolves around the art of altering the 'perceptual realities' of the disputants.[379] Through a carefully orchestrated process, the mediator intervenes in the dispute system, and redirects energy by building relationships with each of the parties in dispute and by assisting them to assess and restructure their perceptions of the dispute and how the mutual problem can be resolved.[380] Fundamental to the whole process is the perceived credibility of the mediator and the trust that can be harnessed into the dispute system. Those[381] that support mediation as an ADR approach seem to suggest that it is often quicker, easier, less expensive, and can provide a more complete solution than going to court[382] though evidence to this is scant especially in Botswana, South Africa and Zimbabwe's labour dispute regimes. In fact mediation seems to enjoy preference in literature as one of the major constituent elements of ADR.[383] Ordinarily it seems to be the preferred approach before arbitration and litigation are considered.[384] The Canadian labour unions have a special preference for mediation for the following reasons:[385] it is considered to be fairly cheaper compared to arbitration; it affords the union and the employer control over the outcome than does arbitration and it is considered as a useful way of getting rid of disputes the unions are

- seek sufficient movement by the parties to allow the parties to negotiate further as far as possible on their own;
- broaden the search for potential solutions;
- train parties in negotiation skills;
- improve communication and common understanding of issues;
- exert direct influence on the dispute; and
- prepare the parties to accept the consequences of their own choices and actions.

[377] Coetzee and Schreuder (2010) 470
[378] Radford and Glaser (1993:72) in Coetzee and Schreuder (2010) 470
[379] Ibid
[380] Coetzee and Schreuder (2010) 470
[381] Bosch *et al.* (2004) 7, see also Patelia and Chicktay (2014) 30
[382] FindLaw https://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html Date of use: 27 November 2018
[383] Zahorka http://www.libertas-institut.com/de/PDF/Mediation.pdf Date of use: 8 March 2016
[384] Ibid
[385] Ibid

reluctant to fight over more efficiently and cost-effectively: in cases where persistent or militant union members declining to accept that their case is a lost cause.[386]

However, mediation is saddled with its own inadequacies that make it weak in achieving efficacy as a dispute resolution mechanism. Mediation is not an ideal approach to extract truth of the matter in dispute from the parties which is different from a courtroom setting whereat lawyers have several tools at their disposal to get people to testify and produce evidence not easily accessible to mediators.[387] Further, being an informal process has no formal rules, unlike the courtroom procedure it is unable to keep things fair to both parties.[388] For instance, if one of the parties to the dispute is timid and the other is loud and aggressive, the timid one runs the risk of losing some of what is legally owed it. Though mediators may have the skills required to restore balance there is a limit to what they can do in those circumstances as aforementioned.[389] In abusive relationships experts believe mediation might provide just another way for the abuser to harm the victim inhibiting the latter's ability to assert their position in such informal settings.[390] In the event that mediation fails and parties are unable to reach agreement on the dispute parties have to resort back to the time consuming and expensive process of trial or other process after wasting time and money in mediation.[391] Given the above demerits of mediation it is evident that it may not be appropriate for all circumstances especially those where an award has to be reached such as dismissal disputes. Mediation may be appropriate in circumstances where the parties in dispute are involved in an ongoing relationship and have to deal with each other after the dispute has been settled or even after failure. The next section considers conciliation as an ADR process.

2.3.1.3 Conciliation as an ADR process

This section discusses the use of and practices of conciliation as an ADR process in Botswana, RSA and Zimbabwe. The idea is to establish the status of the adoption and

[386] Zahorka http://www.libertas-institut.com/de/PDF/Mediation.pdf Date of use: 8 March 2016
[387] FindLaw https://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html Date of use: 27 November 2018
[388] Ibid
[389] Ibid
[390] Ibid
[391] Ibid

use of this process as a mechanism for resolving labour disputes. Conciliation is defined as the use of a neutral or acceptable third party to assist parties to arrive at a mutually acceptable, enforceable and binding solution.[392] The distinction between conciliation and mediation is always blurred.[393] However, conciliation for instance is considered to be a form of mediation with the difference that the third party intervener (now called the conciliator) takes a rather more directive approach during the mediation. S/he may also recommend what the final outcome ought to be.[394] A mediator has a direct function though his/her role is often confined to providing guidance as well as assisting the disputants in conducting their own negotiation. However, in certain instances the conciliator may go further so as to actually provide advice to the disputants during their negotiations, in the hope that this counsel will provide leads to a settlement of the dispute.[395] Wiese[396] argues that the conciliator does not have the power to make a binding decision on the outcome of the matter but may be required to make rulings on procedural matters such as jurisdiction. In the Bombardier Transportation (Pty) Ltd v Mtiya NO & Others case, herein (the "Bombardier matter")[397] it was ruled that where a challenge to jurisdiction is raised prior to or at conciliation stage, it must be determined prior to any conciliation taking place. This means that conciliation may not even take place if jurisdictional challenges have not been dispensed with first.

There is however conflicting opinion[398] on the issue of conciliation in research regarding its meaning and function. Purcell[399] for instance in defining conciliation states that the third party is a facilitator and further that such facilitator cannot make suggestions while Cassim[400] says a conciliator can advise, represents conflict among experts on the meaning of this ADR concept and its function. Cassim[401] actually furthers the argument that unlike the mediator who does not interfere in the outcome of the mediation the conciliator may reach a finalisation of the conciliatory process by

[392] Wiese (2016) 11
[393] Cassim *et al.* (2013) 45
[394] Ibid 46
[395] Ibid
[396] Wiese (2016) 11
[397] Paragraph 13, [2010] 8 BLLR 840 (LC)
[398] Purcell *Individual disputes at the workplace: Alternative disputes resolution* (2010) 1
[399] Ibid
[400] Cassim *et al.* (2013) 46
[401] Ibid

awarding a recommendation that is non-binding, in the hope that it would persuade the disputants to accede to the settlement of their dispute. It is for this reason that conciliation is often called "advisory mediation."[402] This study prefers to see conciliation as a derivative of mediation and the two can be used interchangeably for the reason that they do not proffer binding rulings but advisory.[403] The efficacy of conciliation is in contention in this study. Studies that ascertain this are scant or if they do may exist outside Botswana, South Africa and Zimbabwe. In India for instance a study was conducted by Rahul Suresh Sapkal[404] which sought to evaluate the effectiveness of conciliation as a labour dispute mechanism showered praises for the practice.[405] On the basis of the results of the study a conclusion was reached that conciliation was not just pivotal, but an efficient and effective a method for resolving labour disputes in comparison to litigation.[406] The results of Sapkal's[407] study would need to be compared with studies elsewhere to establish their legitimacy given that different macroeconomic contexts may yield varying results. Unfortunately for the present study it is of interest to note that conciliation features in labour dispute legislative enactments in South African[408] and Zimbabwean though used to a lesser extent than arbitration[409] with the exception of Botswana laws.[410]

From the foregoing discussion it is clear that negotiation, mediation and conciliation are considered as consensual approaches to dispute resolution. Given that they are less formal and generally lack rules of enforcement, they are considered to be more appropriate or best suited for dispute situations designed to preserve a relationship between the parties beyond the dispute settlement. They may also be suitable for interest-based disputes where a party wants to enforce new rights, and not best suited for disputes of right.[411] In certain respects, the ability to achieve efficacious outcomes is dependent on their correct selection and matching these ADR processes to the correct problem. The skills of negotiators, mediators and conciliators can also not be

[402] Cassim *et al.* (2013) 46
[403] Wiese (2016) 11, see also Cassim *et al.* (2013) 46
[404] Sapkal (2017) 279
[405] Ibid 289
[406] Ibid
[407] Ibid 279
[408] S 7, Act 66 of 1995
[409] S 81 (4), Labour Act [chapter 28:01] (amended 01-02-2006)
[410] S 7, Act 15 of 2004 (As amended)
[411] Wiese (2016) 7

left out, especially in this study, in attempts at determining the effectiveness of the approaches. These are considered in the chapters analysing the use of these ADR approaches in labour dispute resolution in Botswana, chapter 3, South Africa, chapter 4 and Zimbabwe, chapter 5. Below arbitration is discussed as a command ADR process.

2.3.2 Command ADR Processes

As opposed to consensual process the command process is one by which the outcome of the disputing process is in a form of judgment that is imposed on the parties or litigants (whichever the case may be) by the judiciary officer.[412] The parties are not involved in the outcome of the matter as they get an independent person to listen to their dispute and give judgment in the end.[413] The net result of this process is that the decision (outcome) is enforced on the parties by sanctions of the state, for example, judgment is enforced by way of execution proceedings. Litigation through the courts and arbitration are examples of command processes in ADR system.[414]

2.3.2.1 Arbitration as an ADR process

Arbitration also enjoys preference in literature as an ADR constitute elements though it would appear that it is the less favourite approach to conciliation and mediation.[415] The concept arbitration is not without challenges pertaining to definition, philosophical bearing as well as process.[416] There is no single definition that is agreed upon among its proponents. Some scholars have tended to provide what they term a general definition,[417] followed by a legal definition.[418] This does not help to resolve the lack of a universally agreed definition; hence the concept remains complex to define.[419] Merriem-Webster dictionary[420] of the English language, for instance, provides what

[412] Cassim *et al.* (2013) 39
[413] Ibid
[414] Ibid
[415] Zahorka http://www.libertas-institut.com/de/PDF/Mediation.pdf Date of use: 8 March 2016
[416] Cassim *et al.* (2013) 39
[417] Merriam-Webster http://www.merriam-webster.com/dictionary/arbitration Date of use: 15 March 2016
[418] Ibid
[419] Merriam-Webster http://www.merriam-webster.com/dictionary/arbitration Date of use: 15 March 2016
[420] Ibid

they term the simplest definition of arbitration which states thus ‘a process by which arguments or disagreements between people or groups on both sides are presented to a third person or group who is empowered to reach a decision on their behalf.’ Put differently, arbitration is the “… process in terms of which parties to a dispute reach an agreement to have their matter referred to an independent and impartial third party (the arbitrator) who ought to decide on the matter and in the result make an award which they are to accept as final and binding upon them.”[421] The legal definition provides that arbitration is “…the process in terms of which an unresolved conflict, grievance or dispute between labour and management is decided by presenting it to a third party or panel outside of the court system who is considered as impartial for a decision that may or may not be binding.’[422] An industrial psychology perspective of arbitration states that ‘arbitration entails the appointment of an impartial third party, who will use quasi-judicial processes and act as the decision maker in a dispute.[423]

What is common to the above definitions is the fact of a deadlock in the form of a dispute, argument or disagreement which has failed to get resolve among the disputants, hence resort to an independent arbitrator. The third party who the practice of arbitration obliges to be independent and impartial is required to make a decision or what is termed[424] ‘make an award’. Lotter and Mosime[425] appear to be ascribing an adjudication tag by stating, ‘arbitration is a form of adjudication and should therefore be distinguished from mediation. In the case of mediation, the third party does not make a binding award,”[426] whereas arbitration is a formal process empowering the third party to make a decision to bring the dispute to a resolution.[427] Each party presents evidence and is given an opportunity to challenge the evidence of the other. Both disputants try to persuade and convince the arbitrator of the merits of their cases in relation to the dispute. Arbitration is more flexible and simple, less time consuming with fewer legal intricacies and therefore cheaper than adjudication.[428] As to its efficacy in resolving disputes arbitration is recommended for its ability to settle disputes and

[421] Lotter and Mosime (1993) 2, See also Patelia and Chicktay (2014) 30 and Wiese (2016) 7
[422] Ibid
[423] Coetzee and Schreuder (2010) 470
[424] Lotter and Mosime (1993) 2,
[425] Ibid
[426] Ibid
[427] Patelia and Chicktay (2014) 30
[428] Ibid

enable enforcement.[429] In the South African case, for instance the 2002 Labour Relations Act amendment made an arbitration award enforceable through certification by the Director of CCMA without need to go to court to make the award an order of court as was previously the case.[430] This development tends to enhance the efficacy of ADR as a dispute resolution process unlike negotiation, mediation and conciliation. Arbitration also has the advantage of being a private and confidential process which is not the case with court proceedings.[431] Arbitration can resolve disputes quicker than court proceedings. Arbitrators appointed are usually experts in the field of the dispute whereas a judge of court is usually not. An arbitration decision is final whereas the decision of court is subject to appeal and review in certain respects.[432] The arbitration process is not without its own demerits. The main disadvantage of the use of arbitration as a dispute resolution process is that the parties lose control of the outcome of the dispute resolution process.[433] Arbitration does not afford judiciary precedent to its users which is only afforded disputants by court litigation, as arbitration awards, in their nature, do not create precedent.[434] In instances where parties resort to complex arbitration rules the arbitration process can end up being more expensive than litigation.[435] In such cases parties will not only need to pay their legal representation, but also arbitration fees and their use of a neutral venue.[436] Arbitration is not suitable for interest based disputes where parties want to create new rights. In Zimbabwe[437] arbitration awards are not automatically binding, but must be made orders of court and could be discouraged where time is an issue.[438] This study sees that from the forgoing there seem to be more disadvantages than advantage of arbitration though it continues to be used to resolve disputes alongside other methods such as conciliation. It is discernible to this study that ADR will have to be developed continually to ensure that selection of each approach is best suited to every situation. This is because interest-based disputes for instance will not be suitable for resolution through arbitration while right based disputes may also not be best resolved through

[429] Wiese (2016) 7
[430] Section 143(3, Act 66 of 1995 (As amended)
[431] Wiese (2016) 127
[432] Ibid 128
[433] Ibid 7
[434] Patelia and Chicktay (2014) 71
[435] Ibid
[436] Ibid
[437] Section 98 (14), Act of 2003 [Chapter 28:01]
[438] Patelia and Chicktay (2014) 71

negotiation and mediation. This study is concerned with ascertaining the efficacy of ADR in labour dispute settlement in Botswana, South Africa and Zimbabwe. The use of processes like arbitration from the foregoing analysis can enhance efficacious resolution of disputes. This depends largely on taking initiative to ensure that the correct disputes are resolved using the correct approaches. This is the subject of the next section.

2.3.2.2 Court litigation as a dispute resolution process

Litigation is a dispute resolution process that traditionally runs through the courts. In South Africa for instance the Constitution of South Africa[439] provides that the judiciary authority or arm of government is vested with the resolution of disputes.[440] Litigation essentially takes place in the court rooms which are open to members of the public who may enter into any court room and watch the proceedings of any case as much as they wish.[441] The court litigation process starts with a grievance in terms of which the aggrieved party asserts a legitimate cause of action in the form of a claim.[442] The court processes[443] are detailed, inevitably requiring the pleading stage,[444] whereat litigants exchange summons and particulars of claim usually stating the nature of injury sustained and the relief sought, the pleas in reply to summons, notices, discovery of documents, which seek to substantiate and prove their claims.[445] The strict rules of evidence are adhered to, to prove claims. The pleading stage often concludes with the pre-trial procedures such as pretrial conference[446] convened to determine the issues in contention to be addressed before the court.[447] Thereafter a notice of set down is issued, leading to trial.[448] Trial is convened before a Magistrate or Judge in open court and usually concludes with the issuance of a judgment.[449] The trial is followed by another lengthy process of enforcement through the writs, Deputy Sheriffs or

[439] Act No. 5 of 2005
[440] Article 165 (1) Act No. 5 of 2005
[441] Agarwal and Owasanoye *Alternative Dispute Resolution Methods* (2001) 4
[442] Nader and Todd (1978) 212, See also Miller & Sarat (1981) 52 and Lippman *Law and society* (2015) 212
[443] Cassim *et al*. (2013) 39
[444] Faris *et al.* (2011) 47
[445] Ibid 81
[446] Ibid 72
[447] Ibid 81
[448] Faris *et al.* (2011) 82
[449] Ibid 86

Messengers of Court executing writs of execution upon the losing party and the like depending on what nature of judgement was entered by the Presiding Officer.[450] Court litigation may take years before a matter is set down for trial. In many countries, court litigation remains an expensive and tortuous way to enforce a legal right aside from the [inherent] delay, there is the question of rigid [and cumbersome] formality, publicity and corruption [that characterizes] many judicial systems, and in international commercial disputes there is the question of multiple jurisdictions from which the parties have to decide'[451] (emphasis mine). Litigation is a more aggressive approach to dispute resolution, which is often regarded as the last port of call after internal and ADR processes have failed to resolve industrial conflicts and disputes.[452] By its nature, court litigation as a dispute resolution process tends to be competitive (adversarial), costly and cumbersome often resulting in winners and losers who may not see eye to eye thereafter. In light of the above, ADR on the other hand seeks to offer a more private, less costly, relationship building focus, time saving and more satisfactory process and outcomes giving regard to the interests of both parties. This study is not focused on litigation through courts as a dispute resolution process, hence the scant focus. Litigation may only be referred to where necessary especially when it is appropriate to compare it with ADR. The rest of the discussion focuses on ADR as a dispute resolution approach especially in labour matters, particularly its efficacy.

2.4 The *Raison datre* and Efficacy of ADR in labour dispute resolution

The second question that this study addresses is what initiatives have been undertaken to make the use of ADR mechanism efficacious in labour dispute resolution in Botswana, RSA and Zimbabwe? Answers to this question consider the *raison datre*, merits of ADR and whether or not these have been considered in the three countries under consideration when formulating ADR policies and its implementation. To place the question in perspective a plausible departure would be to review a question asked in Woodard's study referred to in chapter 1 to this study, which was conducted in the United States of America herein (USA) and couched in

[450] Faris *et al.* (2011) 82
[451] Agarwal and Owasanoye (2001) 4
[452] Redict (2013) 3, See also Colombo (2012) 71 and Cassim *et al.* (2013) 40

these words[453] 'The ADR programs are evidently in place, [but] are they working? [emphasis mine]'[454] Put differently one would ask, 'are ADR programs efficacious?' Seeking answers to that question is the main thrust of the present study. This question resonates with this study in so far as the justification for ADR as a conceivable remedy to resolving disputes is at play.

Resolution of disputes has always involved non-combative methods in many parts of the world, way before even the USA, who are usually regarded as the originators of ADR, adopted and formalised mediation.[455] Traditional societies such as the so-called Bushmen of the Kalahari in Namibia and Botswana have always had systems for resolving their disputes. These societies dispute resolution systems are uniquely embroiled in the communities' own sophistry and customs using what is presently termed ADR the chief aim of which has been avoiding conflicts that spiralled into physical and combative mode.[456] The idea of dialogue and peaceful settlement of disputes makes ADR a favourable option instead of court litigation. Below the advantages of ADR as a dispute resolution option are considered.

2.4.1 The advantages of ADR as a dispute resolution mechanism

There are several merits that influence the favourable use of ADR as a dispute settlement mechanism available to labour disputes.[457] A review of literature revealed a number of distinct advantages accruing to disputants who elect to use an informal ADR process rather than court litigation as a formal process for dispute resolution which are reviewed below.[458]

First, ADR processes have "the effect of translating a legal dispute into an expression of the personal needs of disputants thus converting a rights based dispute into an

[453] Woodard (1997) 10
[454] Ibid
[455] Ury *Must We Fight? From the battlefield to the schoolyard – A new perspective on violent conflict and its prevention (*2002) 40 "'When a serious problem arose everyone concerned was sat down – all the men and women alike – they then talked, and they talked and they talked. Each person afforded a chance to have his/her say. It may have taken several days (two, three or even more) rested on the nature of bone of contention. Such inclusive and open dialogue ensued until the dispute was literally talked out to its conclusive resolution.[455]
[456] Ibid
[457] Cassim *et al.* (2013) 50
[458] Cassim *et al.* (2013) 51. See also Ury *(*2002) 40

interest based problem."[459] ADR possesses enable the disputants to exercise ownership over the process of dispute resolution through selecting the appropriate process, framing the issues in dispute and finally establishing standards for its resolution and take responsibility for the outcome.[460] It means, once a dispute transform rights based to interest based, the relationship between parties becomes the focal point of contestation and the result is its preservation.

Second, ADR processes are private processes. This allows disputants to settle their differences without having to divulge personal or confidential information, which would happen in a public trial.[461] The exception is in the case of court ordered or annexed mediation or arbitration.[462] This advantage is corroborated by Justice Mohammed[463] in a commission of enquiry about ADR in RSA who asserted that 'ADR practices like negotiation and mediation comprises private decision making by the blocs in contention themselves while arbitration involves adjudication by a third party and the proceedings in both cases remain private.[464]

Third, ADR processes are able to address the material issues and interests of the parties in the dispute and achieve the avoidance of aggressive bargaining about the legal rights of parties.[465]

Fourth, the purpose of ADR is to achieve settlement that is mutually beneficial based on consonance of the disputants. This is particularly true in regard to consensual processes such as negotiation, mediation, facilitation, the mini-trial and arbitration/mediation.[466] The chief object of these processes is to reach agreements on integrity that the parties will uphold because the agreements serve their various interests. The presumption is that parties will take responsibility for their agreements and respect them.[467] This ought to lead to a higher level of voluntary compliance than

[459] Cassim *et al.* (2013) 51
[460] Ibid
[461] Ibid
[462] Ibid
[463] Mohammed *et al.* (1997) 18
[464] Ibid
[465] Cassim *et al.* (2013) 51
[466] Ibid
[467] Ibid

is the case with compulsory court orders, which litigants may resist.[468] In the case of arbitration approaches such as expedited arbitration, documents-only arbitration, final-offer arbitration and med/arb, the final and binding arbitral award is founded on the disputants agreements to be bound thereby.[469]

Fifth, the thrust of ADR is the future relationship between the parties involved rather than focus on past wrongs and the consequent attribution of blame which is the chief object of court litigation.[470] ADR processes are therefore best suited to resolving disputes in situations where disputants have in mind a long term relationship with each other, for example, company directors or a divorced couples.[471] ADR has the advantage of preserving relationships that are important to the parties.[472] Arguably, ADR can increase satisfaction of disputants with the outcome.[473] It is therefore strongly recommended that ADR is used (a) if existing judicial processes engender excessive costs, lengthy delays and limited access undermining user satisfaction; (b) cultural norms are inclined towards reconciliation and relationships over winning disputes; (c) considerations of equity favour flexibility to yield outcomes that are more satisfactory to the parties; (d) low rates of compliance with strict rule of procedures typified in court judgments (or a high rate of enforcement actions necessitate systems that maximise chances for voluntary compliance; (e) the legal system tends to be non-responsible to local conditions or local conditions tends to vary.[474]

Sixth, efficient methods for settling issues out of court is characterised by ADR processes which is a cost saving alternative to both parties and the State. The disputing parties save on the costs associated with Court litigation owing to swift and effectual resolution of the dispute, while the saving of court time and the reduction in court administration benefit the State.[475] This element has been a major source of contention given that many cases resolved through ADR do not end with success and have to be committed to courts casting down perception of whether ADR is in fact time

[468] Cassim *et al.* (2013) 51
[469] Ibid
[470] Ibid
[471] Ibid
[472] Wiese (2016) 2
[473] Brown *et al.* (1998) 10
[474] Ibid 12
[475] Cassim *et al.* (2013) 51, see also Wiese (2016) 2

and cost saving as alleged.[476] There are also factors that disfavour ADR especially when (a) cultural norms tend to towards formal as well as deterministic solutions; and (b) cultural norms tend to be discriminatory or biased which would only be perpetuated than curtailed in the ADR system.[477]

Seventh, ADR heightens access to justice for disadvantaged groups which is the case in many less developed countries like Botswana, RSA and Zimbabwe under review in this study.[478] The need to pay the registration and presentation fees necessary to enter the formal legal system often inhibit many groups who simply cannot afford it.[479] Owing to excessive costs associated with formal dispute resolution for many people in developing countries many would favour a less costly alternative.[480] Pursuant to this argument, it is reasonable to use ADR if (a) reliance on formal court systems engenders disbursements in resources often unavailable to large sections of the population; (b) formal court systems tend to be biased against the weak, poor, women, minorities and other groups; (c) illiteracy often inhibit large pockets of the population from resort to formal court systems; and (d) distance from the courts impairs effective use for persons in rural communities, for instance.[481]

2.4.2 The shortcomings of ADR as a dispute resolution approach

Although ADR has been popularised and adopted worldwide it remains susceptible to several limitations that militate against its outright success as a dispute settlement approach, let alone, labour dispute settlement mechanism. About five inherent weaknesses of ADR have often surfaced in literature.[482] First, although ADR offers many benefits to users thereof in sizeable development efforts, it is impaired from serving rule based law initiatives, in particular ADR is not an effective means to; determine and promote a legal framework; redress elements of pervasive injustice, discrimination or human rights abuses; resolve disputes whereat parties possess excessive power or authority disparities; resolve that culminate into public sanction;

[476] Brown *et al.* (1998) 21
[477] Ibid 13
[478] Ibid
[479] Ibid
[480] Ibid
[481] Ibid
[482] Ibid 21

and resolve disputes involving defiant disputants or interested parties who decline participation or cannot participate in the ADR process for some reason or other.[483]

Second, essentially, ADR does not guarantee the procedural rights of litigants, because it settles disputes informally or rather less formally and the disputants may place themselves beyond the protection afforded to court litigants.[484] ADR is impaired by its inability to set precedent, refine legal norms for legal certainty neither is it able to establish a broad community nor national standards nor does it promote consistent application of legal rules.[485] The challenge is bigger in contexts such as Zimbabwe labour dispute settlement where administration of ADR is left to the discretion of government Labour Officers who are appointed to conciliate disputes at will.[486] The instances of bias are unavoidable when the government adjudicates in cases where the parties are employees of government. In Pako case[487] in Botswana, the ADR mechanism had failed to establish whether an employment relationship between the disputants in fact existed, a legal question which could only be determined at court before which the dismissal matter in dispute could not be dispensed with. The mediator had no jurisdiction over such an important issue.[488] There are no guarantees that due process will dispense with the legal rights of disputants.[489] ADR ought to be seen as a gismo of equity rather than mere tools of law, and seeks to resolve disputes on an individualised case by case basis and may resolve similar cases differently should the attendant surrounding conditions direct that different results are fair or reasonable according to local norms.[490] As such the proceedings are not on record. Moreover, as court proceedings are on record, a litigant may later turn to court for further relief without having to prove again the issues already on record, a characteristic or benefit ADR manifestly cannot afford them.[491]

Third, another consideration is that ADR decisions do not have a binding effect. Court decisions are essentially enforced by the State by means of its machinery and

[483] Brown *et al.* (1998) 13
[484] Cassim *et al.* (2013) 51
[485] Brown *et al.* (1998) 21
[486] Madhuku (2012) 31
[487] *Pako Joseph v General Projects (Pty) Ltd and Xia Fanning* UR *52/12*
[488] Ibid
[489] Ibid
[490] Brown *et al.* (1998) 21
[491] Cassim *et al.* (2013) 51

execution procedures such as writ of execution unlike ADR which has to depend on courts to give effect to its decisions.[492] With the exception of arbitration or arbitration-based processes ADR processes are only contractually binding and do not guarantee a final and binding resolution of a dispute. They are left to the maturity and goodwill of the parties to comply with their agreement.[493] ADR settlements lack deterrent, educational or punitive effect on assailants. Given that ADR outcomes are never in the public domain, ADR may be inappropriate when handling matters that ought to result in some form of public sanction or punishment.[494] This applies to matters bordering on violence, repeat offenders such as in those involving domestic violence or violence at work for instance. The society's and individual interests are at better served when court sanctioned punishment such as imprisonment are at play which ADR is unable to offer.[495]

Fourth, the use of litigation as a process, and attendant aspects such as access to court and court time, in principle, are free. This is not the case with ADR.[496] The third-party intervener must be paid and if settlement not reached – costs of informal process have to be added to eventual costs of litigation.[497] Apart from arbitration or arbitration-based processes, ADR processes do not guarantee a final and binding resolution of a dispute. If a settlement is not reached, the costs of an informal process will have to be added to the eventual costs of litigation.[498]

Fifth, ADR seldom thrives in contexts of intense power imbalances. Such discrepancies are often a product of discriminatory norms typified in societal practices which consequently sip into ADR outcomes.[499] Even in instances where such power disparities do not lend themselves from discriminatory norms in society, ADR often lacks the legal teeth to protect weaker parties.[500] The wealthy or more powerful parties may throw their weight on weaker parties into settling for an unfair outcome resulting from coercion, while on the surface appearing consensual. For the same reason, ADR

[492] Cassim *et al.* (2013) 51
[493] Ibid
[494] Brown *et al.* (1998) 21
[495] Ibid
[496] Cassim *et al.* (2013) 51
[497] Ibid 52
[498] Ibid
[499] Brown et al. (1998) 22
[500] Ibid

may not work well when one party is the government acting as both referee and party to a dispute.[501] On the strength of this argument ADR ought not to be used when (a) disadvantaged groups need to establish rights in order to reduce power imbalances; (b) local elites have the power to control program implementation, (c) a number of barriers to access to the justice system can be addressed effectively in an ADR program.[502]

This implies that for ADR to achieve efficacious outcomes it must be used where balance of power will not be threatened and in circumstances where it is appropriate in securing the interests of weaker parties. Efficacy in that case depends on appropriate use of ADR in appropriate cases and circumstances.

2.5 The efficacy of ADR in labour dispute resolution

The third question pertinent to this study is - *are there any challenges faced with **measuring** ADR efficacy in labour dispute resolution in Botswana, RSA and Zimbabwe?* Answering this question with both the precision it deserves requires a framework for measuring ADR efficacy, which is essentially the focus of this section.
Measuring the efficacy of ADR is not a particularly simple but tenuous endeavour.[503] The challenge is exacerbated by the lack of established measurable criteria that can be universally applied.[504] Several attempts at developing measurable criteria have yielded varying but less convincing outcomes as far as ADR efficacy in labour dispute settlement is concerned.[505] The main question begging answers is: how can the efficacy of ADR be measured with certainty? Given that the demand for ADR processes in resolving disputes is gaining traction in many jurisdictions, establishing measures that enhance the efficacy thereof is imperative.[506] This view is corroborated by Shamir[507] who asserted that ADR is an ancient method by way of which people

[501] Brown *et al.* (1998) 22
[502] Ibid
[503] Woodard (1997) 29
[504] Ibid
[505] Shin (2011) 13
[506] Sapkal (2017) 289
[507] Shamir (2003) 4 "'the ADR "movement" begun in the USA around the 1970s consequent upon the need to find more efficacious substitutes to conflict management save litigation. Today, ADR seems to flourish worldwide having proven itself, in more ways than one, better at resolving disputes in stark contrast to the famed route in the courts. The quest for more efficient and better ways to resolve disputes, and the art of managing conflicts, are as old as humanity itself, yet has only begun to be

resolved disputes and is not finding legitimacy in the legal system of the USA as a dispute resolution mechanism.

It is discernible from the foregoing that ADR is to be seen as a major panacea to the inadequacies of the court system in resolving disputes. The emergency of ADR is to be seen as an efficacious system for its efficiency and better way of resolving disputes. Despite many accolades accorded ADR, especially in the USA and elsewhere, whether it is achieving the results it promises its protagonists remain unanswered and this study seeks to find answers to that with respect to Botswana, RSA and Zimbabwe. The efficacy of ADR has landed itself under deliberate and in many respects' heavy scrutiny over the years since its 1886 adoption in the USA.[508] While reviewing ADR efficacy this section will be instrumental to this study as it considers measures that are important for ascertaining ADR efficacy. Factors such as efficiency and time saving, cost effectiveness, settlement and enforcement are considered.[509]

Generally, the term *efficacy* can be defined[510] as 'the power behind the production of a desired outcome (result or effect).' By the same token one could say this study seeks to investigate ''the probability ADR has in producing a desired, predictable and measurable outcome as a consequence of reliance on it when resolving labour disputes.' While Khabo[511] asserts that 'ADR is being adopted as what has become a general trend, and embraced, specifically for its nature and character as accessible, informal, voluntary and capable of speedy resolution of labour disputes' does ADR actually work to achieve that result in practice as it does in principle?[512] This is the main question this study must seek to answer.

The inevitability of ADR as part and parcel of dispute resolution is not contested; rather the question is whether its efficacy can be ascertained with absolute certainty.[513] However, what may work in one context may not work in another even using a similar

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embraced by the legal system within the last thirty years. Only recently has ADR become institutionalized to form part of court systems and a justice system as a whole world-over.'"

[508] Barrett & Barrett (2004) xxvii

[509] Brown *et al.* (1998) 15

[510] Merriam-Webster http://www.merriam-webster.com/dictionary/efficacy Date of use: 15 March 2016

[511] Khabo (2008) 10

[512] Ibid

[513] Woodard (1997) 10

technique.[514] "In many conflicts of a legal nature, reliance on and demand for ADR is gaining traction and enjoying usage as an effective approach to resolve disputes.[515] Prominent research outputs in law and economics appear to propose what Sapkal[516] termed "welfare maximising effects of ADR programs" whose intent is reduction in disposition time and promotion of expedited settlement.[517] Further, that ADR may sponsor the lowering of costs involved in resolution of disputes while reducing risk thereof at the same time are its major selling points by those that sing its praises.[518] Arguably, models of ADR be it theoretical or hypothetical have outpaced empirical enquiries and outputs that support claims of efficacy thereof. There are recent studies[519] that test the empirical claims of ADR program efficiency though yielding differing results[520] especially that ADR has the effect of escalating the prospect of swift settlement while lessening disposition time[521] and carry the potential for cutting on cost and delays by sizeable proportions for disputants.[522] In the alternative, one view having studied optimal use of a fixed mediation, an ADR approach, thinks ADR efficacy is context-specific. In that light, it is not about whether an ADR element is used but rather when is it appropriate to use a certain ADR approach should be a major consideration.[523] There is also a confined assessment of the efficiency of arbitration as a distinct ADR practice in stark contrast to others such as conciliation as well as mediation in each case yielding results that are varied depending on context.[524] This means that, in view of the above, there may not be a blanket assessment of ADR efficacy with certainty hence the need to contextualise such treatise.[525] There is no research, at least this study is aware of that has conducted a comprehensive assessment of ADR efficacy in labour dispute settlement that compares its processes between Botswana, RSA and Zimbabwe.

[514] Woodard (1997) 10
[515] Sapkal (2017) 289
[516] Sapkal (2017) 289
[517] Heise (2010) 63
[518] Kaplow and Shavell *Economic Analysis of Law* (2002) 1743
[519] Sapkal (2017) 289, see also Kerbeshian (1994) 383; Folberg and Rosenberg (1994) 1488 & Woodard (1997) 29
[520] Ibid
[521] Heise (2010) 63
[522] Ibid
[523] Doornik *A rationale for mediation and its optimal use* (2014) 1-10
[524] Ibid (See Balzer and Scheider *Managing a Conflict Alternative Dispute Resolution in Context* (2015) 5, Sapkal (2017) 289 and Brazil *(*2006) 242).
[525] Ibid

2.5.1 ADR Efficacy measures

In measuring success, what the present study terms efficacy, Kerbeshian[526] bring to mind that the response is heavily rested on the object ADR seeks to serve, the construction of what success or failure means and achievement of set yardsticks and standards.[527] It is consequent upon addressing these issues that ADR can be said to be a success, failing which it can also be a failure.[528] Earlier attempts by prominent exponents of the ADR discipline proffered *client satisfaction, settlement and enforcement, efficiency* and *cost* as definitive criteria in ascertaining success of ADR or otherwise, as a dispute settlement programme.[529] Whether these measures are valid in determining success or efficacy of the ADR programme is not without controversy.[530]

First, the time saving nature or efficiency of ADR in resolving disputes as compared to litigation is central to ADR debates abroad[531] and locally.[532] The element of efficiency as far as timely resolution of disputes is a matter of vital importance.[533] Arguably, the ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation.[534] Time alongside cost, is also used as an estimate to measure success of ADR programs though the accuracy of such estimates have not escaped the eye of scrutiny.[535] Studies by Barkai and Kassenbaum[536] in Hawaii, Rosenberg and Folberg[537] in California, USA and Hann and Baar[538] in Canada all reviewing the effectiveness of ADR programmes namely court-annexed arbitration, ENE, and mandatory mediation, respectively all found that cases had been dispensed with more expeditiously. In Canada, for instance, within a space of six months a 25% settlement and enforcement had been achieved compared to

[526] Kerbeshian (1994) 383
[527] Ibid
[528] Woodard (1997) 29
[529] Kerbeshian (1994) 383
[530] Woodard (1997) 29
[531] Folberg and Rosenberg (1994) 1488; Kerbeshian (1994) 383; Woodard (1997) 29 & Love (2011) 3;
[532] Wiese (2016) 2; Mohammed *et al.* (1997) 18; Madhuku Labour Law in Zimbabwe (2015) 350 and Khabo (2008) 40
[533] Law Reform Commission (2008) 120
[534] Shamir (2003) 4
[535] Kerbeshian (1994) 388
[536] Barkai and Kassebaum (1992) cited in Love (2011) 3; Folberg and Rosenberg (1994) 1488 and Hann and Carl *"Evaluation of the Ontario Mandatory Mediation Program* (2001) (Rule 24.1)
[537] Folberg and Rosenberg (1994) 1488
[538] Hann and Carl (2001) (Rule 24.1)

only 15% in respect to court cases.[539] In 2004 a study conducted by Wissler[540] also revealed that in five reviews of matters that got appealed, took between one to three months shorter to dispose of those designated to be resolved through mediation as opposed to other approaches.[541] This is among arguments advanced for ADR's potential to reduce delay in the resolution of disputes. Arguably, bureaucratic huddles embroiled in complex formal procedures and inadequate court resources inhibit expeditious resolution blotting case backlog.[542]

Three justices in the Western world have endorsed ADR and drummed their support for it as a time and cost-efficient approach to resolving disputes better than the courts. Lord Woolf[543] who wrote on the English Civil Justice system in mid-1990s; the Australian Justice Peter Underwood who hold that ADR is efficient and cost effective better than the judiciary[544] and another Justice, USA Chief Justice Warren Burger who argues that the efficiency relates to the length of time it takes to resolve a dispute through ADR.[545]

Given the experiences of these justices as a Justice they would ordinarily have a good picture of how long it takes to have a matter resolved through the courts than would be the case through ADR programs hence advocating for the latter.[546] The US Justice[547] asserted that "people with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."[548] On the strength of that view 'mediation and conciliation may lead to a faster settlement of a dispute than going to court.'[549] It is therefore reasonable to measure the success or efficacy of ADR in terms of efficiency, particularly the timely settlement of disputes as confirmed by an

[539] Hann and Carl (2001) (Rule 24.1)
[540] Wissler *"The Effectiveness of Court Connected Dispute Resolution in Civil Cases."* (2004) 88
[541] Ibid
[542] Brown *et al.* (1998) 15
[543] Lord Woolf *Access to Justice, Interim Report* (1995) 20, *"Where there exists an appropriate dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they had made use of that mechanism."*
[544] Chief Justice Peter Underwood *Alternative Dispute Resolution as a Judicial Tool* (undated) 1
[545] Chief Justice Warren Burger *Our Vicious Legal Spiral* (1977) 49
[546] Lord Woolf (1995) 20; Chief Justice Warren Burger (1977) 49 & Chief Justice Peter Underwood (undated) 1
[547] Chief Justice Warren Burger (1977) 49
[548] Chief Justice Warren Burger (1977) 49
[549] Law Reform Commission (2008) 120

Australian Justice Peter Underwood who hold the view that ADR is efficient and cost effective better than the judiciary.[550]

However, the Federal Judicial Centre in USA published one report of ten mandatory court annexed arbitration programs, attempting to evaluate whether arbitration reduced the time from filing to disposition.[551] Dayton contends that while such report [as aforesaid] "strongly corroborates" earlier studies that vouch for ADR as having helped reduce expense and delay, there was "little indication" that any of those beliefs had empirical backing.[552] Such a view would suggest that Rosenberg and Folberg[553] studies were based on beliefs of participants rather than measures independent of the participants' possible biases hence empirically unfounded.[554] In RSA for instance the Conciliation Boards, Industrial Councils and Industrial Courts, which operated then as engineered by the apartheid government in pre-1994 had un-precedent backlogs with delays taking as much as five months to several years to have the Industrial Courts attend to matters as well as appeals.[555] This study is interested in analysing ADR to ascertain if the situation has changed post the apartheid era in South Africa. Guided by the view that while such measures of efficiency may have been conducted elsewhere outside Africa the need to test their credibility in Botswana, South Africa and Zimbabwe labour dispute resolution is imperative. The matter of cost is discussed next.

Second, cost is another factor of vital importance in discussions of ADR efficacy or any other dispute resolution process. There is a wide support for the cost saving nature of ADR process as compared to the judiciary process of settling disputes.[556] Several scholars[557] assert that ADR process are "less expensive than court proceedings" and essentially, the chief goal of ADR is to "relief court congestion as well as prevent undue cost and delay."[558] In fact, it is contended that 'many poor are denied access to justice

[550] Chief Justice Peter Underwood *Alternative Dispute Resolution as a Judicial Tool* (undated) 1
[551] Dayton *"The Myths of Alternative Dispute Resolution in the Federal Courts"* (1991) 915
[552] Dayton (1991) 915
[553] Folberg and Rosenberg (1994) 1488
[554] Dayton (1991) 915
[555] Ibid
[556] Pretorius (1993) 2; Brown *et al.* (1998) 13; Law Reform Commission (2008) 117; Heise (2010) 63; Shin (2011) 13 & Wiese (2016) 2
[557] Wiese (2016) 2
[558] Pretorius (1993) 2

[under the normal court process] because hefty registration and presentation fees are required for use of the formal legal system' (emphasis mine).[559] The matter of 'cost saving' remains a top priority measure of ADR efficacy when compared to adjudication.[560] In England, for instance the cost of litigation has been highlighted in the case of Egan v Motor Services (Bath) Ltd.[561] Consequently, the English Court of Appeal overwhelmingly endorsed the use of mediation particularly where litigation costs had the potential to be disparate to the disputed amount.[562] In the Egan matter, for instance the amount at issue was only £6,000 but approximately £100,000 was spent in litigating the matter, the appeal included.[563] Ward LJ perceived the parties as "completely cuckoo" to have spent so much litigating yet there was so little at stake.[564] The above case provides strong support for ADR as opposed to litigation in dispute settlement, especially when the stakes are so high in regards to the cost factor.[565] Shavell[566] on the other hand, used behavioural economic analysis of ADR, while Rosenberg and Folberg conducts a true empirical model of ADR.[567] Bernstein paid particular attention to "mandatory non-binding court annexed arbitration (CAA)"; while Heise tests the two of the core goals of ADR through an empirical study the findings of which drum the view that ADR increases chances of settlement and disposition time.[568] It means most evaluations or reviews of effectiveness of ADR ought to look at issues of cost, time and process among other things.[569] Frank Sander and Stephen Goldberg[570] conducted a study that proffered eight (8) elements as determinants of ADR effectiveness and efficiency (efficacy) namely: minimise costs, resolve quickly, maintain privacy, maintain relationships, involve constituencies, link issues, get neutral

[559] Brown *et al.* (1998) 13
[560] Ibid
[561] [2007] EWCA Civ 1002.
[562] Law Reform Commission (2008) 117
[563] Ibid
[564] Ibid
[565] Law Reform Commission (2008) 117 & Ward LJ held that "The cost of... mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of common sense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."
[566] Shin (2011) 13
[567] Ibid
[568] Heise (2010) 63
[569] Shin (2011) 13
[570] Sander and Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* (1994) 68

opinion, and set precedent.[571] The model compares ADR to courts systems and labour dispute settlement mechanisms. It collects around the goals of disputants as the key measures of effectiveness of an ADR system.[572] This view is corroborated by Pretorius[573] who held the view that when deciding to use ADR to resolve disputes seven considerations were important: (1) the formalities, costs and delays associated with the process; (2) the privacy associated with the process; (3) the presence or otherwise of a third party; (4) the type of decision that will result; (5) the degree of choice and influence exercised by the parties in the outcome of the dispute; (6) the degree of knowledge and understanding of the parties of the procedures involved and finally (7) the amount of coercion that is exercised by or on the disputing parties or that are necessary to initiate the process." It is discernible from the forgoing that efficacy of ADR also depends on decision factors that would be considered before opting for it instead of court litigation to resolve disputes.

Opinion is intensely varied between proponents who shield ADR, according it a tag of an efficient and cost-saving affair, and those who cast aspersions on it as ineffective and burdensome.[574] Silver, in 1987, contented that there was no empirical support for the claims of ADR efficacy.[575] Such a view was further agreed upon by Esser[576] who built upon particularised critiques of ADR, argued that there was a general dearth of empirical backing and theoretical probe into the political aspects of ADR.[577] He decried the general prevailing approach to measuring ADR in quantitative terms – cost and time – which tendentiously negates the quality of justice as misleading.[578] It is contended that the quantitative efficiency evaluation of ADR by Esser "blinded" and overshadowed the dispute processing arena from the political underpinnings of ADR.[579] Dayton's assessment went even further to calling ADR's efficacy a "myth."[580] Dayton proffered a strongly held view that "the statistics simply fail to support" the

[571] Sander and Goldberg (1994) 49
[572] Ibid
[573] Pretorius (1993) 6
[574] Dayton (1991) 957
[575] Yamamoto, *et al.* (1996) 1060
[576] Ibid
[577] Ibid
[578] Yamamoto, *et al.* (1996) 1060
[579] Ibid
[580] Ibid 1061

assertion that ADR was a cost and time efficient provision.'[581] 'Dayton as such summoned for "more exacting scrutiny ... to ascertain whether ADR was the panacea for federal civil litigation - or thereby the emperor (litigation) just got to wear new clothes.'[582] These debates[583] cast doubt on the ability of ADR to reduce the cost of litigation despite views to the contrary. The challenge is that while the debates[584] attacking the ability of ADR to achieve cost effectiveness are strong they are outweighed in number by those[585] that affirm its ability to so do. This study believes that court litigation involves the production of pleading documents such as summons, pleas, discovery which are produced by lawyers who charge at each stage including appearance at trial. It is essentially costly to resolve disputes through the courts. Therefore, ADR involves less tenuous and cost saving processes which do not require the technical rigour and involvement of lawyers. This study acknowledges the theoretical arguments[586] for cost effectiveness of ADR but queries its validity in the countries under consideration. The settlement and enforcement as a determinant of ADR efficacy are considered next.

Third, reaching settlement of a dispute is the chief goal of any disputing agenda and process.[587] Parties may resolve their disputes through their own efforts or with the involvement of a third party who either facilitate dialogue or imposes an award.[588] In the end, such resolution is what settlement is about. Tanya Venter and Andrew Levy[589] asserts that "we continue to hold the view that settlement of a dispute at conciliation is neither the responsibility nor does it lie in the hands of the dispute resolution institutions, it is in fact an outcome in the hands of the parties. Therefore, the efficiency or effectiveness of the system should not be determined by how high or low the settlement rate is." It is discernible from the above argument, against CCMA's approach to settlement, that conciliation outcomes (settlement) should never be

[581] Yamamoto, *et al.* (1996) 1060
[582] Dayton (1991) 957
[583] Ibid
[584] Ibid
[585] Pretorius (1993) 2; Brown *et al.* (1998) 13; Law Reform Commission (2008) 117; Heise (2010) 63; Shin (2011) 13 & Wiese (2016) 2
[586] Pretorius (1993) 2; Yamamoto, *et al.* (1996) 1060; Brown *et al.* (1998) 13; Law Reform Commission (2008) 117; Heise (2010) 63; Shin (2011) 13 & Wiese (2016) 2
[587] Pretorius (1993) 69; Ramsden (2009) 2 & Wiese 2016) 49
[588] Bosch *et al.* (2004) 8
[589] Venter & Levy The disputes at the CCMA, Bargaining Councils and Tokiso (2011) 29

credited to the dispute resolution body as it lies in the hands of the parties who finally reach settlement through compromise. However, it can also be argued, opposed to Tanya Venter and Andrew Levy's[590] view, that the fact of a third party facilitating well can contribute to the outcomes of the matter, hence CCMA may not be out rightly denied the right to take credit. Settlement is concerned with a weighing up the efficacy of ADR testing the assumption that settlement is one of its highly priced benefits to punters.[591] It is further argued that presumably ADR is geared towards settlement',[592] and in essence settlement before going to trial is considered a common achievement.[593] This is argued under the auspices that once a case is settled before trial then the dockets get cleared.[594]

The downside of settlement as a focus in ADR programs is that in the rush to settle, leaves it open to scrutiny as to whether the rights of participants are not compromised and the fairness of the outcome jeopardised.[595] It is also contented that settlement figures published on ADR success may be disingenuous.[596] Figures may risk being bloated for innumerable reasons and self-generated-reports may be concocted and inaccurately doctored under the pretext to create an impression of success.[597] In other cases parties that reached an agreement could lay claims of "little or no progress."[598] Further, parties that fail to agree to a settlement during the intervention may reach an agreement immediately following the ADR event.[599] Arguably, settlement and enforcements seldom reflects success with certainty, since the trial settlement ratios often record high scores.[600] Reports have a tendentiousness to indicate that about 90% of all cases were settled without further ado at adjudication.[601] The challenge of analysing settlement and enforcement is acute when it pertains to Botswana and Zimbabwe who generally lack publicly available data on the outcomes of the ADR

[590] Venter & Levy (2011) 29
[591] Kerbeshian (1994) 400
[592] Ibid 420
[593] Kerbeshian (1994) 390
[594] Jennings "Court-Annexed Arbitration & Settlement Pressure: A Push towards Efficient Dispute Resolution or *the Second-Class Justice."* (1991) 317
[595] Ibid 313
[596] Kerbeshian (1994) 390
[597] Ibid
[598] Ibid 391
[599] Kerbeshian (1994) 390
[600] Katz (1993) 52
[601] Edwards *"Alternative Dispute Resolution: Panacea or Anathema?"* (1986) 670

processes in labour dispute resolution. The case is different with South Africa whose data from the main labour dispute resolution bodies, CCMA, Bargaining Councils and Tokiso is made publicly available annually.

Fourth, enforcement on the other hand presents a challenge in Botswana, South Africa and Zimbabwe labour dispute resolution systems. Enforcement pertains to the chief end of disputing where claims and awards are liquidated and afforded winning parties. According to Savage[602] awards and claims must be capable of being enforced by the parties. 'Without functional enforcement mechanisms in place, the constitutional assurance of the right to fair labour practices and the protection of the law risks being significantly undermined if not made meaningless.'[603] Whether or not settled matters are enforced is a measure of whether a dispute resolution process has been effective or otherwise. The challenge with this attribute is that there is no data available in the three countries to ascertain, with certainty and exactitude, its status in labour dispute resolution in Botswana, South Africa and Zimbabwe. It therefore remains an important measure of efficacy among others, cost, time, settlement and client satisfaction. Client satisfaction is considered next.

Fifth, client satisfaction, is arguably the main yardstick, gauge or measure for ascertaining ADR effectiveness or efficiency and in myriads of occasions singled out as the only measure with no data in place.[604] This view is corroborated by Yamamoto[605] who assertively believes that ADR can be *useful, efficient* and *satisfying* under carefully tailored circumstances."[606] In the same vein, it is argued that the use of ADR (as opposed to adjudication) tends to shift the focus from vindication of rights to satisfaction of needs (emphasis mine).[607] In literature on ADR generally user satisfaction … received considerable treatment.[608] A study by Folberg and Rosenberg [609] which empirically tested the efficacy of an ADR found that 'almost two-thirds of respondents in mandatory ADR felt pleased therewith and supposed that it was worth

[602] Savage Challenges in the enforcement of arbitration awards and minimum standards (2013) 46
[603] Savage (2013) 46
[604] Katz *"Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two sides of the coin?* (1993) 1
[605] Yamamoto, ADR: Where Have the Critics Gone Essay, Santa Clara Law Review 1055 (1996) 1057
[606] Ibid
[607] Yamamoto, (1996) 1060
[608] Ibid 1063
[609] Folberg and Rosenberg (1994) 1488

every of mint of resource accorded it.[610] They reported that discontent with it emanated primarily from displeasure with the neutral party assigned to dispense a particular matter at any given point in time.[611]

However, dissenting opinion has it that client satisfaction may not be the best indication of whether ADR is successful when it is used alone.[612] Arguably, client satisfaction does shed some light into participant's "perceived control of the process,"[613] and magnitude of gratification and satisfaction have also come to be "closely linked" with perceptions by participants that ADR engenders fairness.[614] In asserting the elements that cause ADR satisfaction it is also argued that 'an undisputable benefit afforded by mediation as well as conciliation comprise speedy access to a remedy that presents pleasurable and timely outcomes for those reliant on it.'[615]

There is also opinion vehemently opposed to client satisfaction as a measure. The reasons advanced being that it fails to live up to "a desirable yardstick for guaranteeing social justice, one that ADR is not to be expected to achieve," and that seldom reflects social costs with exactitude, expectations of participants or perceptions of fairness in the net result of the resolution."[616] An examination of the climate of displeasure with litigation that led to rising acquiescence of ADR, Professor Judith Resnik[617] argued that ADR and court litigation alike are seldom perceived or gauged on the basis of their own merits.[618] She argued that the muddled context ADR finds itself is seen as positioned to supplant the role of the courts in handling disputes.[619] This study takes client satisfaction as a good measure of efficacy for the reason that there are more advantages advanced towards it than disadvantages. Aspects such as party control over the process, general perceptions of fairness it can achieve are among important advantages ADR affords parties while the challenge of perceptions of dissatisfaction

[610] Folberg and Rosenberg (1994) 1488
[611] Ibid
[612] Woodard (1997) 29
[613] Kerbeshian (1994) 385
[614] Ibid
[615] Law Reform Commission *Alternative Dispute Resolution – Consultation Paper* (2008) 2
[616] Kerbeshian (1994) 429
[617] Yamamoto, *et al.* (1996) 1067
[618] Ibid
[619] Yamamoto, *et al.* (1996) 1056

with a third party assigned to facilitate the resolution and inability to determine the social cost of disputing as the main disadvantage cited. This study however believes that client satisfaction is not to be taken as a single measure but alongside other elements such as cost effectiveness and time efficiency, settlement and enforcement of claims and awards. This means the whole ADR process has to be reviewed inclusive of all these elements, and not just single counts such as client satisfaction for its efficacy to be determined. This study, in view of the forgoing, also holds the view that the debate around ADR efficacy is still far from over for the simple reason that there are many contending views thereon. The fact that courts feel ADR supplanted them of their work, and the doubts about ADR's ability to measure social costs of disputing leaves the debates still far from ending. Other challenges that may also warrant attention are the skills of the commissioners, conciliators and arbitrators who handle disputes.[620] The administrative aspects of the organisations running the ADR process possibly hold some weight on the ability of achieving efficacious resolution of disputes as well.[621] For the avoidance of being constrained in the politics of argument about whether time efficiency, cost, settlement and enforcement and client satisfaction this study will assess these in the ADR processes of the three countries under investigation.

2.6 Summary

This chapter considered the topic under investigation, Alternative Dispute Resolution, providing a framework for understanding its meaning, scope and challenges. The failure to reach a universal definition of ADR led this study to adopt a working definition, thus, ''a buffet of processes of settling disputes outside the courts, consisting of an array of methods such as negotiation, conciliation, mediation, arbitration or a combination thereof, affording disputants an 'accessible, informal, private, voluntary, independent, less combative, relationship building, cheaper and speedy, and more satisfactory resolution of disputes enhancing optimal enforcement of awards and outcomes.'[622] This definition was adopted because of its all-encompassing nature in which it captures the fact that there is no single ADR approach and then the main

[620] Wiese (2016) 78
[621] Ibid
[622] Cassim *et al.* (2013) 39, See also Love (2011) 1

attributes which make ADR unique for example accessibility and privacy, among other things. The definition also captures the elements of ADR efficacy such as enforcement. This study also reviewed three important terms, grievances, conflicts and disputes contending that they are intricately related to each other. The study as such accepted the considered view that disputes start as grievance that are not resolved which escalate into conflicts. It is when grievances and conflicts are not resolved inside an organisation that the inevitability of a third party (ADR or the courts) have to be factored in. For the simple reason that this study was not primarily initiated for assessing grievance and conflict handling the debates were closed there, pursuing disputes and dispute resolution as the main focus. This study was mainly interested in the analysis of dispute resolution in labour disputes in Botswana, South Africa and Zimbabwe, with focus on efficacious resolution thereof or otherwise. It was contended that efficacious resolution of disputes is not an easy task given the lack of agreement on definition issues of what ADR is, what it constitutes and even the absence of measures of efficacy. The choice of which ADR process to use either negotiation, mediation, conciliation and arbitration is also contentious. These are ILO main recommended dispute settlement procedures to be used by member countries let alone the three under consideration in this study. This may be attributed to the various advantages and disadvantages they present. The major disadvantage, amongst others, being the lack of precedent in its determinations and rulings, which only courts can guarantee and then challenges of enforcement have also been considered in this chapter. The chapter finally adopted cost, time, settlement and enforcement and client satisfaction elements as the main measures that will be considered for determining efficacy or otherwise of ADR in labour dispute resolution in Botswana, South Africa and Zimbabwe. While studies may have been conducted in the west or elsewhere +reviewing these measures similar studies in Africa or the three above countries are negligible if not non-existent. The three countries are discussed in the next three chapters in alphabetical order. The next chapter discusses the efficacy of ADR in Botswana.

CHAPTER 3

ADR IN BOTSWANA

3 INTRODUCTION

The previous chapter provided a theoretical foundation for this study, highlighting the challenges surrounding the subject of ADR, especially with regards to conceptual definitions, scope and measurement of its efficacy. The study established a framework on the basis of which to ascertain if ADR was efficacious or otherwise. This chapter conducts a critical analysis of the status of ADR processes in handling labour dispute resolution in Botswana. Given that ADR is considered to be efficacious when it achieves cost efficiency, time saving, settlement and enforcement of claims and awards as well as client satisfaction,[623] it would be vitally important to this study to ascertain if Botswana has achieved this feat in labour dispute resolution. Before a critical analysis of ADR performance is had in Botswana it is also important to consider the context in which the country handles labour dispute resolution. The chapter first provides a contextual analysis of Botswana as a country giving regard to a pestel analysis,[624] followed a brief historical analysis of the development of labour dispute settlement in Botswana from the pre-colonial period to the present. The common law bearings, the manner in which the legislature, judiciary and executive arms of the government handles ADR processes in labour disputes are considered in this chapter. Given that ADR is meant to work alongside courts and resolve lawsuits hence providing relief to courts, one would be keen to review how supportive the latter are in that regard. The independence of the executive government in handling the work of ADR is also a case in point requiring treatise in Botswana. This is followed by an analysis of ADR in terms of criteria established in the previous chapter which seeks to establish whether or not ADR in Botswana is efficacious.

[623] Kerbeshian in Woodard (1997) 383; Brown *et al.* (1998) 15; and Shin (2011) 13); Love (2011) 5 & Wiese (2016) 2
[624] Morrison https://rapidbi.com/history-of-pest-analysis/ Date of use: 25 February 2017

3.1 Context of ADR in Botswana

Botswana is a Southern African country which, besides being landlocked is bordered by South Africa to its south, Zambia to its north, Zimbabwe to its northeast and Namibia to its west and covers[625] an area of about 581 730 square kilometers.

3.1.1 Political factors

Botswana was granted independence by Britain in 1966 led by its first present Seretse Khama who oversaw the establishment of the Botswana Democratic Party herein (the "BDP") which has been in power ever since. Botswana is considered a constitutional democracy, a country which respects civil liberties, holding free and fair elections and has changed four presidents since its independence in 1996. The country generally subscribes to the principle of *trias politica* in terms of which there is a separation of powers between the executive, judiciary and legislative arms of government. The current president of Botswana is Mokgwetsi Masisi.[626] He took over from the former President Ian Khama who retired from power in April 2018.[627] The country is regarded as a stable democracy which holds regular elections every five years though the governing party since independence, the Botswana Democratic Party is accused by the opposition parties to be failing to deliver the needed economic miracle especially in diversifying the economy and reducing unemployment which currently sits at 18.10%.[628]

3.1.2 Economic factors

Botswana is largely touted a mono-cultural economy, because she is dependent on the exploitation and export of diamonds to a great extent. Diamonds account for 71%

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[625] Dicey *Botswana Focus* (2003) 1

[626] Mail and Guardian https://mg.co.za/article/2018-04-03-who-is-botswanas-new-president-mokgweetsi-masisi Date of use: 25 February 2019.

[627] Ibid

[628] Trading Economics https://tradingeconomics.com/botswana/unemployment-rate Date of use: 25 February 2019. "Unemployment Rate in Botswana increased to 18.10 percent in 2017 from 17.60 percent in 2016. Unemployment Rate in Botswana averaged 19.23 percent from 1991 until 2017, reaching an all-time high of 26.20 percent in 2008 and a record low of 13.90 percent in 1991."

of export earnings, on average, followed by copper nickel.[629] At the time of independence, the country had minimal development and was regarded as being among the 20 poorest countries of the world. The discovery of diamonds[630] in 1967 changed Botswana into a very successful economy by all standards in troubled Africa. This success is attributed to the fact that over the years the country has had astute financial or economic management coupled with free enterprise policies that led to highest growth rate in terms of Gross National Product herein ("GNP") in the entire globe in the initial 20 years since attaining independence.[631] Unemployment rate remains on average above 15%.[632] Diamond was discovered in Botswana in 1967 changing Botswana's tag from poorest into a successful country among others in Africa at large.[633] Over the years Botswana's economy has been regarded as needful of Diversification. To achieve more economic development away from the mining resources, it is incumbent upon Botswana to drift to other engines of growth such as tourism, manufacturing, finance etc.[634]

Essentially, Botswana has an annual growth rate of 1.8% quarter on quarter-on-quarter in Quarter One, 2016, leading to a 2.8% annual increase year-on-year.[635] The economic growth rate reflects a healthy economic state given that an annual growth of 2.8% is faster than Botswana's population growth rate is estimated at 1.21% in 2015.[636] However, Botswana still struggles to curb unemployment which stood at 20% according to a 2013 estimate and faces a population 19.3% living below national poverty line according to 2010 estimate. In terms of employment distribution 26.4% are employed in Agriculture; while 17.5% in Industry; and 56.1% services based on a 2010 estimate. Labour participation rate as a percentage of total population ages of 15+ was estimated at 76.8% in 2014.[637] In terms of inflationary pressure – Botswana experienced a marginal increase of 0.1% in its consumer price index (CPI) on a month-on-month (m-o-m) in July 2014, signaling as the fifth consecutive m-o-m rise. The

[629] KPMG, Botswana Economic Snapshot H2, 2016 (2016) 1 and Friedrich Ebert Foundation *Trade Unions in Botswana Country Report 2003* (2004) 8
[630] Dicey (2003) 1
[631] Ibid
[632] Friedrich Ebert Foundation (2004) 8
[633] Dicey (2003) 1
[634] Friedrich Ebert Foundation (2004) 8
[635] KPMG, (2016) 1
[636] Ibid
[637] Ibid

inflation rate per annum nonetheless remained unchanged at 2.7% year-on-year (y-o-y) also recorded in June.[638]

3.1.3 Socio-cultural factors

Botswana occupies a geographical space of about 581 730 square kilometres[639] occupied by a population of 2.2 million people and a population growth of 2.0% per annum.[640] Roughly about 78% of the Botswana population speaks Setswana as their first language as per the 2001 census findings.[641] However the business languages of the country are English, Setswana and Kalanga.[642] The BaTswana ethnic group comprises 8 sub-groups, followed by the BaKalanga, accounting for as much as 8% of the Botswana population. The remainder are BaKgalagadi, BaHambukushu, BaHerero, BaSarwa tribal groupings as well as expatriate (other African, Indian and European) ethic groupings commanding as much as 14% of the country's population.[643] The bigger chunk of the population is concentrated in Gaborone, Serowe, Palapye, Francistown and Selebi-Pikwe cities which are the key strongholds of the country.[644] The Ngamiland Region (also known as the Okavango Delta area) (Maun) and in the South of the country (Lobatse, Mahalapye, Kanye and Molepolole) are also important locations with collecting large collections of the population. Approximately 50% of the population however lives within 100 km environs of Gaborone.[645] Botswana is experiencing the challenge of dual increase in urbanisation and rural depopulation at the same time, with the result that roughly as much as 60% of its population currently lives in the cities. This is owing to the fact that economic development is concentrated in the cities while the hardships common to rural population who survive on the agricultural sector are victims to perpetual droughts.[646] Botswana's urban population is projected to stand at 57.2% while its Human Development Index (HDI) is 0.683 effectively ranked at 109 out of 187 countries. The

[638] KPMG, (2016) 1
[639] Dicey (2003) 1
[640] Bertelsmann Stiftung, BTI 2016, (2016) 2
[641] Jefferis and Nemaorani *Botswana Country Overview 2013/14* (2014) 8
[642] KPMG, Botswana Economic Snapshot H2, 2016 (2016) 1
[643] Jefferis and Nemaorani (2014) 8
[644] Ibid
[645] Ibid
[646] Ibid

life expectancy in Botswana is estimated at 47.4 years according to a 2015 report.[647] The literacy rates of those that can read and write for the Botswana population stands at 88.2% for adults over 15 years of age; spread between 87.2% male and 89.2% female for the year 2015 as estimated.[648]

Botswana still struggles with poverty among other challenges, as well the scourge of the deadly HIV/AIDS disease with a total of 18.5% considered to be living with the disease.[649] The government has many globally recognized efforts to control the infection of its citizens by encouraging safe sex as well as through freely distributing the antiretroviral pill to its citizens.[650] The country's is considered to be suffering the challenge of lack of vibrant civic organization, given that the government has in the past tended to exert a heavy-handedness in the manner it handled unionism.[651] Union activities has often been met with brutal attacks from the government and in certain cases union members have lost their jobs under circumstances considered unfair.[652] Botswana has challenges with hot temperatures that have tended to affect agricultural production especially in terms of crops.[653]

3.1.4 Technological factors

Botswana has generally embraced the use of technology through internet connectivity and participation on social media. Botswana is ranked slightly below the average score with an overall number 74 in the world, is at 102 in terms of innovation and ranked 76th in terms of technological readiness in worldwide rankings.[654] Technology as the know-how for doing or accomplishing a task or something, be-it an age-old technology for wine making or latest cellphone high tech manufacturing know-how.[655] In terms of telephone and internet users Botswana has 160,490 main lines in use; 3.48 million mobile cellular; 600,248 Internet users (2015).[656] Botswana cannot be considered a

[647] Bertelsmann Stiftung, BTI 2016, (2016) 2
[648] KPMG, (2016) 1
[649] Bertelsmann Stiftung, BTI 2016, (2016) 5
[650] Ibid
[651] Ibid 25
[652] Ibid
[653] Ibid
[654] Jefferis and Nemaorani (2014) 23
[655] Smit, Cronge, Brevis and Vrba, *Management Principles* (2013) 72
[656] KPMG, (2016) 1

leader in terms of technological advancement though she has potential for becoming a decent technical diffuser given its growing strides as well as educational, institutional and economic capabilities.[657]

3.1.5 Ecological factors

Environmental sustainability is increasingly topical in the entire globe though not without difficulty as a concept in terms of measuring it.[658] A ranking scale composed of 22 performance indicators termed EPI[659] was developed and employed to gauge the environmental performance of countries within a ten policy categories.[660] The EPI indicators are: "Environmental Health Water (effects on human health); Air Pollution (effects on human health); Air Pollution (ecosystem effects); Water Resources (ecosystem effects; Biodiversity and Habitat; Forests; Fisheries; Agriculture and Climate Change."[661] In light of such a scale Botswana garnered an EPI of 53.74 in 2012 which essentially ranked her at 66 of the 132 countries measured therewith and in the result was overall considered to be as a "modest performer".[662]

3.1.6 Legal factors

Botswana has a dual legal system composed of common law which is essentially a blending of common law which comprises both Roman-Dutch law as well as common law of England put together as one and traditional customary law on the other.[663] The common law tradition as a legal system was imposed on then Bechuanaland Protectorate (present day Botswana) through the colonial piece of legislation then known as *General Administration Order 1891* which was essentially an extension of the laws that obtained in the Cape Colony on 10 June 1891 to the colony (Bechuanaland).[664] Botswana observes constitutional supremacism as a principle, on the basis of which all actions of government as well as all laws it passes down are

[657] Jefferis and Nemaorani (2014) 17
[658] Ibid 21
[659] EPI stands for Environmental Performance Index formerly known as Environmental Sustainability Index (ESI).
[660] Jefferis and Nemaorani (2014) 21
[661] Ibid
[662] Jefferis and Nemaorani (2014) 21
[663] Molokomme *'Reception and Development of Roman-Dutch Law in Botswana'* (1985) 1
[664] Sec 19, of the Bechuanaland Protectorate General Administration Order 1891

subjected to constitutional scrutiny leading to the striking down of any laws that could be found to contravene any rights enshrined in the Constitution of the Republic.[665] 'Botswana's Constitution is graced with "a Bill of Rights, modelled along that of the 1950 European Convention for the Protection of Human Rights, providing for basic fundamental rights and freedoms such as the right to life, equality, personality, protection from torture and inhuman and degrading treatment and freedom of association and conscience as well as socio-economic rights."[666] Botswana's Constitution was relied upon by indigenous peoples commonly known as Basarwa to enforce their rights to ancestral land in the recent past.[667] Dispute the Botswana government holding accolades in respect to upholding decisions of courts it is on record that the decision of the high court regarding the famous indigenous peoples the CKGR matter, was not fully complied with.[668] Botswana has a functional legislature and effective court system which is graced with a Court of Appeal at its zenith.[669] Botswana commands a high record of good governance by all standards in Africa. This may be attributed to high quality public institutions, an independent legal system, and low levels of corruption in government, all of which the country has been able to develop and preserve over time.[670]

3.2 Labour Dispute Settlement between 1885 and 1966

This section discusses labour dispute settlement in Botswana from the pre-independence period, that is, 1885 to 1966. The main focus of this chapter is to ascertain if ADR in Botswana was efficaciously resolving labour disputes. The main issues that characterized the period include the following:

- Botswana has an elaborate history as a pastorate community of people who basically survived on small-hold farming and cattle rearing on a subsistence basis.[671] Essentially, during the pre-colonial era all the ethnic groupings were

[665] Chapter II, Chapter 1, Laws of Botswana.
[666] Ibid
[667] Sesana and Others v Attorney General Misca No. 52/2002 (Unreported judgment handed down on 13 December 2006, CKGR matter)
[668] Bojosi (2009) 11
[669] Ibid
[670] Jefferis and Nemaorani (2014) 12
[671] Duggan *The Kweneng in the Colonial Era: A Brief Economic History* (2009) 41

essentially hunters and gatherers deriving their means of support from arable farming and livestock with time.[672]

- The discovery of gold in the region spelt new challenges in 1867 which did not spare Bechuanaland, as it then was, given that the Transvaal government sought to seize parts of Botswana. This is despite the fact that the British inhibited annexation, but in the 1870s and 1880s that did not stop Boers from continued invasion of native lands.[673]
- There were no labour disputes in Botswana until colonial rule featured in the country and introduced formal organizations similar to the South Africa case.[674] Botswana had British rule formally imposed on her in 1884 beginning with its southern part and then the northern part in the following year.[675] The motive of the British was to prevent and curb the intended expansion of the Germans and Boers from the west and south fronts respectively.[676]
- The period from 1930 to 1966 was characterized by the enactment of several laws regulating labour in the Bechuanaland protectorate, as it then was, now Botswana.[677]
- In 1934, for instance, the Works and Machinery Proclamation Act[678] was enacted to provide for the processes associated with production, manufacturing, mining and issues of safety, health and inspection.[679] Save for safeguarding the interests of the settlers or capital, this law did not have any bearing on industrial democracy in general and fair systems of labour dispute settlement or ADR specifically.
- In 1936 the Women and Boys Underground Work Proclamation Act[680] was enacted which as its main object forbade the employment of females and boys below 16-year-old to work in underground mines.[681] In the same year the Workmen's Compensation Proclamation Act[682] was enacted in 1936 and its main objectives were to protect employees in case they died or were injured in the line of duty. The

[672] Bojosi (2009) 52
[673] Ibid
[674] Swanepoel, Erasmus and Schenk *South African Human Resource Management* (2008) 37
[675] Bojosi (2009) 7
[676] Ibid
[677] Ntumy (1999) 157
[678] Act 40 of 1934
[679] Ibid
[680] Act 74 of 1936
[681] Ibid
[682] Act 28 of 1936

Act defined a workman as a worker under contract of service or an apprentice.[683] The Wages Act[684] called for the formation of a Wages Board (Cap 161) and minimum wages were prescribed for some sectors.[685]

- In 1941 the African Labour Proclamation Act[686] was enacted for purposes of regulating and controlling the recruitment of African labour. Wage advances for Africans were restricted to four pounds and desertion from work was penalised by two months imprisonment or ten pounds fine.[687] In the same year the Shop Hours Proclamation Act[688] was enacted which prescribed strict business hours for shops.[689]
- Clearly, from the onset, the employment environment in pre-independent Botswana was marred by segregation and discrimination. Laws were specifically installed to control African labour and impose punishments such as imprisonment for any slight offense like absenteeism. There is no indication that such employees were afforded the right to be heard, as the principles of natural justice[690] would provide. In such an atmosphere, there can be no scope for efficacious dispute resolution.
- The year 1942 marked the first attempts in pre-colonial period to provide for labour dispute settlement in Botswana (Bechuanaland Protectorate as it then was).[691] With the enactment of the first legislation "Trade Union and Trade Dispute Proclamation of 1942" essentially legalising the formation and operation of trade unions.[692]
- Finally, to consolidate and regulate conditions of work the then Legislative Council of Bechuanaland Protectorate devised the Employment Law Act[693] prior to

[683] Section 6, Act 28 of 1936
[684] Act 20 of 1936
[685] Section 8, Act 20 of 1936
[686] Act 56 of 1941
[687] Ibid
[688] Act 72 of 1941
[689] Ibid
[690] The Principle of natural justice simple provides for the right to be heard by an independent tribunal as a rule against bias. As such in any disciplinary action taken against an employee, the employee must be afforded the right to be heard or present their side of the issue before conviction and sentencing. This in Latin is represented by the axiom *audi alteram patem* rule which states "you must always hear the other side when judging a matter" alongside it is a rule against bias called *nemo judex in causa sua* which states that any disciplinary tribunal presiding over disciplinary hearings must be constituted by an independent tribunal.
[691] Friedrich Ebert Stiftung Foundation, *Trade Unions in Botswana* (2008) 6
[692] Ibid
[693] Act 15 of 1963

independence which in essence repealed all the proclamations that had been made before it.[694]

- In 1963, only ten years later, another piece of legislation named the Employment Law[695] was enacted which, understandably so, provided for a wide spectrum of issues with respect to labour relations but albeit criticized for its regrettable neglect of labour disputes settlement.[696]

3.3 Labour dispute resolution between 1966 to 2002

From 1966 onwards the Botswana government was tasked to determine the legislative framework of the country in general and labour dispute settlement mechanism specifically. That did not happen immediately. The following activities were noted:

- Labour laws which had been passed during the colonial era such as the Trade Unions and Trade Disputes Proclamation of 1942 and the Employment Law[697] remained in force.[698]
- Only in 1969, was the Botswana government able to pass its first pieces of legislation which sought to improve employment sector engagements. These initiatives were particularly motivated by a series of protests especially the 1968 strike.[699] These included the Trade Unions and Trade Dispute Proclamation and the Employment Law,[700] which were subsequently replaced by the Trade Unions Act,[701] the Trade Dispute Act[702] and the Regulation of Wages and Conditions of Employment Act of 1969.[703] The Botswana government only enacted a comprehensive labour dispute settlement legislation in the 1980s.[704]
- Dispute resolution settlement became more pronounced in 1992, once again after a hotly popularized strike of the industrial class employees in 1991. In 1992 the

[694] Act 15 of 1963
[695] Ibid
[696] Kupe-Kalonda (2001) 37
[697] Act 15 of 1963
[698] Ibid
[699] Friedrick Ebert Stiftung *Trade Union in Botswana: Country Report July 2008* (2008) 6
[700] Act 15 of 1963
[701] Act 24 of 1969
[702] Act 28 of 1969
[703] Friedrick Ebert Stiftung (2008) 6
[704] Labour Bulletin *Labour Action: Botswana's Biggest Strike Ever* (1991) 6

Trade Dispute Act amendment is regarded as a landmark milestone because it created the particularly created ADR processes vis a vis mediation and arbitration for resolution of labour disputes. This Act was finally amended by the 2004 Trade Dispute Act which is currently in force.

3.4 Labour dispute between 2003 to the present

It is also important for this study to take a look at legislation particularly the Trade Disputes Act[705] which was enacted in 2003 as it provided many definitive elements of ADR and some measures of its efficacy as well. The year 2003 ushered in further reforms and changes to the dispute resolution machinery in Botswana in the form of the Trade Disputes Act.[706] The Trade Dispute Act[707] established a panel of mediators and arbitrators to administer ADR processes, made provision for medication and arbitration as labour dispute resolution in Botswana and sets out procedures to be followed in the event of a dispute.[708] Botswana generally lacks an independent body to administer ADR. ADR functions, namely mediation and arbitration of labour disputes are administered under the auspices of the Botswana government, the department of labour and social security, undermining the independence and industrial democracy especially for public sector employees.[709] The Botswana government plays both player and referee in disputes involving its own employees who would benefit well under an independent body administering ADR rather than the current system. The current system of administering labour dispute resolution is inundated with many unresolved disputes owing to a poorly resourced ADR system, poorly managed processes and lack of skilled manpower. Apart from a weak legislative enactment,[710] the ADR processes in Botswana lack jurisdiction to determine disputes that resound in money, which has been exclusively left as the prerogative of the Industrial Court.[711] There is not specific jurisdiction pertaining to matters the panel of mediators and arbitrators ought to grapple with. This is coupled with the fact that the Trade Dispute Act lacks clarity on minimum requirements for persons who must be appointed onto the panel

[705] Act 15 of 2004
[706] Ibid
[707] Ibid
[708] Section 3, Act 15 of 2004
[709] Ibid
[710] Act 15 of 2004
[711] Section 3, Act 15 of 2004

that should handle the ADR responsibility. Many strides are still required from legislative to institutional and cultural support structures, to financing and effective administration of case management system seized with the ADR function in labour dispute resolution in Botswana.

3.5 Review of ADR efficacy in labour dispute settlement in Botswana

The previous sections have conducted an analysis of ADR in labour disputes in Botswana focusing on the provisions of mediation and arbitration in legislative enactments in Botswana. It is important for this study to analyse ADR processes in general giving regard to design elements, the planning and implementation of ADR processes and to specifically ascertain the efficaciousness thereof around time, cost, settlement and enforcement and client satisfaction.

This section conducts an analysis of ADR efficacy in labour dispute resolution or settlement in Botswana with three elements in mind. First, the background conditions consist of (1) adequate political and legislative support, (2) supportive institutional and cultural customs and norms, (3) adequate and competent manpower, (4) adequate funding, (5) power parity of disputants.[712] Second, ADR design undertaking related to (1) planning and preparation[713] and (2) operations and implementation.[714] Third, the ADR measures of efficacy, utilising client satisfaction, settlement and enforcement,[715] maintaining privacy, maintaining relationships, involving constituencies, linking issues, getting neutral opinion, and setting precedent,[716] as the focus.

3.5.1 ADR Background Conditions

This section discusses Botswana's ability to provide adequate legislative and political support, institutional support, financial and human resource support, building popular support and acceptance as well as dealing with resistance.

[712] Brown *et al.* (1998) 24
[713] Ibid 33
[714] Ibid 40
[715] Brown *et al.* (1998) 24
[716] Sander and Goldberg (1994) 49

3.5.1.1 Adequate Political and Legislative Support

It is important for an ADR system, at design stage and continuously, to obtain adequate political and legislative support. Legislative and political support will ensure that ADR system is properly scoped; defining its role, jurisdiction, and powers as well as relationship it shares with the court system, among other things. Securing adequate political and legislative support is primarily important in order to establish legitimacy, jurisdiction and authority; securing bureaucratic safeguard against the potential onslaught of resource starvation; securing funding; generating widespread acceptance and use and garnering conquest over opposition from quarters with entrenched interests, among others.[717] This essentially directs that the Botswana ADR system, as far as labour dispute settlement ought to engender the following characteristics: informal, flexible, voluntary, consensual, interest based, relational and future oriented to generate efficaciousness among other things.[718] There is therefore a need for an ADR system to generate support from national government as well as ensuring that it gains widespread legislative and political support.[719] It is important to underscore that the Botswana government, at the attainment of independence in 1966 did not immediately transform labour laws in the country, let alone, dispute settlement laws.[720]

Consequently, employment laws passed during colonial times such as the "Trade Unions and Trade Disputes Proclamation of 1942" and the "Employment Law"[721] remained in force.[722] However, the government continually strangled the role of unions as representatives of the workers' rights through intimidation, arrest and dismissals a case in point being the 1968, 1978, 1991 and 2011 strikes which saw all dissent quashed.[723]

Only in 1982 did the Botswana Government show some measure of commitment to labour dispute resolution by providing for dispute settlement through section 27 of the

[717] Brown *et al.* (1998) 40
[718] Cassim *et al.* (2013) 38
[719] Brown *et al.* (1998) 40
[720] Takirambudde & Molokomme, *The New Labour Law in Botswana* (1994) 10
[721] Act 15 of 1963
[722] Takirambudde & Molokomme (1994) 10
[723] Mwatcha (2015) 45

Employment Act,[724] which could be actioned through the Industrial Court or Labour Officers in the DoLSS. Such Labour Officers were afforded un-feted powers at the level of Magistrate to investigate and enforce their decisions against employers who supposedly flouted the Act.[725] This reflects on the government's effort to provide for dispute resolution though it did not go full throttle.[726]

The same year (1982), a constituent element of ADR – arbitration, was infused into the TDA through institutionalisation of the permanent arbitrator's office – whose role was to arbitrate on labour disputes. Such office had its wings clipped and unable to fly for lack of resources to dispense with labour disputes adequately.[727] This casts doubt on the government's commitment to adequately provide political support for ADR programs specially that the office of Permanent Arbitrator was crippled by lack of funding to dispense with its duties. Without adequate funding ADR is fruitless an endeavor.[728]

From a legislative point of view the current Trade Disputes Act[729] clearly provides for ADR processes, let alone, mediation and arbitration. Courts have continually endorsed the role of mediation and arbitration in Botswana by refusing to hear matters that had not had first resort at these platforms.[730] In the *Modise v The Attorney General*, herein ("Modise matter")[731] the court ruled that the matter had not been properly before it because it had not had first resort at mediation and /or arbitration. Such an approach by the judiciary has the effect of affording the ADR processes required endorsement and giving ADR the required legitimacy among users. That is important for purposes of enhancing ADR efficaciousness owing to support it receives from the judiciary arm of government in Botswana. However, as indicated in foregoing discussions ADR processes have their own set of challenges negatively impacting on its efficacy. The primary challenge is the lack of provision for an independent body to administer ADR processes. Currently, ADR is administered under the auspices of the Department of

[724] Section 27, Employment Act of 1982
[725] Kupe-Kalonda (2001) 40
[726] Ibid
[727] Ibid
[728] Ibid
[729] Section 8(10) or Section 8(11), Act 15 of 2004
[730] [2010] 3 BLR 569 CA, see also Kekgosi v Clover Botswana 2010 3 BLR 714 IC
[731] 2010 3 BLR 569 CA. See also *Kekgosi v Clover Botswana* 2010 3 BLR 714 IC

Labour, as directed by the Minister and Commissioner of Labour.[732] As already pointed out earlier, this makes the executive government both player and referee in the dispute resolution playing field. Employees of the executive government have to undergo dispute resolution processes administered by executive government in the event of a dispute arising between them and their employer, which defies the rule against bias. The Act[733] also clearly omitted to clarify the jurisdiction of the panel of mediators and arbitrators. The mediator is for instance given power to make final decisions, which role can only be exercised by arbitrators.[734] Instead, mediators should only make advisory recommendations after facilitating dialogue between disputants.[735] This is an ambiguity that makes it difficult to determine efficacy of ADR processes. Generally, five challenges pertaining to political and legislative misgivings can be identified in various cases in Botswana case law, which are discussed below in turn.

First, jurisdictional limitations of ADR processes. Where disputes regarding the determination of the existence of an employment relationship or lack thereof, ADR in Botswana lacks jurisdiction to hear and dispense with them. This comprises disputes pertaining to whether an employment relationship existed between the parties as opposed to an independent contractor relationship between them as in the case of Joseph[736] in which it was contented that applicant was not an employee of respondent. Another jurisdictional limitation pertains to matters resounding in money. In the *Montle v Rigaline* matter herein (the Montle matter)[737] it was held that because the TDA[738] did not directly state that the panel of mediators and arbitrators had jurisdiction to hear disputes that resound in money it necessarily follows they were limited from such.[739] Instead, the Industrial Court affirmed the fact that only itself was empowered to dispense with such awards as a matter of jurisdictional provision.[740] It is tempting to refer to the CCMA in the case of RSA where commissioners are not limited from making such awards[741] and the attendant problem with respect to the powers the

[732] Act 15 of 2004
[733] Ibid
[734] Section 8(6), Act 15 of 2004
[735] Patelia and Chicktay (2014) 16
[736] Section 8(6), Act 15 of 2004
[737] [2010] 2 BLR 120 IC
[738] Act 15 of 2004
[739] [2010] 2 BLR 120 IC
[740] Ibid
[741] Swanepoel *et al*. (2008) 613

Botswana legislature conferred on its panel of mediators and arbitrators[742] who were limited from such a provision.[743] In a certain sense, the jurisdictional limitations negatively impact on the timeous resolution of labour disputes as preliminary issues have to be determined first. This means by the time the merits of the disputes are determined time would have been spent on preliminary issues such as questions of whether an employment relationship existed. This delays ADR processes which renders it as inefficient as court litigation, because they are coiled and strangled by the latter. In the case of Botswana, it is discernible that ADR efficacy is already curtained by lack of jurisdiction of ADR practitioners to determine employment relationship status issues and matters resounding in money.

Second, prescription challenges in ADR processes. Prescription pertains to the period within which a matter ought to be lodged before a tribunal beyond which it is considered to be expired. A matter prescribes if the time required for its lodgment has expired. Where a matter prescribes before it is referred to a tribunal it tends to prohibit such tribunal's jurisdiction to hear the matter. In the matter of David v Impact Merchandising Services[744] it turned out that the dispute was not timeously referred, in terms of the Trade Disputes Act[745] and Rules of Court[746] as such the matter had prescribed. This suggests the lack of understanding of due process by disputants, in particular the workers. The points *in limine* raised during the proceeding included the fact that the "Applicant took too long to file an appeal and further failed to request the Industrial Court for condonation on no cause shown."[747] In the result, the Industrial Court consequently determined that having failed to institute its matter before Industrial Court within reasonable time rendered its claim against respondent arising from his dismissal on 18 February 2008 unclaimable.[748]

Third, lack of understanding of ADR processes by disputants. ADR processes ought to be widely and clearly communicated to users so that they know what they are and how they work. In that regard, increased awareness of ADR processes will enhance

[742] Section 3(4), Act 15 of 2004
[743] Section 25 (1) Act 15 of 2004
[744] 2010 3 BLR 46 IC
[745] Cap 48:02
[746] Rule 4(2), Rules for the Conduct of Proceedings in the Industrial Court of Botswana
[747] 2010 3 BLR 46 IC
[748] 2010 3 BLR 46 IC

effective use thereof including choice of which particular one to use in the event of a dispute arising. It means the department of labour, which is responsible for administering ADR, ought to conduct stakeholder engagement to make users of ADR aware of its uses and limitations to enhance efficacious use thereof. However, in the *Lesenda v Debswana Mining Co. (Pty) Ltd*[749] case, herein (the "Lesenda matter"), the applicant applied for an order declaring that his dismissal by the respondent was unfair. In a special plea the respondent alleged that the applicant had accepted the results of mediation by the Commissioner of Labour. He had particularly accepted and cashed out a cheque paid by the respondent in compliance with the recommendation by the Commissioner of Labour's mediator. The cheque tendered by the respondent was in full and final settlement of the dispute. Clearly, the Plaintiff (employee) had accepted a cheque as full and final settlement during the mediation phase and then thereafter (same employee) proceeded to the Industrial Court to challenge the outcome. This is reflective of poor understanding of the workings of mediation as an ADR process on the one hand and poor stakeholder engagement regarding the role and limitations of ADR processes for those that use them, on the other hand. Considering the time it takes to launch a court case, the involvement of experts and costs required, a disputant ought to be fully armed to decide which approach is best suited to their matter. This analysis is important to this study for the simple reason that it sheds light on some aspects of ADR that can reduce or minimize its efficacious use such as lack of understanding of the manner in which it works.

In the same vein, in the Modise matter[750] the applicant had challenged 'being retired' as having been unfair against him is a case in point. The appellant was retired from the public service under s 15(3) of the Public Service Act (Cap 26:01) and General Order 18.3 both of which empowers the employer to retire employees before they reached retirement age. He challenged the validity of that decision in the Industrial Court. The respondent raised the objection *in limine* that the Industrial Court lacked jurisdiction to hear the matter as no referral certificate had been issued in terms of either s 8(10) or s 8(11) of the TDA.[751] The court upheld the objection and dismissed the appellant's claim. The appellant appealed against that decision. The court held

[749] 2004 (1) BLR 255 (IC)
[750] 2010 3 BLR 569 CA
[751] Act 15 of 2004

that the objection was correctly upheld and that the Industrial Court lacked jurisdiction to entertain a trade dispute in the absence of a referral certificate issued in terms of either section 8(10) or s 8(11) of the TDA[752] as it was not then properly before the court in terms of s 18(1) of the Trade Disputes Act. The *Botswana Railways' Organisation v Setsogo and Others*[753] case applied. The Industrial Court ruled that it could only dispense with a matter if it had been lodged before it by way of certificate of referral by a Labour Officer in terms the TDA[754] as it was then not properly before the Industrial Court in terms of the TDA.[755] Clearly, Modise lacked understanding of how ADR worked, especially that a matter must be mediated upon first or dealt with under ADR before resort can be had at the Industrial Court. The effect of people appearing and settling disputes through ADR and then immediately challenging ADR outcomes they have agreed to has the effect of wasting time that should be devoted to other matters. It also speaks to poor knowledge and understanding of the role of ADR by disputants which tends reduce efficacious administration of its processes.

Fourth, arm-twisting of due process by the judiciary. The courts have also shown that they at will, can arm-twist due process when it is fitting for them to do so, usurping the role of ADR. In *Kekgosi v Clover Botswana*[756] the court did not dispense with requirement of mediation and arbitration as a first step before escalating same to the Industrial Court. The TDA[757] directs that disputes must, as they ought to, be referred to the commissioner for mediation or arbitration. This signifies that access to the Industrial Court is not direct.[758] In Kekgosi case[759] the court did not make it a requirement, as happened in other matters such as *Botswana Railways' Organisation v Setsogo and Others*[760] and the Modise matter[761] to have the matter go before ADR first before entertaining it. Instead, the court proceeded to entertain the matter despite the lack of a certificate of failure to settle issued in terms of s 8(10) or s 8(11) of the

[752] Act 15 of 2004
[753] [1996] B.L.R. 763, CA
[754] Sections 8(10) and 8 (11) 7 (1), Act 15 of 2004 (Amended)
[755] Section 18(1), Act 15 of 2004 (Amended)
[756] 2010 3 BLR 714 IC
[757] Section 7 (1), Act 15 of 2004 (Amended)
[758] Ibid
[759] [2010] 3 BLR 714 IC
[760] [1996] B.L.R. 763, CA
[761] 2010 3 BLR 569 CA

TDA.[762] The applicant failed to demonstrate urgency[763] or the need for a referral by the minister,[764] or the Commissioner of Labour[765] or parties before there was need for the matter to be directed or committed to the Industrial Court, as required by the Act.[766] The court in that matter, instead, devoted it's time to asserting its own powers especially derivable from the TDA[767] which directs that the Industrial Court was duly 'a court of law and equity'. In that regard pursuant to such objects, the same Act[768] adorned the Industrial Court with the latitude to 'regulate its own procedure and proceedings as it deemed fit.' Section 19(1)[769] specifically directs that:

> "The Court shall not be bound by the rules of evidence or procedure in civil or criminal proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice."

This study is not certain whether the power of court as provided for by the said section[770] supersedes the requirement of section 7[771] which requires all disputes to be referred to the Commissioner of Labour or Labour Officer delegated with such power by the Commissioner of Labour. If that is not the case then a conflict of laws or legal provisions does exist or the court overpowered the role of ADR as directed by section 7[772] which downplays its efficaciousness in the result. This is especially so because all disputes must be referred to ADR with the exception of matters brought to the Industrial Court on an urgent basis, which urgency requires proof to be dispensed with as ruled in *Molelekwa v Lebang T/A Century Fresh Produce* herein ("the Molelekwa matter")**.**[773] As a matter of fact this issue was decided by authority, a full bench in the matter *Botswana Railways' Organisation v Setsogo and Others*[774] herein (Botswana Railways matter) in the CoA. In the Botswana Railways matter[775] the court decided on

[762] Act 15 of 2004
[763] Section 20(3), Act 15 of 2004 (As amended)
[764] Section 14(1), Act 15 of 2004 (As amended)
[765] Section 13, Act 15 of 2004 (As amended)
[766] Act 15 of 2004
[767] Section 15(1), Act 15 of 2004 (As amended)
[768] Section 18(3), Act 15 of 2004 (As amended)
[769] Act 15 of 2004
[770] Section 19(1), Act 15 of 2004 (As amended)
[771] Section 7, Act 15 of 2004 (As amended)
[772] Ibid
[773] [2007] (3) BLR 307 (IC)
[774] [1996] B.L.R. 763, CA (Full Bench)
[775] Ibid

the issue of legal rules that governed the lodging of matters before the Industrial Court. The Industrial Court through Justice Amissah JP asserted that:[776]

> "These are the only two methods now provided by the Act by which a dispute may come before the Industrial Court. There is no other procedure laid down for bringing proceedings before the Industrial Court. I am therefore constrained to conclude from that, that proceedings cannot be brought before the Industrial Court, unless they are brought by reference under the two methods specified, namely, by either one or all of the parties referring a dispute to it which had previously gone before the Commissioner of Labour, but which the Commissioner of Labour had notified the parties that his efforts had proved unsuccessful in settling. Alternatively, by the Minister referring a dispute to it under section 5." I should however point out that currently urgent applications may come to court without first going to the Commission of Labour because of a 1997 amendment (Amendment Act 14 of 1997) now s 20(3) of the TDA. However, the claim for the P200 is not an urgent matter.

This study is at pains to find reason for exclusive direct escalation of compensation matters to the Industrial Court in the case of Kekgosi[777] or any referral by the Minister or Commissioner of Labour to dispense with the requirements of section 7.[778] However, argument may also be made that the TDA[779] did not specifically make it clear that the panel of mediators and arbitrators[780] did not have jurisdiction to hear matters regarding compensation which jurisdiction was given exclusively to the Industrial Court in terms of which:

> 'The Court may order the payment, to any person, of money it finds to be due to him under the terms of his contract of employment, this Act or any other written law.'[781]

The Industrial Court in the Montle matter[782] explicitly affirmed that "there is understandably no similar provision regarding mediators and arbitrators," directly

[776] [1996] B.L.R. 763, CA (Full Bench)
[777] [2010] 3 BLR 714 IC
[778] Section 7, Act 15 of 2004 (As amended)
[779] Act 15 of 2004 (As amended)
[780] Section 3 Act 15 of 2004
[781] Section 25(1), Act 15 of 2004
[782] [2010] 2 BLR 120 IC

referring to the lack of jurisdiction of the ADR officers to determine matters that included monetary compensation. The Learned Judge made an inference that because there is no direct reference to the effect that mediators and arbitrators may not make awards of monetary value, the TDA[783] meant that they should not. However, section 7 was also silent as to which types of disputes may be referred to them. It provides that any party to a dispute may refer it to the Commissioner.[784] One could infer that such referral would incorporate compensation disputes.' But the court feels otherwise. One may be persuaded to make the inference that Kekgosi[785] was afforded direct access to the Industrial Court for the reason that the court asserted the silence of the TDA[786] about ADR jurisdiction over money-related disputes meant it was left for the exclusive jurisdiction of the court. In other words, the Act empowered only the Industrial Court to hear all matters that resound in money, though the honorable court[787] did not necessarily state it as such.

From an international law perspective, Botswana has ratified all the relevant conventions that deal with ADR in labour dispute resolution.[788] This is an important step as it ensures that the country has obligated itself to enforce laws that support international labour standards in so far ADR is concerned. It remains to be seen whether such ratification is coupled with efficacious implementation of ADR processes informed by ILO labour standards enunciated in those conventions. The Botswana government for instance has been accused of arm-twisting the laws such as its amendment of the Trade Disputes Act of 2015[789] to extend the scope of essential services to unreasonably include prison services for instance as essential service, so as to curtail the right to strike was considered unfair. Botswana has therefore appeared before the ILO disciplinary committee to answer for its acts of labour criminality especially its poor compliance of the ILO labour standards as reported at the current Geneva June 106th session by the Committee of Experts.[790] The behaviour of the Botswana government in respect of poor ILO compliance has negative implications in

[783] Act 15 of 2004
[784] Section 3m Act of 2004
[785] [2010] 3 BLR 714 IC
[786] Section 25(1) of Act 15 of 2004
[787] [2010] 3 BLR 714 IC
[788] ILO https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103303 Date of Use: 06 August 2019
[789] Bill No. 21 of 2015
[790] Mmegi https://www.mmegi.bw/index.php?aid=69405&dir=2017/june/09 Date of use: 28 June 2019

that it curtains the establishment of industrial democracy in the country and let alone an environment in which ADR efficacy in labour dispute resolution can be achieved.

3.5.1.2 Supportive Institutional Capacity and Cultural Norms

This study is interested in ascertaining if the Botswana government has adequately provided institutions and has enabling cultural norms that support ADR processes and their efficacious administration. Generally, any provisions of the Act[791] that support the use of ADR will not be effectively implemented unless there are enabling institutions that provide the implementation systems. This is important to this study as it contributes to the analysis of ADR efficacy. Enabling institutions and cultural norms are important for effective administration of ADR processes. This section analysis the status of ADR institutions and cultural norms in Botswana.

In terms of institutional support, Botswana government can be accredited with effort to provide for dispute settlement through establishment of three major institutions namely: the Labour Officers, Commissioner of Labour, the Office of Permanent arbitrator,[792] panel of mediators and arbitrators[793] Labour Advisory Board[794] and the Industrial Court.[795] Essentially, these are institutional mechanisms that exist to facilitate workplace dispute settlement in Botswana. First, the Employment Act in Botswana provides for the establishment of a Labour Advisory Board.[796] Such Labour Advisory Board exists to advise the Minister on required legislative developments as the case may be, review of mechanisms for dispensing with disputes both for preventing and resolving them as well as consulting on the appointment of mediators and arbitrators onto the Panel[797] as required by the TDA.[798] It stands to reason, therefore that, when the panel of mediators and arbitrators is established, consultation between the Minister and the Labour Advisory Board is an instructive imperative.[799]

[791] Act 15 of 2004
[792] Section 9 (1) Trade Disputes Act of 1982
[793] Section 3 (1) (2) Act 15 of 2004
[794] Section 148 Employment Act (Amendment) Act 2003
[795] Section 15 Act 15 of 2004
[796] Section 148 Employment Act (Amendment) Act 2003
[797] Section 3 (1) Act 15 of 2004
[798] Section 148 Employment Act (Amendment) Act 2003
[799] Ibid

The Trade Dispute Act[800] created the Joint Industrial Councils which are essentially negotiating machinery for dispensing with collective bargaining tasks within various industrial sectors.[801] The TDA[802] directs unions and employers' organizations to apply if they so wish to create a Joint Industrial Councils for a respective industry if it sufficiently is representative of workers in the given industry.[803] In the event that the Commissioner of Labour declines the registration of a new Joint Industrial Councils, or in the alternative revokes an existing one, an appeal may be made to the Minister[804] or to the Industrial Court.[805] While the legislature has clearly provided for the establishment of such institutional machinery for collective dispute resolution there remains a death of information as to their effective functioning or otherwise on the ground.

Intervention by labour officers was first introduced in the Employment Act of 1982.[806] The office of Permanent Arbitrator was an important step in terms of institutionalising ADR though it was highly criticised for its lack of adequate funding to dispense with labour disputes.[807] However, the institutionalisation of the Industrial Court, which was empowered to dispense with labour disputes through litigation and arbitration, assisted the overwhelmed Labour Officers.[808]

However, it is noteworthy that, in the foregoing three institutions afore-discussed there appears to be no independent body of ADR for dispute settlement in Botswana.[809] Dispute settlement is administered through the Department of Labour which may refer matters to the Industrial Court for settlement in the event that they fail to resolve at the mediation or arbitration front.[810] It can be concluded that its Labour and Social Security Department administers ADR in Botswana, under the auspices of The Labour Officers and the office of the Commissioner of Labour.[811] This necessarily implies that it is

[800] Act 15 of 2004
[801] Section 34 (4) Act 15 of 2004
[802] Act 15 of 2004
[803] Section 34 (6) Act 15 of 2004
[804] Section 36 (6) Act 15 of 2004
[805] Section 34 (7) Act 15 of 2004
[806] Section 27 Employment Act of 1982
[807] Kupe-Kalonda (2001) 40
[808] Ibid
[809] ibid
[810] Ibid
[811] Section 3(2), Act 15 of 2004

administered by the Executive Government and not a body or agency independent of government. The only other independent institution that is observable to this study is the Industrial Court which is not exactly ADR on the basis of the definition adopted by the study that ADR is any dispute settlement short of the courts.[812] This is corroborated by Mr. Tshenolo Mabeo[813] in response to a question in the legislative assembly on February 28 affirmed as follows:[814]

> "Currently, the Department of Labour and Social Security is charged with the responsibility of mediation and arbitration of trade disputes. Arbitration is a quasi-judicial function while the Industrial Court exercises full judicial functions."

The ADR functions in Botswana constitute the mediation and arbitration presently performed by Industrial Relations Officers and part-time mediators and arbitrators at the Department of Labour Social Security.[815] It stands to reason that the lack of independent ADR institutions goes to compromise the efficaciousness thereof. This is so because in cases where a dispute arises against an employee of government and the government as employer, the fact that a government officer gets to mediate in matters in which they have an interest violates the principles of natural justice in particular *nemo judex in causa sua*.[816] The possibility of biased mediation is inevitable as officers would not want to rule against their employer which impairs the ability of ADR achieving the objects of independence, impartiality, and natural justice per se.

3.5.1.3 Adequate and Competent Manpower

In terms of manpower for the administration of ADR processes, the TDA of 1992 made provision, first, for the Labour Officers, Commissioner of Labour and Minister of Labour to dispense with ADR issues vis a vis mediation. The Commissioner of Labour is required to formulate a panel of mediators and arbitrators instructive of TDA.[817] In terms

[812] Kalula *et al.* (2008) 14
[813] The Minister of Employment, Labour Productivity and Skills Development,
[814] Mabeo http://www.dailynews.gov.bw/news-details.php?nid=34383 Date of use: 10 April 2017
[815] Mabeo http://www.dailynews.gov.bw/news-details.php?nid=34383 Date of use: 10 April 2017
[816] O'Brien *Nemo Judex in Causa Sua: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies* (2013) 2
[817] Sections 3 (1)(2), Act 15 of 2004

of skills set, the Act makes provision for the appointment of a panel of mediators competent in employment law or industrial relations or other relevant areas of expertise.[818] This is in recognition of the fact that ADR work viz mediation and arbitration requires a specialist set of skills to dispense with labour disputes. However, the Act[819] does not state the minimum academic requirements within those categories mentioned, for example, whether a diploma or degree is required.[820] The Act also does not mention the need to upgrade the skills of such experts with training. Given that skilled and competent ADR practitioners are required to enhance ADR efficacy Botswana may need to provide for the upskilling of them.[821] The Act[822] also does not provide a guideline on a number of mediators and arbitrators per region or provision for increasing them when disputes escalate instead it just states a requirement for their appointment.[823]

The reliance of dispute resolution through Labour Officers as a precursor to labour dispute settlement by the Industrial Court is inundated with insurgence of cases without sufficient manpower to handle them.[824] This study lacks data to prove the number of cases registered with the Department of Labour and Social Security. The few statistics available to this study shows that there were 10,137 matters lodged with the Industrial Court in 2008 alone, and the same number in 2009, and 13,500 in 2010 while 12,911 were registered in 2011.[825] This study is curtailed by the lack of recent statistics on labour dispute resolution in Botswana save for inferences from records cited in a study like Ntumy.[826] Though these are somewhat older statistics they speak to the volume of cases that go through the Industrial Court in Botswana. The number of matters lodged with the Department of Labour, Social Security and Industrial Court speak to a large inflow of cases though it does not provide for the number of those that were effectively settled nor those that were handled by either mediation or arbitration first.[827] Owing to the fact that there is no direct access to the Industrial Court

[818] Section 3 (3), Act 15 of 2004
[819] Act 15 of 2004
[820] Section 3 (3), Act 15 of 2004
[821] Giovannucci and Largent (2009) 52, see also Brown *et al.* (1998) 40
[822] Act 15 of 2004
[823] Section 3 (3), Act 15 of 2004
[824] Kupe-Kalonda (2001) 44
[825] Ntumy (2016) 58
[826] Ibid
[827] Ibid

it would suffice to say that these matters at most are cases of failed mediation and arbitration hence their referral thereto.[828] The lack of accurate statistics makes it difficult to tell if these matters were effectively dispensed with or otherwise. However, inferences can be made from the fact that referral to the Industrial Court signified failure by ADR processes to dispense with them. By a stretch of imagination, this study would not want to suppose that the large chuck of those cases cited above either were before the Industrial Court for urgency or because they had monetary jurisdictional challenges limiting them from resolution by ADR processes.

The main challenge levelled against the DoLSS is its inability to adequately provide competent manpower to dispense with labour issues that were registered before it, and also that those presently employed to do so lacked the necessary skills.[829] A case in point is a mediator's inability to understand that s/he did not have jurisdiction to hear matters that resounded in money as provided by the TDA[830] as in the Montle matter[831] as afore-discussed. While there may be varied reasons why matters fail to settle at mediation the lack of competences by mediators and arbitrators should not be counted out.[832] This study lacks access to full data that reports on the issues under consideration hence the inability to provide accurate discussions of reasons for failure to settle by ADR processes in Botswana hence referral of several matters to the Industrial Court.

Further, the panel of mediators and arbitrators may not enjoy the autonomy to decide on matters but save at the direct supervision and control of the Commissioner of Labour in the discharge of their functions.[833] This potentially compromises the role of autonomy and independence which tenet is critical for the success of ADR processes.[834] This finding is corroborated by a study[835] conducted to assess the

[828] Ntumy (2016) 58
[829] Ibid
[830] Section 25(1), Act 15 of 2003
[831] [2010] 2 BLR 120 IC
[832] [2010] 2 BLR 120 IC
[833] Section 3(4), Act 15 of 2004
[834] Ibid
[835] Centre for Employment & Labour Relations Law (2006) 7

initiatives of six SADC[836] countries Botswana, included, the object of which was to consolidate and align their labour laws with ILO standards.[837]

Basically, the project reviewed progress and bottlenecks in labour law and dispute resolution systems in the respective countries, Botswana included, which is of interest to the present study.[838] In Botswana the terms of engagement of part-time mediators which apparently require that they are disallowed to act as advocates in mediation or arbitration is not without challenges.[839] Under that system of engaging part-time mediators very little mediation has taken place. The government consequently only created new roles of full-time Labour Officers among whom may be seized with the dispute settlement task.[840] Thus, the Industrial Court remains inundated and saddled with a larger case-load than necessary, much of which is said to be cases that could have been dealt with by mediation.[841] The inability to secure competent mediators in Botswana presents a substantial impediment to its ADR sustainability,[842] and attendant efficaciousness thereof. It is descendible from the foregoing that despite the indications that more officers would be appointed to handle ADR roles in 2006,[843] four years later the case load in the Industrial Court was still at 13,500 in 2010 while 12,911 were registered in 2011. Recently while launching the new rules of the Industrial Court, on 21 March 2017 Judge President Tebogo Maruping confirmed the poor handling of cases. He stated that "in 2011 there was a backlog of 6780 cases caused by having to enter data manually and the poor handling of cases. From Maun alone we discovered 415 unattended files which was a shock for us."[844] One of the factors the Judge President highlighted was shortage of manpower as the causes of backlogs of cases. One can infer that the Industrial Court being closely related to the mediation and arbitration processes administered under the Department of Labour and Social Security, cases flowing through it failed to be resolved under ADR system. Generally,

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[836] SADC stands for Southern Africa Development Community. The six countries studied comprise Botswana, Lesotho, Malawi, Namibia, Swaziland & Zambia.
[837] ILO's 1998 Declaration on Fundamental Principle and Rights at Work
[838] Centre for Employment & Labour Relations Law (2006) 7
[839] Ibid
[840] Centre for Employment & Labour Relations Law (2006) 7
[841] Ibid
[842] Ibid
[843] Ibid
[844] UNDP http://www.bw.undp.org/content/botswana/en/home/presenter/articles/2017/03/21/new-industrial=court-rules-launched-undp-acknowledged-for-support.html Date of use: 06th January 2019

the system for the mediation and arbitration of labour disputes in Botswana is poorly managed, poorly resourced and not running efficaciously.[845]

3.5.1.4 Adequate Financial Resources

It was important for this study to consider the adequacy of financial resources to administer ADR as it is considered to either positively or negatively influence the cost of administering the processes. Given that the cost of ADR is an important element in decisions by disputants to use it instead of court litigation in dispute resolution, the government has to set aside funds to administer it. Funds would ensure that institutions that administer ADR have the equipment, machinery and manpower required to ensure effective administration thereof.

There is no record as to whether ADR in Botswana is provided with sufficient financial resources. The TDA[846] has no explicit budget allocation reserved for funding of ADR this study is aware of.[847] The only reference there is that there is no charge imposed on disputants who refer matters to either the Department of Labour and Social Security or the Industrial Court within the TDA.[848] It can only be surmised that, given that the panel comprising mediators and arbitrators are answerable to the Commissioner of labour the financing of their work rests with the DoLSS, as there is no independent body charged with ADR intervention in labour disputes in Botswana.[849]

3.5.1.5 Parity Power of Disputants

It is also critical to this study to consider the power party of disputants in determining efficacy of ADR in resolving labour disputes. Power parity engenders the extent to which there is industrial democracy and a party to a dispute does not abuse power and due process at the expense of the other. Botswana's civic society, unions included, is considered relatively weak when matched against sister countries like

[845] UNDP http://www.bw.undp.org/content/botswana/en/home/presenter/articles/2017/03/21/new-industrial=court-rules-launched-undp-acknowledged-for-support.html Date of use: 06th January 2019
[846] Act 15 of 2004
[847] Section 3, Act 15 of 2004
[848] Section 9 (11), Act 15 of2004
[849] Part II, Act 15 of 2004

South Africa which already implies that power tilts in favour of government is no good for industrial democracy.[850]

Granted that in Botswana the President is vested with all powers to appoint judges it causes a weakened tripartite relationship where unions and other players basically play a subordinate role.[851] The Constitution of Botswana provides that the President appoints the Chief Justice and the President of the Court of Appeal.[852] This implies that unions do not have the power to push for the creation of an independent body for dispute settlement in Botswana as long as the executive government is against it.[853] The absolute power the government wields has essentially placed civic organisations such as unions in a position inferior to it.[854] This is especially so since government is never an unbiased agent of "public or social interest" nor is it "a captive of class forces, economic forces or the capitalist mode of production" but rather enjoys a high degree of relative autonomy not at the disposal of the unions.[855] It implies that the unions in Botswana are constricted to always bargain from a disadvantaged position.[856] This possibly explains the reluctance by the legislature, executive and judiciary to institute an independent body for dispensing with labour disputes.[857] It is seen as a potential threat to executive power in bargaining for labour rights and conditions where government would be subject to such body in cases of dispute.[858] It can be concluded from the foregoing that Botswana lacks an ADR system administered by a body independent of Government because of the reluctance to share power with workers.[859] Power disparity flows from the weakened union power as well as the lack of an independent body.[860] Such a power disparity is probably rooted in Botswana's labour fraternity history and attendant development thereof.[861] The emergence of trade unions in Botswana is traceable to the colonial area wherein few Batswana were educated

[850] Bertelsmann Stiftung, BTI 2016, (2016) 25
[851] Mwatcha (2015) 43
[852] Sections 96(1) and 100(1), Constitution of Botswana of 1966
[853] Motshegwa & Bodilenyane *Abrupt Termination of Employee Contracts in a Democratic State* (2012a) 72
[854] Motshegwa & Bodilenyane *Botswana's Executive Presidency: Implications for Democracy* (2012b) 201
[855] Motshegwa & Bodilenyane (2012a) 72
[856] Ibid
[857] Ibid
[858] Bertelsmann Stiftung, BTI 2016, (2016) 5
[859] Ibid
[860] Bertelsmann Stiftung, BTI 2016, (2016) 5
[861] Motshegwa and Tshukudu (2012) 119

sufficiently enough to understand the object of unionism.[862] There and then unionism was triggered by political activism through individuals who were also responsible for political formations of parties in Botswana.[863] Employers from another angle enjoyed absolute power by which they employed few workers who they subjected to constricted choices and controlled with an iron hand, such as those who lacked alternative sources of employment. Such power disparities have not had abrupt changes ever since.

3.6 ADR program design considerations

This study assesses design considerations for ADR in Botswana, including planning and preparation and operations and implementation. First, planning pertaining to whether there is a clear picture on determining causes within ADR jurisdiction and those outside and then, second, operations relate to the presence of a system of appointing ADR manpower.

3.6.1 Planning and Preparation

In this section, I look at the extent to which the Botswana ADR system is well planned and prepared for resolution of labour dispute settlement. This includes the nature of disputes that go through the system.[864] The Trade Disputes Act does not define the jurisdiction of the mediation and arbitration process specifically except for termination of employment.[865] The Commissioner of Labour is the one with power to determine which matters go through mediation and which ones go through arbitration.[866] This study is not aware of any case management system in place in Botswana's ADR system to decide on cases that go through it. This poses a possible threat to ADR efficiency, as there is no funnel to prevent matters that are frivolous and not within the ambit of the ADR system's jurisdiction from going through the system.

[862] Motshegwa and Tshukudu (2012) 119
[863] Ibid
[864] Brown *et al.* (1998) 40
[865] Sections 7 and 8, Act 15 of 2004
[866] Sections 7 (1) (a)(b), Act 15 of 2004

3.6.2 Operations and Implementation

It is important for this study to consider the manner in which ADR processes are operated and implemented as a determinant of ADR efficacy. This section therefore considers the manner in which ADR appoints its ADR experts, registers its matters and the processes under which matters are resolved.

Botswana's TDA[867] provides for the qualifications of mediators and arbitrators though not specifying the levels of attainment required.[868] The Minister is seized with the role to appoint to the panel, mediators and arbitrators with requisite expertise.[869] In terms of the TDA[870] a legal representative is only allowed to appear on behalf of a disputant in an arbitration intervention conditionally.[871] In that light an arbitrator may sanction representation by legal practitioner on behalf of a disputant in arbitration proceedings on condition that (a) the parties are agreeable thereto; or (b) a party to the dispute requests same, and the arbitrator satisfies him/herself that the nature and complexity of the matter warrants such representation provided it does not cause prejudice to the other disputant.[872] Such a provision however appears to be clouded by vagueness for its failure to define the criteria for determining 'complexity' and guidelines that must direct an arbitrator in reaching a verdict. However, in any mediation or arbitration intervention sessions, disputants have a choice to appear in person or through representation by a member or official of the organisation or a co-employee or in the case of juristic persons a delegated official.[873] The Act[874] has left much of the administrative role of determining jurisdiction and registry of disputes in the hands of the Commissioner of Labour. The lack of exact delineation of which matters are within the jurisdiction of mediators and arbitrators makes it difficult for implementers to weed out frivolous matters to reduce clutter in the ADR system. This may explain why ADR system in Botswana is considered inefficient and ineffective in handling labour disputes.

[867] Act 15 of 2004
[868] Section 3 (3), Act 15 of 2004
[869] Ibid
[870] Act 15 of 2004
[871] Section 10 (2), Act 15 of 2004
[872] Section 10 (2), Act 15 of 2004
[873] Section 10 (1), Act 15 of 2004
[874] Act 15 of 2004

3.7 The ADR measures of efficacy

The previous sections have focused mostly on general background issues that matter to the inception of ADR in Botswana. Aspects such as legislative support for ADR, financial investment and manpower provision among other things. An assessment of how such issues have been handled when ADR was introduced in Botswana were considered. It is important for this study to consider the specific determinants of efficacy of ADR in labour dispute resolution. This study utilises measures such as client satisfaction, settlement and enforcement, efficiency in terms of time and cost to assess ADR efficacy in Botswana.[875] These are considered below, in turn.

3.7.1 Efficiency and time saving nature of ADR

This study sought to analyse the time saving nature of ADR in Botswana, given that it is generally regarded[876] as a more efficient alternative to court litigation in dispute settlement. Pursuant to that objective, this section analyses ADR in labour dispute settlement in Botswana. The one aspect that will be important to this study is whether there are set time frames within which ADR processes ought to dispense with disputes and then whether such time frames are being adhered to.

Botswana's Trade Dispute Act[877] provides for prescriptions as to time frames within which parties ought to lodge disputes and minimum time periods within which matters ought to be dispensed with by ADR system. This provides for measures on the basis of which cases can be dispensed with.[878] A party to a matter ought to lodge it within 30 days from the date on which it occurred.[879] A mediator shall attempt to resolve a dispute referred to him, within 30 days of the date the dispute was received by the Commissioner or Labour Officer delegated in terms of section 7.[880] Likewise, upon the conclusion of an arbitration hearing, the arbitrator shall make an award and shall, within 30 days of the hearing, give reasons for the award.[881] Given that there is no

[875] Kerbeshian (1994) 383
[876] Wiese (2016) 2
[877] Act 15 of 2004
[878] Sections 8 (1) and 9 (9), Act 15 of 2004
[879] Section 7(2), Act 15 of 2004
[880] Section 8 (1), Act 15 of 2004
[881] Section 9 (9), Act 15 of 2004

record available to this study regarding disputes resolved and the times taken to resolve them it is difficult to provide an exact measure of efficiency of ADR in Botswana. However clearly the ADR in Botswana suffers from a poorly resourced system in terms of both sufficient numbers of manpower to dispense with cases and the lack of skills of those already running the system.[882] This may suggest that Botswana suffers a backlog of unresolved cases and delays in handling cases lodged with the government run ADR system. The lack of skilled ADR practitioners may suggest that labour cases are being poorly handled generally. The lack of an independent body ADR may also suggest that ADR is being subjected to the usual bureaucratic bottlenecks typical of government run functions. Giovannucci and Largent[883] suggest the need for mediators to be trained on specific mediation skills to dispense with mediation duties.[884]

3.7.2 Cost effectiveness of ADR

Cost effectiveness of using ADR instead of litigation is a major consideration to disputants.[885] Apparently in Botswana disputants do not pay for any mediation and arbitration services as there is no provision for such in the TDA.[886] This is also because the TDA[887] has provided only for the Industrial Court to handle all matters that relate to monetary disputes.[888] According to the Act[889] mediators and arbitrators may not order costs except in circumstances where parties are agreeable thereto or party or a person representing a party in the proceedings acted in a frivolous or vexatious manner[890] it means the matter of cost does not arise except in arbitration where a party engages an attorney and attorneys who would ordinarily charge to so represent such party. There is no clear picture either in the Act[891] or elsewhere where charges for ADR services are indicated. Furthermore, the Act[892] omitted to prescribe jurisdiction of mediators and arbitrators over matters resounding in money. By such omission the

[882] Kupe-Kalonda (2001) 170
[883] Giovannucci and Largent (2009) 52
[884] Ibid
[885] Kerbeshian (1994) 383
[886] Act 15 of 2004
[887] Ibid
[888] Section 25(1), Act 15 of 2004
[889] Act 15 of 2004
[890] Section 9(11), Act 15 of 2004
[891] Act 15 of 2004
[892] Ibid

court interpreted and asserted in the Montle matter[893] that ADR was excluded from jurisdiction over matters that required orders or awards resounding in money. That would only imply that ADR in Botswana may only preside over matters that required orders of performance by the losing party such as reinstatement in dismissal cases or other order and not orders requiring payments in money. This would further imply that ADR in Botswana does not have any jurisdiction to decide on disputes whose end result is monetary payments by the losing party hence matters of cost of ADR remains blurred. The matter of cost would arise when matters appear before the Industrial Court.[894] This makes it difficult for this study to ascertain whether it would be costly or otherwise to resolve labour disputes using ADR in Botswana.

3.7.3 Settlement and Enforcement of ADR Outcomes

This study is not aware of any study or literature that reports on settlement of disputes in Botswana. In a study[895] that sought to rate settlement in SADC it was confirmed that "…caseload data is not readily available" Botswana and Zimbabwe included with a few exceptions in the cases of Lesotho, Swaziland and South Africa.[896] The information[897] that has surfaced in this study is that the DoLSS is swamped by the number of unresolved cases that are presented before it.[898] As to whether the department keeps a record of the resolved cases remains unknown to this study.[899]

Conciliation and arbitration are administratively undertaken under the auspices of the commissioner of labour, under the Ministry of Employment, Labour and Social Security.[900] Ordinarily, given the provisions of the TDA[901] that limited disputes are pertaining to monetary compensation to the jurisdiction of the Industrial Court,

[893] [2010] 2 BLR 120 IC
[894] Section 25(1), Act 15 of 2004
[895] Gumede http://www.africanlii.org/content/swazilands-benchmarcks-conciliation-mediation-and-arbitration Date of use: 10 April 2017
[896] Gumede http://www.africanlii.org/content/swazilands-benchmarcks-conciliation-mediation-and-arbitration Date of use: 10 April 2017
[897] Kupe-Kalonda (2001) 44
[898] Ibid
[899] Gumede http://www.africanlii.org/content/swazilands-benchmarcks-conciliation-mediation-and-arbitration Date of use: 10 April 2017
[900] Section 3 (4), Act 15 of 2004
[901] Section 25 (1), Act 15 of 2004

supposing as the court held in Kekgosi[902] such matters had direct access to the Industrial Court, it would be reasonable to conclude that such matters would be enforced as does any other court matter.[903] In ADR it would suffice to say that the issue of enforcement does not arise except in instances where such a decision was been granted by default.[904] In terms of enforcement, the decisions of the Industrial Court wield the same force and effect as judgments and orders of the High Court.[905] The TDA[906] directs that an order that degenerates into money may be liquidated summarily in the form of a civil debt.[907] There are no records that are available to this study indicating the manner of enforcement of arbitration and conciliation outcomes in the ADR framework in Botswana at large. The Act[908] does not provide for the enforcement of mediation and arbitration outcomes in labour dispute settlement. This means if a party renegades on an obligation to pay the wining party there is no provision for how such party can enforce its claim. This state of affairs was confirmed recently by a Botswana Industrial Court Judge, Justice Harold Ruhukya in a symposium on the enforcement of arbitration and mediation awards in Gaborone, Botswana's capital city.[909] Justice Harold Ruhukya acknowledged that the Act never anticipated situations in which a mediated settlement resulted in parties signing a settlement agreement and one renegaded hence the question 'what enforcement mechanisms existed for such a situation?' The Act does not provide for a process of enforcement of any awards which renders ADR in Botswana ineffectual.

3.7.4 Client Satisfaction

Client satisfaction measure pertains to the degree to which ADR interventions can meet disputants' expectations in resolving their disputes. To do so such intervention ADR processes ought to exhibit qualities such as maintaining disputant's privacy, maintaining relationships, involving constituencies, linking issues, affording neutral opinion, setting precedence among other issues. There are no studies or data this

[902] *Kekgosi v Clover Botswana* 2010 3 BLR 714 IC
[903] Section 25 (2), Act 15 of 2014
[904] *Kekgosi v Clover Botswana* 2010 3 BLR 714 IC
[905] Section 25 (2), Act 15 of 2014
[906] Section 28, Act 6 of 2016
[907] Ibid
[908] Act 15 of 2004
[909] Mokwape http://www.mmegi.bw/index.php?aid=78048&dir=2018/october/10 Date of use: 26 December 2018

study is aware of in the Botswana's case that assesses client satisfaction with ADR processes in labour dispute resolution.[910] There are no provisions for these measures in the TDA either. The Act only directs the Minister to circulate a code of ethics that mediators and arbitrators are to abide by as they go about performing their functions after such Minister has had consultation with the Board.[911] The degree of satisfaction that clients derive from ADR interventions in Botswana remains unknown given the lack of information to that effect, at least known to this study.

3.8 Summary

The immediately foregoing sections assessed the efficacy of ADR in Botswana on the basis of measures such as cost-effectiveness, time efficiency, settlement and enforcement and client satisfaction thereof. This study found that lack of skilled manpower to administer ADR has minimised the efficiency with which labour disputes are handled in Botswana. The Act provides timeframes within which ADR processes must be administered including minimum time for registry of matters with the commissioner of labour and the time they ought to be dispensed with. This study found that the department of labour and social security still struggles with a backlog of unresolved matters. The many cases that are appealed to the industrial court reflect the poor manner in which mediation and arbitration is handling them. Given that ADR constitutes the first forum in the line of labour dispute resolution most matters referred to the industrial court would have failed to be resolved at that level. The role of the ADR is also curtailed by the fact that the Act has not afforded it jurisdiction to determine equity issues resounding in money. These remain the prerogative of the industrial court, which is already inundated with many unresolved matters. This study could not ascertain with certainty, the cost of handling matters using mediation and arbitration in Botswana given that the Act does not clearly online cost issues. An arbitrator was afforded the power to award costs in cases brought frivolously before the tribunal but no more than that. An arbitrator cannot issue awards that relate to money. Botswana presently runs an inefficacious ADR system for dealing with labour disputes.

[910] Sander and Goldberg (1994) 68
[911] Section 12, Act 15 of 2004

This chapter discussed labour dispute settlement in Botswana from the pre-independence period to the present. The main focus of this chapter was to ascertain if ADR in Botswana was efficaciously resolving labour disputes. Before critically analyzing the processes that are used to administer ADR this chapter showed that during the pre-independence era there were no cases reported pertaining to labour disputes or labour dispute resolution to contend with. This may be attributed to the fact that Batswana were generally pastorate people who basically lived on subsistent farming of livestock.[912] Labour dispute settlement became an issue when Botswana was colonised. This is when Batswana people were required to work in mines in South Africa and other modernised organised life. Botswana became independent from the British Empire in 1966 a period which ushered in a new era of statehood. From 1966 onwards the Botswana government was seized with the duty to determine the legislative framework of the country in general and labour dispute settlement mechanism specifically. That however did not happen immediately. Labour laws which had been passed during the colonial era such as the Trade Unions and Trade Disputes Proclamation of 1942 and the Employment Law[913] remained in force. Only in 1969, was the Botswana government able to pass its first pieces of legislation which sought to improve employment sector engagements. These initiatives were particularly motivated by a series of protests and notably the 1968 strike which pushed the government to its wits to create labour laws in response.[914] These included the Trade Unions and Trade Dispute Proclamation and the Employment Law,[915] which were subsequently replaced by the Trade Unions Act,[916] the Trade Dispute Act[917] and the Regulation of Wages and Conditions of Employment Act of 1969.[918] The Botswana government only enacted a comprehensive labour dispute settlement legislation in the 1980s. Dispute resolution settlement became more pronounced in 1992, once again after a hotly popularized strike of the industrial class employees in 1991. In 1992 the Trade Dispute Act amendment is regarded as a landmark milestone because it created the particularly created ADR processes vis a vis mediation and arbitration for

[912] Bojosi (2009) 52
[913] Act 15 of 1963
[914] Friedrick Ebert Stiftung *Trade Union in Botswana: Country Report July 2008* (2008) 6
[915] Act 15 of 1963
[916] Act 24 of 1969
[917] Act 28 of 1969
[918] Friedrick Ebert Stiftung (2008) 6

resolution of labour disputes. This Act was finally amended by the 2004 which is currently in force.

This chapter concluded that ADR in Botswana is still far from efficacious and a number of factors account for such a state of affairs. Botswana generally lacks an independent body to administer ADR. ADR functions, namely mediation and arbitration of labour disputes are administered under the auspices of the Botswana government, the Department of Labour and Social Security specifically, undermining the independence and industrial democracy ADR ought to provide especially for public sector employees. The Botswana government plays both player and referee in disputes involving its own employees who would benefit well under an independent body administering ADR rather than the current system. The current system of administering labour dispute resolution is inundated with many unresolved disputes owing to a poorly resourced ADR system, poorly managed processes and a general lack of adequate and skilled manpower. Apart from a weak legislative enactment,[919] the ADR processes in Botswana lack jurisdiction to determine disputes that resound in money, which has been exclusively left as the prerogative of the Industrial Court. There is not specific jurisdiction pertaining to matters the panel of mediators and arbitrators ought to grapple with. This is coupled with the fact that Botswana's Trade Dispute Act lacks clarity on minimum requirements for persons who must be appointed onto the panel that should handle the ADR responsibility. Botswana has not fared well in terms of adherence to ILO labour standards, which led her to getting blacklisted for such non-compliance, and curtailment of the right to strike through converting many services into essential services unnecessarily. This has negative implications on establishment of efficacious ADR processes given the heavy-handedness with which the government overpowers other players through enactment of restrictive legislation pertaining to same. Many strides are still required from legislative to institutional and cultural support structures, to financing and effective administration of case management system seized with the ADR function in labour dispute resolution in Botswana. The next chapter discusses ADR in South Africa.

[919] Act 15 of 2004

CHAPTER 4

ADR IN SOUTH AFRICA

4 INTRODUCTION

This chapter provides a discussion of ADR in South Africa (hereinafter referred to as ("RSA"),[920] the aim of which is to ascertain its efficacy in labour dispute resolution. The chapter briefly traces labour dispute settlement starting from its pre-colonial period to the present. It is important for this study to provide a historical context of labour dispute settlement as it enhances understanding of its influences on present ADR practices. ADR processes in labour dispute settlement after 1994 are closely analysed to ascertain their effective and efficient administration or otherwise and factors responsible for it. This is important as it answers to the main aim of this study which is to ascertain the efficacy of ADR labour dispute resolution in selected countries. Before reviewing the performance of ADR in terms of its measures such as cost, time, settlement and enforcement, and client satisfaction, the chapter discusses other aspects such as legislative support, financing, institutional support, power parity of disputants, as well as planning and implementation of ADR processes in South Africa. These are background factors that help to ascertain whether ADR was implemented with due consideration to important levers such as endorsement by communities who were going to make use of it. It is important to review these aspects as they help in ascertaining if ADR was started on the correct pedestal rather than a practice that was imposed on constituencies, who had no regard for it. This analysis leads to a determination of whether ADR in South African labour dispute resolution can be said to be efficacious or otherwise. Before going into the detailed discussion of the above issues this chapter begins with an analysis of the context in which labour dispute resolution takes place in South Africa, focusing on the attendant political, economic, social, technological, ecological and legal issues.

[920] RSA stands for Republic of South Africa

4.1 Context of ADR in South Africa

South Africa is a country situated at the Southern Hemisphere of the African continent sharing boarders with Namibia to the South West, Botswana and Zimbabwe to the north, Eswathini and Mozambique to the north east. Lesotho, an independent country, is an enclave in the eastern part of the Republic, entirely surrounded by South African territory. South Africa's coastlines border the Indian Ocean to the southeast and the Atlantic Ocean to the southwest.[921] South Africa is a large country boasting a population of 55.9 million people.[922]

4.1.1 Political factors

South Africa is considered a constitutional democracy conducting multiparty elections every five years, South Africa attained independence from apartheid repression in 1994 when the stalwart Nelson Mandela was released from prison after 27 years.[923] The country held its first democratic election which the African National Congress won resoundingly under the leadership of Nelson Mandela. Currently South Africa's President is Cyril Ramaphosa who took over from the embattled former president Jacob Zuma who spent most of his term of office embroiled in corruption charges and accusations of mis-governance. The popularized firebrand politician Julius Malema who broke away from the governing African National Congress to form his splinter party – the Economic Freedom Fighters gave Jacob Zuma a running for his money through pointing out many of the shoddy dealings and corrupt practices that characterized the former President's administration.[924]

4.1.2 Economic factors

Cyril Ramaphosa has a challenge under his belt to correct the perceptions of a corrupt country and party that he inherited from his predecessor as well as a poorly functioning

[921] Britannica https://www.britannica.com/place/South-Africa Date of use: 26th February 2019
[922] Bertelsmann Stiftung, BTI (2018) 3
[923] SA History https://www.sahistory.org.za/article/south-african-general-elections-1994 Date of use: 26th February 2019
[924] Lings (2014) 13

economy.[925] The unemployment rate in RSA fell to 26.5% in the last three months of 2016 after reaching a 12-1/2-year high of 27.1% in the previous period,[926] with a GDP per capita of 13046.2 USD in 2016.[927] Unemployment is arguably the most central and vexing problem the South African economy is presently saddled with. The unemployed population suffer mental hardship among other challenges and unemployment essentially poses a serious threat to the country's social fibre and very political stability.[928] The net result is that there has been increased production not backed by complementary gains in employment – a phenomenon commonly touted as "jobless growth."[929] A high GDP growth rate of approximately 7 and 8% annually in real terms is required in South Africa. South Africa is battling 28 percent unemployment, especially youth unemployment which stands at over 65% of the national score.

4.1.3 Socio cultural factors

The country is a culturally diverse mix consisting of the following types of people according to race: White – 4,584,700; Colored – 4,424,600, Indian/ Asian – 1,299,900 and blacks – 38,682,600.[930] There are 11 national languages in South Africa namely English, Afrikaans, Sotho, Ndebele. Pedi, Venda, Tswana, Xosa, and Isizulu.[931] South Africa has a poverty rate of 35.9%, and a life expectancy of 61.9 years.[932] The Black herein ("native African") population is considered the hardest hit by the scourge of poverty. RSA is regarded as one of the grossly unequal nations on earth and appears to have become even more unequal than it was when apartheid ended.[933] The low life expectancy may be attributable to HIV/AIDS prevalence in South Africa.[934] Based on wide ranging data published by the UNAIDS / WHO in 2015 it was estimated that there

[925] Xinguanet http://www.xinhuanet.com/english/2018-02/16/c_136979344.htm Date of use: 26th February 2019
[926] Trading Economics http://www.tradingeconomics.com/south-africa/unemployment-rate Date of use: 02 April 2017
[927] Bertelsmann Stiftung (2016) 3
[928] Mohr, Fourie & Associates *Economics for South African Students* (2008) 79
[929] Ibid
[930] Smit *et al.* (2013) 270
[931] Statistics South Africa *Documented immigrants in South Africa* (2012) 4
[932] Bertelsmann Stiftung, BTI (2018) 3
[933] Lings (2014) 15
[934] Smit *et al.* (2013) 75

is an estimated 6.9 million persons in the age range between 15 to 49 years and 2.1 million orphans living with HIV/AIDS in South Africa.[935]

4.1.4 Technological factors

In terms of technology use, about 53.5% (28.9 million users) of the South African population uses the internet.[936] The use of internet is an important global development which creates a catalyst for research and development and the advancement of economic growth and development.[937] Among other issues that is now commonplace in the South African technology environment is the emergence of whistleblowing and citizen journalism.

4.1.5 Ecological factors

South Africa is ranked at 72nd in a benchmark of 178 countries gauged on the same scale termed the Environmental Performance Index which basis its measure on 20 various indicators measuring compliance with environmental policy and public health aims and standards.[938] Unfortunately environmental and health interests appear, more often than not, outranked to give economic growth and job creation preference on its priority list.[939] In 2011, the South African government launched a Green Economy Accord, which pays greater attention to environmental issues and gives more attention to cooperation with the private sector.[940]

4.1.6 Legal factors

South Africa clearly operates on the basis of a 'hybrid' or 'mixed' legal system in terms of which the common law system runs parallel to the indigenous legal system.[941] The classification suggest that the two parallel systems are seen as blending both African tradition and modern common law.[942] South Africa is popularly considered a

[935] KPMG *South Africa Economic Snapshop H2, 2016* (2016) 1, see also Smit *et al.* (2013) 75
[936] KPMG (2016) 1
[937] Smit *et al.* (2013) 73
[938] Smit *et al.* (2013) 73
[939] Ibid
[940] Ibid
[941] Van Niekerk and Wildenboer, *The Origins of South African Law* (2009) 1
[942] Ibid

constitutional democracy as of the new constitutional order of 1996 which replaced parliamentary sovereignty with constitutional supremacy. The net result was that the Constitution was framed as the ultimate law of the land.[943] That also means any law or conduct which is found to be inconsistent with the Constitution, be it procedurally or substantively, will be declared invalid to the extent of such inconsistency. The 1996 Constitutional Order enshrined the Bill of Rights as a safeguard to human rights, to end decades of state-sanctioned repression and racism under the auspices of the apartheid regime. The courts were afforded wide latitude to pronounce any law or conduct that is found to be inconsistent with the Bill of Rights and the Constitution to be invalid to the extent of its consistency.[944] The Bill of Rights guarantees and safeguards people's rights.[945]

4.2 Labour dispute resolution between 1652 and 1948

The period 1652 is very important to this study as it unearths the history of suppression as it also negatively impacted labour dispute resolution. The discovery of mineral deposits particularly diamonds and gold precipitated an industrial revolution peculiar to South Africa in the late 1860s and 1870s leading to an increased demand for mining and engineering-related skills[946] owing to the fact that South Africa lacked a sufficiently skilled labour force[947] to mine the mineral deposits. The following are some of the common issues that characterize labour dispute resolution between 1652 to 1948:

- The period between 1652 and 1948 was characterized by both forced labour (slavery) and voluntary or free labour which have existed side by side since time immemorial.[948]
- When slavery was finally abolished in 1834[949] the first attempt at a formal regulation of an employment relationship came about through the enactment of

[943] Currie and de Waal *The Bill of Rights Handbook* (2005) 2
[944] Sections 2; 172 (1), the 1996 Constitution
[945] Section 38, the 1996 Constitution
[946] Ibid 37
[947] Budeli (2009) 58
[948] De Kock Industrial Laws of South Africa (1956) 18
[949] Nel and van Rooyen *South African Industrial Relations* (1993) 54

the 1841 Masters and Servants Act,[950] which was not long-lived.[951] It was annulled in 1856 by the Masters and Servants Act[952] in terms of which servants were apparently subjected to a host of hostile conditions for failing to uphold employment rules.'[953] The employment relationship that existed during these times was controlled by a contract of employment to suite the times given the rural economy that South Africa then was and most workers were employed on farms.

- Clearly, the employment relationship at the time became increasingly complex and protection afforded employees by the individual contract of employment proved inadequate.
- In 1918 the enactment of Factories Act[954] and the Regulation of Wages, Apprentices and Improvers Act[955] became instrumental to the regulation of the conditions of employment for the first time.
- The first Industrial Conciliation Act[956] came into operation in April 1924, though crippled by its glaring exclusion of blacks from its conception of the term "employee.'[957] The birth of this Act is attributed to the 1922 Rand Revolt which sparked alarming controversy, unrest and protest.[958]
- During 1915 – 1930 the employers and employees doubled.[959] Regarded as a more comprehensive Industrial Conciliation Act[960] came into operation in December 1937.
- During 1930 – 1948 the conflicts between employers and employees were again doubled. The Black Labour Relations Regulation Act[961] was then enacted and it particularly regulated black employees' labour relations.
- The Industrial Conciliation Act of 1956 was promulgated on 11 May 1956. The Industrial Conciliation Act 1956 completed the creation of a separatist industrial

[950] Swanepoel *et al*. (2008) 36 "…failure to commence work on an agreed date, intoxication, disobedience, unauthorized absence from work, substandard work performance, negligence and the use of abusive language," among others was punishable by imprisonment.
[951] Swanepoel *et al*. (2008) 36
[952] Act 15 of 1856
[953] Swanepoel *et al*. (2008) 36
[954] Act of 1918
[955] Regulation of Wages Act of 1918
[956] Act of 1924
[957] Swanepoel, *et al*, (2008) 38
[958] Bendix *Industrial Relations in South Africa* (2001) 59
[959] De Kock (1956) 18
[960] Act 36 of 1937
[961] Act 48 of 1953

system constructed along racial lines entrenched in the racial division of workers, ensuring the registration of new unions for both Caucasians and coloureds membership was prohibited and certain work was exclusively reserved for "persons of specified race" reminiscent of the 1893 'job colour bars' spearheaded by the Volksraad as well as that prevalent in the 1898.[962]

- The early 1970s was characterized by an insurgence of strikes in South Africa orchestrated by native Africans particularly in the Durban region, fighting for recognition and against the exclusion policy of apartheid.[963] For example, in 1973, native African workers embarked on a protest strike action with respect to wage grievances bringing the industry to an almost grinding standstill. For the first time, native African workers demonstrated that they possessed real power.
- The apartheid government speedily reacted to the 1973 strike[964] by passing the Black Labour Relations Regulation Amendment Act herein ("the BLRA").[965] The whole objective of the Act was to control working conditions for native Africans, preventing and settling of disputes between employers and native African workers and as well as drawing up procedures for setting up labour committees.[966]
- Although the legislative regulation of labour relations increased from 1918, the concept of fair labour practices was not addressed until 1977.[967] The employment relationship was predominantly regulated by the contract of employment and little attention was afforded to the fairness of labour practices between employer and employee particular for the Native African workers.[968]

4.3 Labour dispute resolution between 1979 and 1994

The period between 1979 and 1994 is quite important in the evolution of labour dispute resolution in South Africa as it was characterized by several changes that became a

[962] Tolcher (2011) 3
[963] Ibid
[964] Swanepoel *et al.* (2008) 41
[965] Act 70 of 1973
[966] Budeli (2009) 69
[967] De Kock (1956) 18
[968] Ibid

catalyst for the current framework. The following characterise the period between 1979 to 1994:

- The Wiehahn Commission for instance, made recommendations to afford unions the freedom to set their own rules and to render as unfair labour practice any practices that curtailed union membership of native Africans and succinctly clarify employee's participation in union activities.[969]
- The Industrial Conciliation Act 1956[970] was revised in 1979 and in 1980.[971] In 1981 the Act was amended[972] and renamed the Labour Relations Act herein ("LRA")[973] which underwent numerous amendments in the years 1982, 1983, 1984, 1988 and 1991 respectively.[974] The aim of such modifications thereof was to afford considerable safeguard to the freedom of association for all workers regardless of origin or race.[975]
- In 1988, the Labour Relations Amendment Act herein ("LRAA")[976] was amended which considered unfair labour practice extending to include the protection of native Africans; any direct or indirect meddling with the freedom of association, or belonging to a union or otherwise among other offenses.[977] The LRAA[978] afforded protection against anti-union discrimination to employees defined in terms of the Act. This tacitly rendered employees falling outside its scope unprotected.[979]

4.4 Labour dispute resolution between 1994 to the present

The early 1990s ushered a new dispensation in RSA marking an end to the years of political oppression under the scourge of apartheid rule. The year 1994 for instance saw a new democratically elected government under President Nelson Mandela

[969] Budeli (2007) 70
[970] Act 28 of 1956
[971] Industrial Conciliation Amendment Acts 94 of 1979 and 95 of 1980
[972] Act 57 of 1981
[973] Act 28 of 1956
[974] Act(s) 51 of 1982; 2 of 1983; 81 of 1984; 83 of 1988 and 9 of 1991.
[975] Budeli (2007) 70
[976] Act 83 of 1988
[977] Budeli (2007) 70
[978] Act 83 of 1988
[979] Budeli (2007) 70

formed widely regarded as a miracle.[980] At the core of RSA's democratic dispensation is that it ushered in the Constitution of the Republic of South Africa, 1996 herein ("the 1996 Constitution")[981] which comprises a Bill of Rights,[982] in which a variety of fundamental rights are enshrined for all South Africans.[983] A deep-rooted component of the 1996 Constitution[984] was the installation of rights such as the right to fair labour practices, freedom of association, to collectively bargain and the right to undertake strike protest action,[985] a marked difference from the previous era. Labour legislation that gives effect to these rights was developed and formalised.[986] RSA rapidly enacted four important components of labour legislation in succession, namely: the LRA,[987] the Basic Conditions of Employment Act herein ("the BCEA");[988] the Employment Equity Act herein ("the EEA")[989] and the Skills Development Act herein ("the SDA").[990] These legislative enactments completely transformed the manner labour relationships are handled in RSA to date, and are collectively touted the most comprehensive labour legislative arrangement in the world.[991]

In some respects, ADR in South Africa has attained notable milestones towards an efficient body especially when it comes to enacting legislation that supports its adoption and use. The enactment of a Labour Relations Act[992] ushered in a new labour dispute settlement regime different from that during the apartheid era which did not recognize the rights of native Africans. South Africa installed an independent regulatory body – the CCMA - to dispense with ADR in labour disputes.[993] South Africa is highly commended for its efforts in employing the services of ILO in establishing an independent ADR body – the CCMA - in 1996, training of its first 100 full time and 300 part-time conciliator's and arbitrators and over 300 support staff as well as establishing an electronic case management system that deals with over 100 000 cases each year.'[994]

[980] Swanepoel *et al.* (2008) 45
[981] Ferreira (2004) 76
[982] Act 108 of 1996
[983] Ferreira (2004) 76
[984] Act 108 of 1996
[985] Section 23 Act 108 of 1996
[986] Ferreira (2004) 76
[987] Act 66 of 1995
[988] Act 75 of 1997
[989] Act 55 of 1998
[990] Act 97 of 1998
[991] Venter, Grossett, and Hills *Labour relations in South Africa* (2003) 148
[992] Act 66 of 1996 (As Amended)
[993] Section 113, Act 66 of 1996 (As Amended)
[994] Steadman (2011) 43

Compared to the National Party which institutionalised and solidified apartheid and deepened its exclusion of native Africans from participation in the labour movement that would assert their rights, the post 1994 government achieved much in installing industrial democracy in South Africa.[995] Considering that the Industrial Conciliation Act[996] enactments under apartheid which introduced Industrial Councils and Conciliation Boards as dispute resolution instruments among other things excluded native Africans and public sector workers from the definition of an "employee"[997] the LRA is an important change of direction in the dispute resolution space. Having an independent body that dispenses with conciliation and arbitration of disputes ushered a new wave of industrial democracy. This is an important milestone according to this study. ADR processes in South Africa are responsive and have achieved targets in resolving disputes through conciliation and arbitration proceedings. The LRA amendments for instance introduced section 143 (3) which gave the CCMA director power to certify arbitration awards so as to make them enforceable. This took away the need to always convert arbitration awards into orders of court to make before section 143 was enacted.[998] Such a responsive enactment has added to steps that enhance ADR efficacy as far as enforcement of arbitration awards is concerned. It is however discernible from the discussions in this chapter that ADR efficacy has been curtailed by those that seeks to use review of arbitration awards in the Labour Court and prescription period as ploys to evade responsibility. The Constitutional Court however ruled that the Prescription Act[999] did not apply to arbitration awards and could not be used as a delay mechanism by those that sought to evade responsibility.[1000] A landmark ruling of Justice Zondo and Justice Jafta in the Myathaza matter"[1001] settled the issue and made it difficult for employers to run to the use of prescription arguments as well as review proceedings of arbitration awards through the Labour Court to evade liquidating claims or reinstatements.

[995] Swanepoel *et al.* (2008) 40
[996] Act of 1924
[997] Swanepoel *et al.* (2008) 38
[998] Section 143 (3), Act 66 of 1995 (As amended in 2014)
[999] Prescription Act 1969
[1000] Par 142, [2016] ZACC 49, [2017] 2 BLLR 213 (CC)
[1001] Ibid

Other aspects that negatively impacts on ADR's ability to efficaciously dispense with matters in CCMA is its inability to determine whether an employment relationship existed between the parties in dispute before issues in dispute can be determined. It causes unnecessary delay. Further, the Act[1002] does not specify the minimum qualifications required for persons who act as commissioners and in certain circumstances inability to have specialised knowledge among commissioners are matters this study believes impinges on RSA ADR ability to be efficacious. This study considered whether ADR in South Africa was actually achieving time efficiency expectations. The study established that CCMA reported 74% success rate in settlements in the 2015/2016 period.[1003] This study concurred with a reasoned position by Venter & Levy[1004] who observed that CCMA was not accurately reporting. CCMA piles arbitration settlements together with conciliations to suppose that together they reflected settlement success. Conciliations by their nature are a result of the effort of the parties. CCMA ought to have indicated success attributed to them in arbitrations as they have power to make decisions, which power they do not have when it comes to conciliations. Conciliations are settled by the parties with minimum effort of commissioners. When looking closely into arbitration awards, Venter & Levy[1005] observed that about 50% (12,730) of the 25,460 matters resolved by way of arbitration are not enforced but rather dishonored by employers. Such a state of affairs reflects an unfavorable situation when it comes to enforcement of awards. This study agrees with Savage[1006] view that awards and claims must be capable of being enforced by the parties. Without functional enforcement mechanisms in place, the constitutional assurance of the right to fair labour practices and the protection of the law risks being significantly undermined if not made meaningless.'[1007] South Africa still faces the challenge of enforcement of arbitration awards especially the attitude of some employers as they seek to evade responsibility. By the strength of the foregoing arguments this study finds that ADR in labour dispute resolution is still far from being efficacious in South Africa. There are still gaps especially in enforcement that need to be resolved as seen from the foregoing discussions.

[1002] Act 66 of 1996 (As Amended)
[1003] CCMA *Annual Report 2015-2016* (2016) 31
[1004] Venter & Levy (2013) 45
[1005] Venter & Levy (2013) 45
[1006] Savage (2013) 46
[1007] Savage (2013) 46

4.5 Review of the Efficacy of ADR as a Labour Dispute Settlement System in South Africa

This section discusses the efficacy of ADR in RSA with three elements in mind. First the background conditions consisting of (1) adequate legislative and political support, (2) supportive institutional and cultural norms, (3) adequate and competent manpower, (4) adequate financial resources, and (5) power parity of disputants.[1008] Second, ADR program design considerations related to (1) planning and preparation[1009] and (2) operations and implementation.[1010] Third, the ADR measures of efficacy, utilising client satisfaction, settlement and enforcement, efficiency and cost-saving[1011] maintaining privacy, maintaining relationships, involving constituencies, linking the issues, getting neutral opinion, and setting precedent,[1012] as the focus.

4.5.1 ADR Background Conditions

This section discusses the state of ADR in RSA in terms of legislative and political support for it as well as institutional and cultural support, adequate and competent manpower and financial resource support and parity in the power of disputants.[1013]

4.5.1.1 Adequate Political and Legislative Support

It is important for this study to consider the political and legislative support of ADR as this speaks to background conditions under which its processes were established from its inception. The legislature being responsible for creating the laws may either enhance or derail ADR efficacy, depending on whether such laws provide for clear definitions of important terms, specific scope of jurisdiction, enabling authorities, putting measurement criteria in place in the case of ADR to ascertain time efficiency, cost issues among others as well providing adequate awareness among users of the system. This section therefore discusses whether ADR in RSA has been afforded the necessary support from the legislative and political front for it to be efficacious.

[1008] Brown *et al.* (1998) 24
[1009] Ibid 33
[1010] Ibid 40
[1011] Kerbeshian (1994) 383
[1012] Sander and Goldberg (1994) 49-68
[1013] Brown *et al.* (1998) 40

Immediately upon attaining independence from apartheid rule in 1994 the new democratically elected government in South Africa took steps to transform the labour market space, let alone the labour dispute settlement landscape through establishing an independent body – the CCMA. The LRA[1014] was passed to liberalise the workplace giving workers a voice.[1015] Subsequent efforts by the government to support the CCMA as a dispute resolution body in labour matters is widely applauded. In terms of the Act,

> "The CCMA is hereby established as a juristic person."[1016] The Act, by providing for the establishment of CCMA as an independent dispute resolution entity demonstrated a commitment by government to provide a scheme for labour dispute settlement in RSA.[1017]

It is more than 25 years since the CCMA/ BCs were conceived in South Africa.[1018] The phenomenal and steady increase in the number of CCMA users, and its exponential growth in recent times bears testimony to user confidence therewith and support of ADR processes at large.[1019] South Africa is to be commended, however, for training over 100 full-time and 300 part-time conciliators and arbitrators, and over 300 support staff at the inception of its post 1994 ADR system establishment.[1020] This may have given the country, especially its CCMA body a good start at ensuring competent manpower who are adequately trained are handling labour disputes. There is also an evident commitment to adhere to ILO standards by South Africa in dispute resolution shown by her reliance in the ILO body to help build capacity.

However, it is instructive that efforts at building popular acceptance and use also aim at overcoming opposition of vested interests, among others.[1021] There is some form of resistance and dissent to ADR in South Africa that cannot go unnoticed. Carr and

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[1014] Section 7, Act 66 of 1995
[1015] Ibid
[1016] Section 112, Act 66 of 1995
[1017] Ibid
[1018] Labour Bulletin *A critical and analytical assessment of the potential benefits and problems of Conciliation / Arbitration as forms of Alternative Dispute Resolution (ADR) mechanisms* (2015) 8
[1019] Ibid
[1020] Steadman (2011) 43
[1021] Brown *et al.* (1998) 40

Jencks[1022] argue that, amongst other disadvantages of RSA's ADR is that it leads to a waning of the role of the judiciary which risks being reduced as an "after thought" by the Government thereby robbing it of on-going collation of judicial precedent.[1023] It is argued further that opting for ADR increases chances of loss and reduction of information hidden from the public eye. The Labour Bulletin[1024] aired its misgivings of ADR particularly that it was eroding the role of formal law provided for my court litigation.[1025]

The resistance building against ADR is that it is eroding formal law and essentially robbing society of judicial precedence, which is a hallmark of common law in South Africa.[1026] This is the same outcry by lawyers in India who view ADR as a threat to court litigation and as causing them loss of important cases and insisted that the government should take over the system.[1027] The fact that there is discontent among legal practitioners as to the role of ADR renders it subject to scrutiny and facing legitimacy issues among people such as lawyers who ordinarily should be promoting its efficacy. Given that political and legislative support is regarded as one of the determinants of ADR efficacy, there is evidently a challenge when the legal community expresses sentiment suggesting that ADR is disadvantaging them instead of seeing it as a panacea for the inadequacies of the courts in labour dispute resolution. This may negatively affect the ability of ADR processes to achieve efficacy, as end users may be negatively disposed towards it when it appears to be failing a legitimacy test among lawyers who should be supporting it. South Africa has ratified all the relevant conventions that deal with ADR in labour disputes.[1028] South Africa has essentially implemented all these conventions by enacting labour laws that promote ADR

[1022] Carr and Jencks *The Privatisation of Business and Commercial Dispute Resolution: A misguided Policy decision*, (1999-2000) cited in Labour Bulletin (2015) 9
[1023] Labour Bulletin (2015) 9
[1024] Ibid
[1025] Labour Bulletin (2015) 9 "As noted earlier, one attractive feature of ADR is that its interventions remain private and confidential. However, significant chunks of information become difficult to keep track of and deprived the public eye. Further, to the extent that public disclosures are volunteered during the privatised process, they are often not tracked, memorialised and stored. There is already a scarcity of data information available to scholars studying private ADR and the court system. The privatisation of business disputes only adds an additional layer of fog making the meaningful study and analysis thereof all the more difficult. Moreover, if we are serious and sincere about protecting the public welfare, much of the information that is normally hidden by private ADR should be available to the public."
[1026] Ibid
[1027] Brown *et al.* (1998) 25
[1028] ILO https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 Date of Use: 06 August 2019

processes that safeguard industrial democracy in the country. This has contributed to the effectives of CCMA in dispensing with labour dispute resolution in the country and important for achieving ADR efficacy. In the next section supportive institutional capacity and cultural support is considered.

4.5.1.2 Supportive Institutional Capacity and Cultural Norms

It is particularly concerning to this study to consider the implications of having sufficient institutional capacity and supportive cultural norms to administer ADR processes effectively. Once a legislative enactment has been instituted for it to be implemented requires an enabling authority in the form of institutions. The state of ADR institutions in RSA are reviewed hereunder.

The LRA[1029] also provided institutional support in the form of an independent body of government as follows. In terms of the Act:

> "The CCMA exists and operates as an entity separate from the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations".[1030]

This signifies an express departure from the old practice which coiled around government bureaucracy towards one that affords autonomy and independence to the CCMA in dispensing with labour disputes.[1031]

However, according to Bendeman[1032] 'majority of role players who rely on CCMA lack the skill to deal with its requirements hence at pains in handling the consequences of the unfair dismissal regime and the shortcomings of the ADR scheme.' It is discernible from this observation that users of the CCMA scheme are unaware of what CCMA offers them as well as skills to adequately use the ADR processes afforded them. This is attributed to the realities of the RSA labour market and same is obtaining in several

[1029] Section 113, Act 66 of 1995
[1030] Ibid
[1031] Section 112, Act 66 of 1995
[1032] Bendeman (2007) 159

other African countries among whose large chunks of workers come from poor education backgrounds; while a large proportion of employers have little skills or training in labour relations as well as labour law to handle ADR and also operate small to medium-sized businesses.[1033] For example while it may be cheap to use conciliation proceedings for employees who cannot afford to pay lawyers to represent them should they use arbitration, employers generally prefer arbitration. Evidently employers abscond or challenge the conciliation hearings in favour of arbitrations.[1034] The argument is that the government has not foreseen and provided for capacity building on internal conflict resolution processes through bodies such as the CCMA within society to reduce escalation of disputes which could well be minimised.[1035] Inadequacies of ADR institutions may reduce its efficacy as cases fail to be administered effectively due to poor management therefore. Clearly, ADR in RSA still lacks adequate awareness among end users. Many people lack understanding of what CCMA can and cannot do for them because of poor stakeholder engagement thereon. This means CCMA may still struggle with wrong cases being brought before it giving it an administrative burden to screen them, a task which engages resources which could be used elsewhere to resolve disputes. The next section considers manpower as a determinant of efficacy of ADR.

4.5.1.3 Adequate and Competent Manpower

Given that ADR efficacy largely depends on skilled and competent manpower who administer the processes, it is important for this study to consider it as far as labour dispute resolution in RSA is concerned. Whether the manpower will skillfully execute the duties in either facilitating resolution or resolving disputes will influence whether such matters are resolved efficaciously.

The first challenge that this study would have to establish is whether the Act provides for the adequate and competent workforce to administer ADR processes. The Act[1036] provides for the appointment and supervision of commissioners to administer ADR

[1033] Ibid
[1034] Benjamin (2013) 18
[1035] ibid
[1036] Section 117 (1), Act 66 of 1995 (Amended)

processes. The Act states that “the governing body must appoint as commissioners as many competent persons as it considers necessary to perform the functions of commissioners by or in terms of this Act or any other law.”[1037] The aspect of ‘competent persons’ is provided for in the Act which supposedly deals with the skills levels. The use of the phrase “as many” competent persons supposedly deals with the aspect of adequacy or sufficient manpower. The challenge with competent persons is that it does not specify the level of competence required especially in terms of minimum qualifications and experience. This could pose problems for the commission especially when it comes to handling of complex disputes often requiring the interpretation of law or technical areas. The lack of specific minimum skills requirements is highlighted by Singh[1038] when analysing CCMA disadvantages who stated that the ‘lack of technical skills / adequate legal skills by commissioner. Given the informal nature of ADR proceedings and processes, it is not a requirement for arbitrators to be legally trained nor are they expected to possess expertise in any subject matter in dispute. This may limit the ability and competence of a presiding commissioner, especially in respect of possessing sufficient knowledge of the law, which is sometimes necessary especially when lawyers are used to represent parties in arbitration. This could give rise to many challenges by way of review applications, thus delaying the finalisation of the dispute.’ CCMA has had many of its rulings especially in arbitration proceedings subject to court review over the years.[1039] There is a challenge regarding conduct of commissioners in CCMA in South Africa particularly their competence levels to dispense with disputes.[1040] This could also be attributed to the fact that the LRA[1041] in RSA does not prescribe minimum skill level requirements for commissioners who handle labour disputes.[1042] These challenges limit the ability of ADR in South Africa to achieve the efficacy goal in labour dispute resolution. This next section considers the element of adequate funding.

4.5.1.4 Adequate Funding

[1037] Section 117(1), Act 66 of 1996 (As Amended)
[1038] Singh A critical and analytical assessment of the potential benefits and problems of Conciliation / Arbitration as forms of Alternative Dispute Resolution (ADR) mechanisms (2015) 8
[1039] Singh (2015) 8
[1040] Labour Bulletin (2015) 9
[1041] Act 66 of 1995
[1042] Ibid

It is important to ensure that ADR is adequately funded to administer dispute resolution efficaciously. Without adequate funding ADR processes may be frustrated. This section considers the status of funding of ADR processes in South Africa and particular its influence on efficacy of labour dispute resolution.

The CCMA as a labour dispute settlement body is funded by the State and disputants are not charged for lodgment of disputes thereto.[1043] The CCMA was established as part of the system overhaul from the pre-1994 one with the chief aim of ensuring '(a) workers themselves could lodge disputes and seek relief, free of any charge; and (b) providing a dispute resolution forum which was quasi-judicial in its offering but at the same time, statutorily entrenched so that justice would not be placed beyond the reach of an impoverished or disadvantaged employee or party.'[1044] It is readable from the foregoing that ADR in South Africa is afforded disputants free of charge. This would suggest that ADR is least costly than court litigation in South Africa. Disputants lodging their grievances through the CCMA or the Labour Court may do so themselves or through assistance from their union or in certain instances by attorneys.[1045] The aspect of involving lawyers has attracted dissent with others disparaging is as making ADR litigious which it sought to avoid by its nature and others saying disallowing lawyers is unnecessarily and unfair discriminating to the disfavor of members of the legal fraternity.[1046] Arguably allowing legal representation tendentiously increases the cost of ADR which may not be afforded by less privileged members of the community.[1047] It is descendible from the foregoing that ADR in South Africa is cheap and therefore costless compared to court litigation in terms of labour dispute resolution. From the aim of this study it would be observable that the fact that ADR is free of charge in RSA contributes positively towards efficacy thereof especially in labour dispute resolution. The next section discusses power parity of disputants.

4.5.1.5 Power Parity of Disputants

[1043] Benjamin (2013) 6, see Singh (2015) 5
[1044] Singh (2015) 5
[1045] Benjamin (2013) 6
[1046] Okharedia (2011) 13
[1047] Bendeman (2007) 150

It is important for this study to consider the power balances or imbalances within the context of ADR processes. This addresses situations where people who are powerful for some reason or the other could use such power to discomfit the rights of the less powerful in disputes. The question is therefore more of to what extend does ADR in RSA afford an environment where power between those using the processes balanced? This may refer to use of money, gender and other sources of power to disadvantage others.

South Africa is an unequal society spiraled from the pre-independence era of apartheid rule.[1048] In the PESTEL analysis section under economic factors in this study it was indicated that RSA is regarded as one of the grossly unequal nations on earth and appears to have become even more unequal than it was when apartheid ended.[1049] This undermines the effectiveness of dispute mechanisms such as ADR as was noted by Lynch[1050] experiences of CCMA commissioners.[1051] It is argued that the CCMA's scheme of processes are characterised by power play in that employers often prefer a cavalier reliance on arbitration rather than conciliation just to reaffirm their power obviously to the disadvantage of the workers who lack power.[1052] Reliance on grievance procedures is often derided as it is perceived as a challenge to management's power, which needs to be corrected in the subsequent processes.[1053] The likelihood of pre-dismissal procedures bearing much fruit is negligible in such unequal environments.[1054] However, RSA has managed to fully utilize the tripartite alliance of the government, unions and the business community to put up a labour legislation that engenders industrial democracy.[1055] Even though there may still be power imbalances between the haves and have nots approaching the ADR systems, the government has made an effort to put mechanisms in place to address such issues. The installation of an independent ADR body which is free of charge ensures that the common man for instance is able to access justice. As to whether the goals of a power-balanced society is being achieved is unknown. There may be a challenge

[1048] Smit *et al.* (2013) 75 (See Lings (2014) 15)
[1049] Lings (2014) 15
[1050] Lynch (2001) 208
[1051] Ibid
[1052] Ibid
[1053] Ibid
[1054] Bendeman (2007) 157.
[1055] Section 23, Act 108 of 1996, See also Ferreira (2004) 76

of the gap between principle and practice of RSA's ADR whereby legislation and mechanisms thereof speak towards addressing challenges but what is happening on the ground is ineffective enforcement of such ethos. RSA still has to address power imbalances in society in general and power parity of disputants in labor dispute resolution specifically; as the only hope for achieving ADR efficaciousness.

4.5.2 ADR Program Design Considerations

This section assesses and discusses matters around ADR design efficacy in South Africa. Attention is given to issues of the planning and preparation as well as operations and implementation of ADR under the auspices of the LRA[1056] and CCMA in South Africa.

4.5.2.1 Planning and Preparation

The CCMA runs a case management system whose role is to screen cases referred to it according to whether such disputes are within its jurisdiction or otherwise.[1057] This is an example of a planning role of an ADR programme.[1058] This is an important exercise to this study because screening cases frees the tribunal of unnecessary load of cases that do not fall within its jurisdiction so that focus may be placed on those it must handle. That has a tendency to enhance efficaciousness through spending time within the CCMA to handle.

Research[1059] indicates that the CCMA or ADR system has design challenges especially that it is an imposing system.[1060] RSA's ADR practitioners prefer use of the term 'appropriate as opposed to the term 'alternative' in the formulation of ADR as a scheme while theories suggest the use of alternative as the most ideal for reason discussed in chapter 2 of this study.[1061] This, it is argued calls for an overhauling of approaches to dispute settlement, touching upon the very selection (the design) of a process to establish the one best suited to any particular dispute bearing in mind the

[1056] Act 66 of 1995
[1057] Jurisdiction means for the competence of a court (tribunal) to hear a matter and enforce its decisions
[1058] CCMA *Annual Report 2015-2016* (2016) 31
[1059] Bendeman (2007) 157
[1060] Ibid
[1061] Ibid

needs, the mean of the concept ADR and capacity of disputants in RSA at large to engage the processes.[1062]

4.5.2.2 Operations and Implementation

It is also important for this study to consider the manner in which ADR processes are administered at CCMA giving regard to processes and implementation. It is the subject of this section.

Arguably, the problems / challenges identified within the ADR system in RSA by and large comprise the attitude of interested parties to the attendant processes and /or competence levels of commissioners who administer same.[1063] As such the need to overhaul the existing ADR schemes is instructive and the more, furnishing sufficient education and training to users, who subsequently can facilitate ADR success in labour dispute resolution is an urgent imperative.[1064]

The CCMA adopted a case management system with the help of ILO[1065] wherewith it sits officers at its receptions screening disputes as they came in to determine those within its jurisdiction and those without.[1066] This has contributed to effectiveness in handling those cases it is mandated to dispense with. Furthermore, since its inception, the CCMA has installed an electronic case management system (CMS) designed as a tracking and coordinating tool for all matters lodged thereto.[1067] A mandatory referral form which captures details about the grievance and relief sought by the disputant referring same acts as its primary source document for processing of matters.[1068] As matters progress through the CCMA process, further details thereon are captured into the CMS. The CMS makes the scheduling and tracking of progress of disputes workable.[1069] On 1 January 2012, CCMA made the following additional information obtainable through CMS as a matter of requirement:

[1062] Labour Bulletin (2015) 9
[1063] Ibid
[1064] Ibid
[1065] Steadman (2011) 43
[1066] CCMA (2005) 8
[1067] Benjamin (2013) 9
[1068] Ibid
[1069] Ibid

- the manner of lodgment of dispute (e.g. fax, walk in, registered mail etc.);
- details about the disputant referring the matter (gender, identity number, length of service, monthly earnings, age, race and whether the employee is employed through a labour broker/temporary employment service);
- if the disputant is an individual, the gender must be furnished thereto;
- if the employer is an organization, its size by staff complement;
- whether the disputants are represented and, if so, the nature of representation (lawyer, trade union official, etc.);
- the outcome of settled matters, including the awarded amount;
- the outcome of arbitration award made, including the amount awarded.[1070]

Table 1 indicates that the settlement rate for the past five years (2012-2016) have been impressive and way above the target of 70%.[1071] The settlement rate went down in the year 2016 by 2% compared to the previous year where it was 76%.[1072] This is explained by the addition of caseload emanating from the promulgation of new amendments to the Act that requires CCMA to preside over cases that emanating from the Basic Conditions of Employment Act[1073] such as those pertaining to severance benefits.[1074] In a strong sense there is progress in ADR in South Africa given that the aspect of measuring settlement rate is infused within the system.[1075] In terms of the Act,[1076] disputes should be settled within the threshold of 30 days at a minimum.[1077]

In terms of table 1 of all conciliations of all jurisdictional cases heard each year between the years 2011 and 2016 had a resolution of 96% on average in total. That is an impressive resolution rate.[1078] Though some argues that the settlement rates do not accurately reflect success, since the trial settlement ratios are frequently as high well[1079] there is merit in having settlement as an outcome in ADR. Reports are often

[1070] Benjamin (2013) 10
[1071] CCMA (2016) 31
[1072] CCMA (2016) 31
[1073] Basic Conditions of Employment Act No. 75 of 1997
[1074] CCMA (2016) 18
[1075] Section 135, Act 66 of 1995 (Amended)
[1076] Act 66 of 1995 (Amended)
[1077] Ibid
[1078] CCMA (2016) 31
[1079] Katz (1993) 52

inflated to reflect success but without some form of measure including settlement rate, there is no determination of efficacy of ADR.

Table 1 Number of disputes referred to CCMA 2011 – 2016

Referrals	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016
Total referrals	161 588	168 434	170673	171854	179528
Jurisdictional cases	126 504	131 564	134 943	137 479	145 728
Non-Jurisdictional	35 084	36 870	35 730	34 375	33 800
Pre-conciliations heard	16%	17%	17%	15%	17%
Pre-conciliations finalised	8%	9%	11%	11%	11%
Corn/Arb finalised	36%	36%	40%	38%	37%
Conciliations heard and closed	96%	96%	96%	96%	96%
Arbitrations finalised	95%	95%	95%	95%	95%
Late Awards - by commissioner	0%	0%	0%	0%	0%
Late Awards - sent to parties	7%	1%	0%	0%	0%
Postponements/Adjournments	5%	5%	4%	5%	5%
Process reworks (8%)	7%	6%	5%	6%	6%
Turnaround time - conciliation (30 days)	24	24	24	23	23
Turnaround time - Arbitration (60 days)	59	61	68	61	61
Settlement rate	70%	73%	75%	76%	74%

Source: CCMA Annual Report (2016) 31-32

4.5.3 The ADR measures of efficacy

Generally speaking, the CCMA is considered inundated with matters while at the same time rush and frivolous suits being instituted by disputants abound.[1080] This state of affairs is attributable to the flexible nature of the procedure by which an action is instituted through CCMA.[1081] In terms of the LRA,[1082] an employee needs only to prove that a dismissal has occurred to institute an action through CCMA[1083] and thereafter the burden shifts to the employer who must prove that the dismissal was a fair sanction

[1080] Venter (2003) 522
[1081] Van Schaack *with All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change* (2004) 2305-2319.
[1082] Act 66 of 1995 (Amended)
[1083] Section 192 (1), Act 66 of 1995 (Amended)

both procedurally and substantively.[1084] The provision of section 92 of the LRA, is considered too simple and rather too flexible and in the result, instances of frivolous suits being instituted by employees abound at CCMA.[1085] The argument is that the employee is given a simpler task to only prove that a dismissal has occurred and the employer bears the larger task thereafter to prove that such dismissal was a fair sanction both procedurally and substantively.[1086] The challenge with such a provision is that it tentatively opens floodgates for potentially rash and frivolous charges of unfair dismissal to be lodged with the CCMA.[1087] This anomaly in turn, "clogs and slows the entire system, and perhaps even leads to an overshadowing of other more serious allegations that warrant greater attention from being accorded such."[1088]

This section however evaluates specific elements of the performance of ADR in South Africa with respect to client satisfaction, settlement rate, efficiency (time saving) as well as cost saving measures.[1089]

4.5.3.1 Efficiency and time saving nature of ADR

It is important for this study to ascertain the efficacy of ADR labour dispute resolution in general, efficiency and time saving nature thereof. This study established that time efficiency is one of the important determinants of ADR efficacy and in fact among the reasons why it is opted for as a dispute resolution mechanism in place of court litigation. The court litigation process is considered time consuming and ADR is therefore an efficient alternative. As a result, one considers the time it takes to dispense with a dispute under ADR as opposed to court litigation.

The Act[1090] provides timeframes within which matters are lodged with the tribunal, and the time it should take for these matters to be resolved. A dispute must be submitted to CCMA for conciliation within 30 days from the date it occurred. This study is more

[1084] Section 192 (2), Act 66 of 1995 (Amended)
[1085] Madhuku Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa (2002) 242
[1086] Section 192, Act 66 of 1995 (Amended)
[1087] Animashaun, Odeku and Nevondwe (2014) 680 (See Venter (2003) 522)
[1088] Venter (2003) cited in Animashaun, Odeku and Nevondwe (2014) 680
[1089] Kerbeshian (1994) 383
[1090] Sections 135 and 136 (1) (b), Act 66 of 1995 (Amended)

interested in the time it takes to resolve a dispute once it is in the hands of CCMA. CCMA reports that cases have been resolved efficiently, way above the target of 70% for the past five years (2012-2016) which is regarded as an impressive performance.[1091] The challenge raised by Tokiso is that the 70% success claim is inflated as it does not reflect matters CCMA settled. It includes matters that were settled by conciliation which are decided by the parties and not CCMA, Tokiso feels that the measurement of success by CCMA should be against arbitrated matters and not conciliated ones. CCMA only facilitates in conciliation but not decide on the decision to settle the matter. Though such an argument has some merit it is important to note that by a large stretch the efficacy of ADR in South Africa is satisfactory. This study sought to ascertain whether settling a labour dispute in RSA was time efficient and somewhat there is satisfactory achievement in the matter in which ADR processes are administered in that regard. The next section considers the cost effectiveness of ADR in RSA.

4.5.3.2 Cost effectiveness of ADR

The cost effectiveness of ADR is another important factor why it is elected as a dispute resolution mechanism instead of the courts. The cost effectiveness of ADR is therefore important to this study in its attempt to ascertain the efficacy of labour dispute resolution in South Africa.

The CCMA has reported 70% success in its effort to settle labour disputes.[1092] It is however discernible that ADR in RSA is cost effective given that it is afforded disputants free of charge. Disputants do not need to pay anything to appear before CCMA with a dispute. Disputants may however incur costs when it comes to engaging lawyers especially when appearing for arbitration proceedings. There is no specific guideline in the Act as to how much lawyers may charge clients to appear in CCMA tribunal. Generally, it may be reasonable to conclude that ADR in South Africa is cost effective. This attribute adds to ADR efficacy in RSA labour dispute resolution significantly. The next section considers settlement of disputes as a measure of efficacy.

[1091] CCMA (2016) 31
[1092] CCMA *Annual Report 2015-2016* (2016) 31

4.5.3.3 Settlement of ADR disputes

The whole objective of an ADR intervention as with court litigation is settlement of disputes. The previous sections dealt with the cost effectiveness and time efficient manner in which ADR disputes are settled as measures of efficacy and this section is interested in the actual settlement. It is not enough for a tribunal to entertain disputes if such engagement does not settle them or facilitate same.

Settlement of labour disputes is a priority in RSA. The CCMA is the body saddled with the role and responsibility to dispense with labour disputes, measures and reports on its settlement and attendant enforcement.[1093] Based on reports available on CCMA's website from its inception in 1996 to the present, labour dispute settlement through ADR has both been documented and made a matter of public record.[1094] Generally, CCMA has managed to settle disputes at a rate of 75% on average, attributable to continuous effort to improve in many fronts, including resources mobilization, case management system and capacity building of its commissioners.[1095] However, the data regarding settlement and enforcement has not escaped the eye of scrutiny in South Africa. This study concurs with Venter & Levy[1096] that CCMA reports have inflated settlement by including conciliation success figures which are not within CCMA ambit to decide.

> "We continue to hold the view that settlement of a dispute at conciliation is neither the responsibility nor does it lie in the hands of the dispute resolution institutions. It is in fact an outcome in the hands of the parties. Therefore, the efficiency or effectiveness of the system should not be determined by how high or low the settlement rate it."[1097]

Considering the foregoing statement, the CCMA decides on arbitration outcomes where it is empowered to settle and make awards. The 75% claim is therefore regarded as an inflating of settlement figures and success rate not reflect the reality

[1093] CCMA (2016) 31
[1094] Ibid
[1095] Ibid
[1096] Venter & Levy (2011) 47
[1097] Ibid

on the ground. In making out their argument Venter & Levy[1098] asserted that CCMA seldom publishes its definitions, categorizations or the basis for which it calculates its figures. In 2009/2010 period for instance it alluded that "the actual number of cases settled increased by 14%; 6% more cases were withdrawn by the applicant (note that this figure is across all processes); 13% more were settled by the parties and the CCMA commissioner settled 16% more than in the previous year."[1099] This study is however guided by the fact that other factors considered together, including efficient handling of processes, cost effective nature thereof, ADR is satisfactorily efficacious in labour dispute settlement. Settlement, in large part is also curtailed in certain instances by the delays when commissioners have to dispense with jurisdictional battles, in either conciliation or arbitration as it is the duty of the commissioner to determine questions of jurisdiction first before dispensing with matters.[1100] In principle, CCMA commissioners ought to determine the existence of jurisdiction on four areas in relation to: the territory or area of jurisdiction, the persons concerned, the cause of action or matter in the dispute, and the period of time involved.[1101] There is controversy collecting around whether the existence of an employment relationship and a dismissal are jurisdictional facts in the context of a dismissal dispute. Authority for this matter is Bombadier Transportation (Pty) Ltd, v Mtiya NO & Others herein ("the Bombadier matter").[1102] The court herein[1103] sought to decline that the existence or otherwise of an employment relationship was truly a jurisdictional issue to be determined before conciliation or arbitration could resume or before CCMA could be seized with jurisdiction to entertain the matter. The Bombadier matter[1104] finally ruled that indeed determining an employment relationship was an important jurisdictional issue before the matter is heard. In the Linda matter[1105] undue delay was placed on the matter because the respondent (employer) claimed that an employment relationship did not

[1098] Venter & Levy (2011) 47
[1099] Ibid
[1100] Myburgh & Bosch Reviews in the Labour Courts (2016) 109
[1101] Ibid
[1102] Par 13, [2010] 8 BLLR 840 LC "The distinction to be drawn is one between facts that the Legislature has decided must necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power) and facts that the Legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising its statutory powers."
[1103] Ibid, Par 16 point 1
[1104] Paragraph 13, [2010] 8 BLLR 840 (LC)
[1105] Linda Erasmus Properties v Lucky Mhlongo, the CCMA and Janine Beytell, J 1604/04, See also Building Bargaining Council (Southern and Eastern Cape) vs Melmons Cabinets CC & Another (2001) 22 ILJ 120 (LC)

exist between it and the other party, but only a contract of service (independent contractor relationship) existed. The CCMA was therefore unable to hear the matter until the court settled the issue of the existence or otherwise of an employment relationship between the parties.[1106] In the matter of Fidelity Guards Holdings (Pty) Ltd v Epsen NO & Others herein (the "the Fidelity Guards matter")[1107] in order for CCMA to have jurisdiction, among other things, CCMA ought to determine if an employment relationship exists or previously existed between the parties (in the case of a dismissal disputes.) If the reading of this is a correct one, one would assume that CCMA will only have jurisdiction if an employment relationship or otherwise existed between the parties, which issue must be determined elsewhere. It means that time will have to be spent determining such a matter before ADR can be dispensed with in resolving labour disputes in RSA. The foregoing issue renders ADR unable to be sufficiently efficient in dispensing with disputes. South Africa still needs to work on its legislation to deal with conferring the power to determine jurisdiction on CCMA commissioners to enhance ADR efficacy in labour dispute resolution. The next section considers the aspect of enforcement of ADR outcomes.

4.5.3.4 Enforcement of ADR outcomes

Enforcement is an important aspect of labour dispute resolution. Savage[1108] asserts that awards and claims must be capable of being enforced by the parties. Without functional enforcement mechanisms in place, the constitutional assurance of the right to fair labour practices and the protection of the law risks being significantly undermined if not made meaningless.'[1109]

In terms of the LRA,[1110] an arbitration award issued by a CCMA Commissioner is final and binding and may be enforced as if it were an order of the LC in respect of which a writ has been issued, with the exception of advisory arbitration awards such as orders for performance, other than payment of money, for instance, reinstatement.[1111]

[1106] Ibid
[1107] Par 16, [2000] 12 BLLR 1389 (LAC)
[1108] Savage (2013) 46
[1109] Ibid
[1110] Section 143 (1), Act 66 of 1995
[1111] Ibid

Such a development was quite important in 2014 especially that an arbitration award may be certified by a CCMA Director[1112] and thus it becomes unnecessary to approach the court to convert it into an order, in terms of the LRA.[1113]

The court in Mlaudzi v Metro South Towing CC herein ("Mlaudzi matter")[1114] warned that a party who declines to comply with a certified order, will risk such order getting enforced without a further order by way of contempt proceedings lodged at LC.[1115] This is also consistent with the judgement of the Labour Court in SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd and Others[1116] herein ("the SATAWU obo Phakathi matter"), in which the Labour Court held that section 158(1)(c) applications were not a precondition for contempt proceedings.[1117]

Nonetheless, in Mlaudzi matter, the Labour Court further held that a section 158(1)(c) application may not be dismissed for the mere fact that the arbitration award was certified. Instead, the Labour Court ruled that the employee made out a proper case and, in the result, made the arbitration award an order of the Labour Court.[1118] Prior to this amendment, a party would invoke the provisions of the Act[1119] which directed the Labour Court to convert an arbitration award into an order of court. Now the CCMA can enforce its own awards through its own process by certifying them through its Director, and not having a winning party approach the Labour Court to be issued with a writ of execution in order to enable enforcement.[1120] Such award therefore becomes directly enforceable without the need for a writ to be issued by any Court or the CCMA.[1121] The LRA[1122] regulates awards sounding in money. For purposes of enforcement, an arbitration award is executed as if it was an order of the Magistrate Court.[1123] The Deputy Sheriff may enforce and execute orders of the Magistrate Court and by virtue of this section have the power to enforce and execute a certified

[1112] Section 143 (3), Act 66 of 1995 (As amended in 2014)
[1113] Section 158(1)(c), Act 66 of 1995 (As amended in 2014)
[1114] [2017] ZALCJHB 37
[1115] Par 9, [2017] ZALCJHB 37
[1116] [2011] 32 ILJ 1728 (LC)
[1117] Ibid
[1118] Par 9, [2017] ZALCJHB 37
[1119] Section 158(1)(c), Act 66 of 1995
[1120] Section 143 (1), Act 66 of 1995
[1121] Ibid
[1122] Section 143 (5), Act 66 of 1995
[1123] Section 143 (1), Act 66 of 1995

arbitration award.[1124] The Amended Section 143(1) of the LRA reads as follows: "An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued". Section 143 (5) as amended further reads: "Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrates Court." The implications of the amendments[1125] are as follows: (a) Employees who have awards issued in their favour, no longer have to approach the Labour Court for a writ of execution in the event of non-compliance with the award; (b) An arbitration award that orders compensation must be enforced or executed as if it is an order of the Magistrates Court. The above-mentioned position was confirmed by the Labour Appeal Court on 28 June 2016 when it delivered judgement in CCMA v MBS Transport CC.[1126] The Department of Labour has made funding available to the CCMA to assist employees who are not in a financial position to enforce awards in their favour.[1127] The funding is aimed at employees who are too indigent to afford the costs of enforcement.[1128] These employees are deemed to be: (a) Employees who earn below the earnings threshold (currently at R205 433.30 per annum) – proof of income will be required by the CCMA; (b) Employees who earn up to the amount as reflected above, irrespective of whether they are represented by a union or legal representative at the arbitration proceedings are afforded the benefits of such a facility. It is important to note that in the enforcement of the award the sheriff will be empowered to: (a) attach movable goods belonging to the employer; (b) take the above goods into execution; (c) publicly auction the goods; (d) pay over from the proceeds of the auction the amount due to the employee; (e) deduct his costs incurred in the course of the execution from the proceeds of the auction after the employee has been paid; and (f) recover the whole or the unpaid portion of the costs of the execution from the CCMA.[1129] The amendments discussed above therefore makes it easier for an employee to enforce an award in his / her favour and the employer should therefore

[1124] Section 143 (1), Act 66 of 1995
[1125] Section 143 (5), and 143(1) Act 66 of 1995
[1126] [2016] J1807/15
[1127] Strydom https://ceosa.org.za/amendments-to-section-143-of-the-labour-relations-act-66-of-1995-and-the-implications-thereof/ Date of use: 13th February 2019
[1128] Ibid
[1129] Strydom https://ceosa.org.za/amendments-to-section-143-of-the-labour-relations-act-66-of-1995-and-the-implications-thereof/ Date of use: 13th February 2019

be pro-active with regards to any matter involving the CCMA to avoid non-compliance and the consequences thereof.[1130]

Concerning prescription, the Constitutional Court (CC) handed down a landmark decision in the Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others herein ("the Myathaza matter")[1131] in which it held that arbitration awards issued in terms of the LRA do not prescribe.[1132] In the decisions of Cellucity (Pty) Limited v Communication Workers' Union obo Peters herein ("the Cellucity matter)[1133] and Mazibuko v Concor Plant herein ("Mazibuko matter")[1134] the CC had to consider whether an arbitration award issued in terms of the LRA had prescribed on the expiry of three years[1135] from the date on which the award was issued and the court ruled that they did not.[1136] The judgment in this matter was motivated by the desire to bring finality to the arguments that the arbitration awards which had been issued in favour unfairly dismissed employees could no longer be actionable because they had prescribed in terms of the Prescription Act.[1137] The general undertaking is that the matter of enforcement is not conclusive just because the commissioner has handed down an award, the director of CCMA has certified it, or even that the courts have issued judgments in favour of a particular disputant.[1138] Enforcement remains a challenge impinging on the very possibility of efficacy of ADR or otherwise. When an employee is unfairly dismissed, it does not necessarily follow that compensation or returning to work are afforded them instantaneously.[1139] When an award is issued against an employer, such employer may wait to see if the other party will have the audacity to enforce it through the other institutions available to them.[1140] The losing party may lodge an objection to Labour Court to have such award reviewed which is virtually a delay tactic.[1141] CCMA Commissioners are taken on judicial review by the

[1130] Strydom https://ceosa.org.za/amendments-to-section-143-of-the-labour-relations-act-66-of-1995-and-the-implications-thereof/ Date of use: 13th February 2019
[1131] [2016] ZACC 49, [2017] 2 BLLR 213 (CC)
[1132] Ibid
[1133] CA 3/14
[1134] LAC JA 39/14
[1135] Section 11(d), Prescription Act, 1969
[1136] Par 145, [2016] ZACC 49
[1137] Prescription Act, 1969
[1138] Benjamin *Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges* (2009) 40
[1139] Benjamin (2009) 40
[1140] Ibid
[1141] Ibid

Labour Court.[1142] During the period awaiting review, the award was rendered sterile by reason of prescription.[1143] Both the Labour Court and Labour Appeal Court had ruled in the favour of the debtors, that indeed the matters had expired due to prescription. The awards in that light were treated as debts which expired after three years from the day they were issued. In terms of the Prescription Act the arbitral award was an ordinary debt which expired after three years if it was not claimed or interrupted. It was not necessarily a judgement debt which prescribed after 30 years from the time it is issued. In the Myathaza matter"[1144] Judge Zondo ruled that the Prescription Act[1145] did not apply to arbitration awards given that they LRA had its own provision of prescriptions and that the arbitration award was not a court order.[1146] This study concurs with judgments like the Myathaza matter."[1147] Such rulings have the effect of contributing towards ADR efficacy especially enhancing enforcement of awards by removing the cavalier or arrogant manner in which debtors or losing parties would hide behind review or prescription to evade its obligation to pay compensation and/or to reinstate an unfairly dismissed employee as stated in the award. An arbitration award in terms of the LRA is not subject to an appeal like a judgment or order of the Labour Court: it is subject to review in terms of section 145.[1148] An order or judgment of the Labour Court is not subject to review. A court order or a judgment also does not require certification before it may be executed as is the case with an arbitral award in terms of LRA.[1149]

Unfortunately, the Labour Court is crippled by the lack of records on the number of matters lodged for review therewith. Further, apart from the initial requirement in the LRA that reviews be instituted within six weeks of an award, there are no requirements in either the rules or practices of the Labour Court to expedite such reviews through the court and to inhibit reviews from use as delaying techniques.[1150] It takes an

[1142] Benjamin (2009) 40
[1143] Section 11(d), Prescription Act, 1969
[1144] Par 142, [2016] ZACC 49, [2017] 2 BLLR 213 (CC)
[1145] Prescription Act, 1969
[1146] Par 142, [2016] ZACC 49 Justice Zondo stated "It [arbitral award] is also not a judgment debt because an arbitration award is not a court judgment. Section 15(2), (3), (4) and (5) [of the Prescription Act, 1969] contemplate that the process contemplated in section 15(1) is a process that leads to a judgment."
[1147] Par 142, [2016] ZACC 49, [2017] 2 BLLR 213 (CC)
[1148] Act 66 of 1995
[1149] Section 143 (3), Act 66 of 1995 (As amended in 2014)
[1150] Par 33, [2016] ZACC 49

estimated 23 months from the date of the arbitration award for the Labour Court to hear a review application and a further three months for judgment to be handed down.[1151] This negatively impacts as much on enforcement of awards specifically as it does the efficacy of ADR in general.[1152] There is need for more institutional reforms to prevent reviews being abused through cavalier tactics to frustrate the enforcement of awards.[1153]

First, that arbitral awards ought to be certified by the director of CCMA is a hurdle.[1154] Second, the possibility of delays when challenged on review with its own concomitant delays often lasting 23 months from the date of issuance of such arbitration award for the application to be entertained by the Labour Court and a further three months for judgment to be handed down cripples the system.[1155] Thirdly and finally, the winning party, if it be an employee ought to pay a security deposit to the sheriff to attach and if need be sell the employer's assets to liquidate the owed amount (save for those indigent, assisted through the Department of Labour grant) are among cumbersome processes that renders ADR far from completely efficacious.[1156] However, even on the CCMA side there are still glaring challenges with enforcement of arbitration awards rendering ADR inefficacious. CCMA reports that 44,667 arbitrations were conducted in the 2011/12 period for instance, and 43% arbitrations were settled, implying that 25,460 awards were issued.[1157] It is surmised that if 50% of the awards are in favour of employees (including default arbitrations) therefore 12,730 were issued in favour of employees, it means about half of the awards issued in employees favour are not honored by employers in the first instance.[1158] This excludes the high levels of non-compliance at bargaining councils in particular with arbitration awards in favour of the councils in the enforcement of collective agreements.[1159] Based on the foregoing, it can be concluded that ADR in RSA is not completely efficacious given the challenges surrounding enforcement of arbitration awards as afore-discussed.

[1151] Par 33, [2016] ZACC 49
[1152] Kwakwala *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* (2010) 29
[1153] Benjamin (2009) 42
[1154] Section 143 (3), Act 66 of 1995 (As amended in 2014)
[1155] Benjamin (2009) 44
[1156] Ibid
[1157] Venter & Levy The disputes referred to the CCMA, Bargaining Councils and Tokiso (2013) 45
[1158] Venter & Levy (2013) 45
[1159] Ibid

4.5.3.5 Client Satisfaction

Client satisfaction with ADR processes is important to this study as an important determinant of efficacy in labour dispute resolution. This is because clients who use the system have to endorse it for its usefulness and benefits. If end users are unhappy with ADR processes, they will not use them and that will render them ineffectual. It is therefore important in this study to ascertain if ADR processes lead to efficacious outcomes that satisfy clients' expectations and needs in labour dispute resolution. This study is not aware of any other research outputs conducted in RSA that seek to measure client satisfaction as a determinant of ADR efficacy in labour dispute settlement. Other considerations under client satisfaction are governed by ADR's ability at maintaining privacy, maintaining relationships, involving constituencies, linking issues, getting neutral opinion and setting precedent.[1160] Clearly, ADR issues that go through CCMA are never made public given that CCMA is not a tribunal of record operating with strict guidelines on breach of confidentiality during its awards.[1161] This satisfies one of the tenets of South Africa's ADR as a private and confidential dispute settlement procedure.[1162] Matters of maintaining relationships have been seriously contested as atypical of what transpires in CCMA administration of disputes.[1163] The CCMA has not registered a good record of accomplishment of employee reinstatement after dismissal. ADR interventions through private entities is rather costly, rendering it not affordable to majority of the ordinary workers.[1164] This implies that the ADR system in South Africa does not focus on restorative relationships beyond the dispute settlement.[1165] Other elements such as setting precedence are not within the mandate of CCMA and therefore cannot be expected from CCMA given that it is a private and confidential body in the manner that it conducts its business.[1166] The LRA[1167] directs[1168] the CCMA to make orders for costs according to the requirements of law and fairness in accordance with its rules and so on.[1169] The foregoing speaks to

[1160] Sander and Goldberg (1994) 68
[1161] Section 16, Act 66 of 1995
[1162] Ibid
[1163] Bendeman (2007) 142
[1164] Ibid
[1165] Ibid
[1166] Section 16, Act 66 of 1995
[1167] Act 66 of 1995
[1168] Section 115 (2A) (j), Act 66 of 1995 (As amended)
[1169] Section 138 (10), Act 66 of 1995

the requirement of CCMA to observe fair procedure within the confines of the law guaranteeing the involvement of parties, linking issues and giving neutral opinion[1170] and that all its decisions reviewable at the Labour Court and appealable at the Labour Appeal Court.[1171]

4.6 Summary

The aim of this chapter was to ascertain the efficacy of ADR in South Africa's labour dispute system in general and CCMA specifically. The chapter discussed the efficacy of ADR in labour disputes in South Africa. Various elements that determine efficacy were considered, including, among others, cost effectiveness, time efficiency, settlement and enforcement of matters and client satisfaction. A discussion of the performance of RSA's labour dispute settlement has been considered around each of the previously mentioned determinants. The study noted that South Africa has made commendable steps towards making labour dispute resolution to all employed persons in the country. Prior to independence labour dispute resolution was nonexistent until 1977. Previously the rights of the parties to the employment relationship was government by a contract that existed between them. More so, the coming in of the apartheid form of government led to the enactment and enforcement of laws that gave no legal rights to the native Africa. After 1994 the labour dispute settlement regime took a totally different turn. The study found that in some respects ADR in South Africa has attained some milestones towards an efficient body especially when it comes to enacting legislation that supports its adoption and use. The enactment of a Labour Relations Act ushered in a new labour dispute settlement regime different from that during the apartheid era which did not recognize the rights of native Africans. South Africa installed an independent regulatory body – the CCMA - to dispense with ADR in labour disputes. Compared to the National Party which institutionalized and solidified apartheid and deepened its exclusion of native Africans from participation in the about movement that would assert their rights the post 1994 government achieved much in installing industrial democracy in South Africa.[1172] Considering that the ICA[1173]

[1170] Sander and Goldberg (1994) 49-68
[1171] Section 167, Act 66 of 1995 as amended
[1172] Swanepoel *et al.* (2008) 40
[1173] Act of 1924

enactments under apartheid which introduced Industrial Councils and Conciliation Boards as dispute resolution instruments among other things excluded native Africans and public sector workers from the definition of an "employee"[1174] the LRA is an important change in the dispute resolution space. Having an independent body that dispenses with conciliation and arbitration of disputes ushered a new wave of industrial democracy. This is an important milestone according to this study. The study noted also that there are still glaring challenges with enforcement of arbitration awards. Given the leeway provided by the LRA for the arbitral awards issued by CCMA to be reviewable, many employers have used it to their own advantage leading to delays in liquidating these awards especially those compensation ones in favour of employees. Employers have also relied on prescription[1175] in an effort to frustrate the liquidation of awards. It is thus discernible from the discussions in this chapter that ADR efficacy has been curtailed by those that seek to use review of arbitration awards in the Labour Court and prescription period as ploys to evade responsibility. ADR processes in South Africa are responsive and have achieved targets in resolving disputes through conciliation and arbitration proceedings. The LRA amendments for instance introduced section 143 (3) which gave the CCMA director power to certify arbitration awards to make them enforceable. This took away the need to always convert arbitration awards into orders of court to make before section 143 was enacted.[1176] Such a responsive enactment has added to steps that enhance ADR efficacy as far as enforcement of awards is concerned. The Constitutional ruled that Prescription Act did not apply to arbitration awards and could not be used a delay mechanism but those that sought to evade responsibility.[1177] A landmark ruling of Justice Zondo and Justice Jafta in the Myathaza matter"[1178] settled the issue and makes it difficult for employers to run to the use of prescription arguments as well as review of arbitration awards by the LC to evade liquidating claims or reinstatements. Winning parties to arbitration awards can no longer be bound by prescription in terms of the Prescription Act[1179] to enforce their awards. Other aspects that negatively impacts on ADR's ability to efficaciously dispense with matters in CCMA's inability to determine whether an

[1174] Swanepoel *et al.* (2008) 38
[1175] Section 11(d), Prescription Act, 1969
[1176] Section 143 (3), Act 66 of 1995 (As amended in 2014)
[1177] Par 142, [2016] ZACC 49, [2017] 2 BLLR 213 (CC)
[1178] Ibid
[1179] Prescription Act of 1969

employment relationship existed between the parties in dispute. It causes unnecessary delay. The Act does not specify the minimum qualifications required for persons who act as commissioners and in certain circumstances inability to have specialised knowledge among commissioners are matters this study believes impinges on RSA ADR ability to be efficacious. This study considered whether ADR in South Africa was actually achieving time efficiency expectations. The study established that CCMA reported 74% success rate in settlements in the 2015/2016 period.[1180] This study concurred with a reasoned position by Venter & Levy[1181] who observed that CCMA was not accurately reporting. CCMA piles arbitration settlements together with conciliations to suppose that together they reflected settlement success. Conciliations by their nature are a result of the effort of the parties. CCMA ought to have indicated success attributed to them in arbitrations as they have power to make decisions, which power they do not have when it comes to conciliations. Conciliations are settled by the parties with minimum effort of commissioners. When looking closely into arbitration awards, Venter & Levy[1182] observed that about 50% (12,730) of the 25,460 matters resolved by way of arbitration are not enforced but rather dishonored by employers. Such a state of affairs reflects an unfavorable situation when it comes to enforcement of awards. This study agrees with Savage[1183] view that awards and claims must be capable of being enforced by the parties. Without functional enforcement mechanisms in place, the constitutional assurance of the right to fair labour practices and the protection of the law risks being significantly undermined if not made meaningless.'[1184] South Africa still faces the challenge of enforcement of arbitration awards especially the attitude of some employers to seek to evade responsibility. By the strength of the foregoing arguments this study finds that ADR in labour dispute resolution is still far from being efficacious in South Africa. There are still gaps especially in enforcement that need to be resolved as seen from the foregoing discussions. It can thus be concluded that South Africa's ADR in dispute resolution is far from perfect but is satisfactory in achieving efficacy in labour dispute resolution.

[1180] CCMA *Annual Report 2015-2016* (2016) 31
[1181] Venter & Levy (2013) 45
[1182] Ibid
[1183] Savage (2013) 46
[1184] Ibid

CHAPTER 5

ADR IN ZIMBABWE

5 INTRODUCTION

The previous chapter discussed ADR in South Africa, giving regard to whether or not its processes were efficacious in resolving labour disputes. This chapter looks into ADR in Zimbabwe. The aim is to ascertain if ADR in Zimbabwe has been able to achieve efficacious outcomes in labour dispute settlement. It is therefore important for this study to conduct a treatise of ADR before and after 1980 to the present. Zimbabwe attained independence from British imperialism in 1980 and before that suffered under a regime that did not afford native Africans industrial rights and fair access to labour dispute resolution. It was only in 1980 when Zimbabwe freed itself from the clutches and grip of British colonial rule effectively achieving its independence therefrom by way of a negotiated settlement at the popularized Lancaster House agreement of 1979, after a protracted armed struggle against the minority government of Ian Smith.[1185]

This study, as noted in chapter 3 and 4 above, context is important to a study of this nature for the simple reason that "…by its nature, influences the interpretation of phenomenon or issues under consideration." According to Gadamer cited in Lessem & Schieffer[1186] context determines meaning underscoring the notion that people have of a historically effected consciousness. He further argues that our consciousness is embedded and inclined in a particular history and culture that shaped it.[1187] The context to this study will therefore be reviewed through a pestel analysis. Before analyzing the status of ADR in Zimbabwe this study will look into the Zimbabwean context particularly the political, economic, social, technology, ecological and legislative (pestel analysis) within which ADR is administered. A review of the three tier system that constitute the State, that is, "the legislature, the executive and the judiciary"

[1185] Maphosa Industrial Democracy in Zimbabwe? (1991) 15
[1186] Lessem & Schieffer Integral Research: A Global Approach towards Social Science Research Leading to Social Innovation (2008) 226
[1187] Lessem & Schieffer (2008) 226

conduct towards the work of ADR is instructive to this study alongside the pestel analysis.[1188] After the pestel analysis this chapter reviews the developments of ADR from 1890 to 1980 to ascertain if there were any efforts made towards making it efficacious in labour dispute resolution. The study then turns towards the period between 1980 to the present leading to a final look at the status of ADR in terms of background conditions such as legislative and political support for it, funding, adequate and competent manpower in administering it among other things. In the final analysis the chapter will consider whether ADR in Zimbabwe is efficacious as far as time, cost, settlement and enforcement of disputes as well as client satisfaction.

5.1 Context of ADR in Zimbabwe

Zimbabwe is a landlocked independent republic occupying an area of 390 757 km^2 to the south fragment of the African continent thereon, bordered by Botswana to the southwest; Mozambique to the north and east; South Africa to the south; Zambia to the northwest and with Namibia sharing a border post on the western tip of Zimbabwe.[1189] Zimbabwe occupies a geographical area of 390 757 km^2 with a population estimated at 15.2 million people 32.5% of who live in urban areas while the rest live in the rural villages according to the World Bank's World Development Indicators 2015.[1190] Zimbabwe has an estimated population growth of 2.3% per annum.[1191]

5.1.1 Political factors

The country is an embattled political and economic case though regarded as a constitutional democracy.[1192] Having attained independence in 1980, after a protracted armed liberation struggle the country arguably inherited a sound economy from the former imperial government, which has since been a thing of the past.[1193] The country now sits with unemployment above 100% and no currency of its own because its

[1188] Mandaza Zimbabwe: The Political Economy of Transition, 1980-1986 (1986) 243
[1189] Adams & Adams *Commercial Law in Africa An Easy Reference* (2015) 105
[1190] Ibid 1
[1191] Ibid
[1192] Bertelsmann Stiftung, BTI 2018 (2018) 30
[1193] Maphosa (1991) 15

currency was hit by inflation which shot over the roof due to various factors.[1194] The current President of Zimbabwe is Emmerson Dambudzo Mnangagwa who took over from the nonagrian leader Robert Gabriel Mugabe who had been in power since 1980 until he was overthrown in a military cue style in November 2017.[1195] The current President is as much struggling for legitimacy as the former president having come under spotlight for allegedly rigging elections and failing to restore economic and political stability. The President, like his predecessor has been accused of using military force that has led to deaths of several civilians in the aftermath of the July 2018 election.[1196] This has caused the West to withhold aid and debt from Zimbabwe and in fact extended the economic sanctions which were inherited from the former President. The current president was under travel and economic sanctions even while he was in Robert Mugabe's government for participating in a government that did not uphold the rule of law, engaged in human rights abuses against its own people and particularly facilitated the killing of Ndebele's in the early 1980s in what was popularly known as Gukuraundi, which was essentially perceived as a tribal cleansing facade.[1197] Zimbabwe is still far from recovering having lost the formal economy and struggled with basic commodities such as supply of food, water, roads and public services to the people of Zimbabwe.[1198] The country introduced a new constitution which has all the pronouncements of democratic government but in principle that on the ground the practices are of repression against its own people.[1199]

5.1.2 Economic factors

The capital city of Zimbabwe is Harare and its currency is the Zimbabwean Dollar (though no longer in use due to economic collapse) while its GDP sits at USD 16289.20 million in 2016 constituting a 0.7 decline from 2015's 1.4 GDP growth and Zimbabwe's GDP per capita is $2006.00.[1200]

[1194] Bertelsmann Stiftung (2018) 30
[1195] Ndimande and Moyo Zimbabwe is Open for Business': Zimbabwe's Foreign Policy Trajectory Under Emmerson Mnangagwa (2018) 2
[1196] Ndimande and Moyo (2018) 2
[1197] Maphosa (1991) 15
[1198] Bertelsmann Stiftung, BTI 2016, Zimbabwe Country Report (2016) 3
[1199] Ibid
[1200] Ibid 2

5.1.3 Socio-cultural factors

The life expectance is 59.0 for men, and 62.3 for women, which means the average life expectancy is at 60.7.[1201] Zimbabwe is rated at 0.516 in terms of the Human Development Index herein ("HDI') which is ranked at 156 of the 187 countries polled.[1202] The United Nations herein ("UN") education index Zimbabwe scores 0.500. In terms of gender inequality index Zimbabwe is ranked at 0.516.[1203] Zimbabwe's Gini Index which in 2011 fell to 0.583 exhibits women experiencing more struggles handling the country's slow economic recovery than men.[1204] In 2015 World Health Organisation (WHO) revealed that women's life expectancy was pegged at 62.3 years which could be attributed to better and easier access to nutrition and antiretroviral drugs for those infected with the HIV virus.[1205]

5.1.4 Technological factors

In terms of technology up-take, Zimbabwe has a 333,702 main line telephones in use and 12.8 million mobile cellular telephone lines. Zimbabwe also has 2.33 million internet users according to 2015 estimates. Zimbabwe's internet domain is .zw.[1206] It would appear to this study that there are about only 14% internet users among the whole population base which is quite low a number.[1207] There is also a challenge of unreliable data on these issues given that KPMG[1208] who consolidated the information from various sources[1209] state that there are 14% internet users while Bertelsmann Stiftung[1210] state that there are over 20% internet users in the Zimbabwean nation. The establishment of internet cafés in towns, suburbs, rural schools and business centers in rural areas has made internet access possible and this has led to highetened use of social media and political participation.[1211] Under the former President Mugabe's

[1201] Bertelsmann Stiftung (2018) 30
[1202] Ibid 3
[1203] Bertelsmann Stiftung (2016) 15
[1204] Ibid
[1205] Bertelsmann Stiftung (2018) 30
[1206] KPMG (2016) 2
[1207] Ibid
[1208] Bertelsmann Stiftung (2016) 14
[1209] Sources of data: CIA World Factbook, World Bank, UNESCO, Trading Economics ITU, UNAIDS, UNDP, ZimStat & NKC Research who say there is 14% internet users in Zimbabwe.
[1210] Bertelsmann Stiftung (2016) 14
[1211] Ibid

regime, a popular Pastor Evan Mawarire, for instance, from April 2016 on, posted his protest online and thereby initiated the temporary movement #ThisFlag, which had thousands of followers.[1212] The government has attempted to curtail use of internet and social media throigh enacting and invoking laws such as the 2002 Access to Information and Protection of Privacy Act (AIPPA) represents a fundamental curtailment of freedom of speech and freedom of the press as well as the Public Order and Security Act (POSA).

5.1.5 Ecological factors

In terms of the EPI ratings Zimbabwe 2014 among 178 was ranked 94, a score lower than it was in 2012. There is dearth of a robust legal framework, institutional capacity or political will in place to implement policies currently in place and proficiently manage the environment.[1213]

5.1.6 Legal factors

The Zimbabwean Constitution subscribes to the principle of *trias politica* which engenders separation of powers between the "legislative; executive and judiciary" arms of government. *Trias politica* is a principle which has proved futile in Zimbabwe because of a heavy-handedness with which all other arms of government such as the legislative and judiciary have been rendered subordinate to the operation of executive powers of the president.[1214] The President is invested with executive authority which he exercises through an appointed cabinet as prescribed by the constitution.[1215]

5.2 Labour dispute resolution between 1890 and 1979

Labour dispute settlement in Zimbabwe can be discussed in terms of four phases. First the pre-independence era that runs between 1890 and 1965;[1216] second, the period of Rhodesian colonial rule under the so-called Unilateral Declaration of

[1212] Bertelsmann Stiftung (2016) 12
[1213] Ibid 15
[1214] Ibid 10
[1215] Section 88, 2011 Constitution of Zimbabwe
[1216] Rowland Criminal Procedure in Zimbabwe (1997) 2

Independence (UDI) between 1965 and 1980;[1217] third the post-independence period between 1980 and 2003; fourth and finally the period between 2003 to the present.[1218]

Southern Rhodesia, later Rhodesia, as it then was, and now called Zimbabwe was colonized by British imperialism at the end of the 19th century,[1219] specifically in 1890 through the first occupation by European settlers.[1220] Arguably and as alluded to earlier, this move signified the official investiture and ascendance to dominance of the 'free enterprise scheme' of things in the political economy,[1221] all of which point to a deliberate '…process of intrusion by capital whose earliest representatives were avid entrepreneurs who had amassed fortunes out of diamond and gold mining in neighboring South Africa.'[1222] A prominent imperialist and British entrepreneur Cecil John Rhodes and his British South Africa Company pioneer column,[1223] epitomized the unrelenting invasion by this early capital.[1224] It is the capitalist drive to maximize profit and minimize loss, which makes it difficult to trust labour plight in its hands.[1225] From 1890's unlawful settler occupation of Rhodesia as it then was (present day Zimbabwe), successive governments fortified an economic development agenda that traversed capitalist and racial lines.[1226]

In the main, Africans in the pre-colonial period, before settlers entered to colonize Zimbabwe in 1890, lived on subsistent farming.[1227] Essentially, native+ Africans worked in their fields to feed their families without need of going into formal employment because none existed at the time. The insurgence of settlers into colonial Zimbabwe was the start of the labour struggle.[1228] The entry of the British South Africa Company's pioneer column into the territory therewith emerged monetary wealth requiring transformation into capital.[1229] The territory had its own social formations

[1217] Maphosa (1991) 16
[1218] Ibid
[1219] Sachikonye *Labour Legislation in Zimbabwe: Historical and Contemporary Perspectives* (1985) 3
[1220] Rowland (1997) 2
[1221] Sibanda (1989) 3
[1222] Sachikonye (1985) 3
[1223] Sibanda (1989) 3
[1224] Sachikonye (1985) 3
[1225] Ibid
[1226] Ibid 3
[1227] Sibanda (1989) 4
[1228] Ibid
[1229] Ibid

whose production systems bound direct producers to the means of subsistence, particularly, land.[1230] This however conflicted with the requirements of the incoming system which required the amputating of this unity leaving the class of dispossessed direct producers selling their labour power to capital as the last resort.[1231] Essentially native Africans were to be dispossessed of their farming lands and freedom, to work in the new capitalist system. Some of the mechanisms, besides coercion, effectively turned peasant producers into wage labourers.[1232] Some of the key issues that characterized labour dispute resolutions in Zimbabwe during the period under consideration are as follows:

- The year 1894 for instance saw the arbitrary introduction of a hut tax which inevitably forced the indigenous population to seek work for wages to foot the new bill.[1233] The colonial master passed agricultural policies like the Maize Control Act and other measures to 're-service' and push peasants into barren soils with in mind to throttle their agricultural production.[1234]
- The first attempt at formalizing industrial dispute resolution in Zimbabwe are traceable to the year 1895 which marks the inception point of labour market regulation through the Provincial Labour Bureau herein (the “PLB”) which in 1903 was also followed by the establishment of the Labour Board of Southern Rhodesia herein (the “LBSR”).[1235]
- A more subtle and elaborate colonial state came into force to procure cheap African labour (proletarianisation of African peasants) through the use of legislative instruments such as the Master and Servants Act herein (“MASA”);[1236] the Pass Law herein (“PLA”);[1237] the Private Locations Ordinance herein (“PLO”);[1238] the Industrial Conciliation Act herein (“ICA’34”);[1239] the Native Registration Act herein (“NRA”);[1240] the Sedition Act herein the (“SA’36”);[1241] the Compulsory Native Labour

[1230] Sibanda (1989) 4
[1231] Ibid
[1232] Ibid
[1233] Ibid, See Sachikonye (1985) 3
[1234] Sachikonye (1985) 4
[1235] Ibid 3
[1236] Act 5 of 1901
[1237] Act of 1902
[1238] Act of 1910
[1239] Act of 1934
[1240] Act of 1936
[1241] SA Act of 1936

Act herein the ("CNLA")[1242] and other expropriatory pieces of Legislation such as the Maize Control and Land Apportionment Acts herein ("MCLA").[1243]

- In 1902 the Pass Law[1244] (1902) was enacted with the chief object to facilitate labour procurement agencies such as PLB of 1895 and LBSR of 1903.[1245] The Act essentially controlled the movement of unskilled labour and penalised those who engaged in desertions[1246] and much of that labour consisted of native Africans.[1247]
- In 1926 the 'native' Juvenile Employment Act[1248] herein the ("JEA") was enacted for the main purpose of regulating the employment of native African youths in 1926.[1249] The whole objective has always been exploitation of labour in general by capital while marginalizing the natives. A more comprehensive Industrial Conciliation Act' of 1934[1250] discussed below followed all these enactments.[1251]
- In 1927, another Shamva Mine strike by 3500 workers was notably a popularized struggle and labour unrest in not only declaring a labour dispute attributed to intolerable conditions of work but alerting workers' rights in general in the process.[1252] The strikers consisted of desperate social organisation like those organisations whose core business was dance; mutual aid associations and religious formations such as the Watchtower Movement.[1253] The strike lasted five days whose continuance was short-lived as the Rhodesian Army crushed it accusing the workers organisations of having been a springboard for labour unrest and facilitating the struggle.[1254]
- In 1934 the Industrial Conciliation Act of 1934 herein the ("ICA '34")[1255] was enacted with the objective of controlling the movement of labour while impeding unionization and politically motivated pursuits amongst workers.[1256] The ICA'34[1257] was touted the most comprehensive labour legislation owing to its regulatory scope

[1242] Act of 1943
[1243] Act of 1930
[1244] Act of 1902
[1245] Sachikonye (1985) 3
[1246] Ibid
[1247] Ibid
[1248] Act of 1926
[1249] Sachikonye (1985) 3
[1250] Act of 1934
[1251] Sachikonye (1985) 3
[1252] Sibanda (1989) 6
[1253] Ibid
[1254] Ibid
[1255] Act of 1934
[1256] Sachikonye (1985) 3
[1257] Act of 1934

in the colony[1258] compared to previous enactments such as the MASA,[1259] the Pass Law;[1260] the Masters and Servants Ordinance; Juvenile Employment Act[1261] among others.

- In 1943 the colonial government enacted the Compulsory Native Labour Act herein the ("CNLA)[1262] which was, arguably, formulated and administered on behalf of capital.[1263]
- The year 1944 was significant in native African labour dispute settlement in colonial Zimbabwe as it saw native African labour forming its first industrial union termed the Rhodesia-Railway Employees Association herein the ("RREA"), and they employed the subtle use of "Association" instead of "Union" because the MASA[1264] had banned native African unionism.[1265]
- In 1945 a Milling Employees Association herein the ("MEA") was formed and operated in Bulawayo as its base.[1266] Arguably, despite much agitation by native Africans trade unions for recognition, which emerged in the 1940s, the working conditions for black workers remained inferior to those of the white counterparts.[1267] Whites retained 'white privilege' remaining superior to blacks in the employment situation.
- The year 1956 was characterized by an increase in the number of native Africans who engaged in wage labour starting with a total of 254 000 workers in 1926 and rising to as many as 377 000 in 1946 finally to a record breaking 600 000 in 1956.[1268]
- Africans were subjected to a system of discrimination; victim to a spate of regulations and prior to the enactment of the Industrial Conciliation Act of 1959 herein ("ICA '59").[1269] African workers were deprived the right to determine their conditions of service as the ICA '59"[1270] deliberately excluded them from being defined as 'employee'.[1271]

[1258] Sachikonye (1985) 3
[1259] Act 5 of 1901
[1260] Act of 1902
[1261] Act of 1926
[1262] Act of 1943
[1263] Sibanda (1989) 3
[1264] Act 5 of 1901
[1265] Ibid 9
[1266] Sibanda (1989) 15
[1267] Sibanda (1989) 15
[1268] Ibid 8
[1269] Act of 1959
[1270] Ibid
[1271] Maphosa (1991) 15

- This remained the prevailing position during the entire period of 'transitional government' that occurred between 1977 and 1979 up until Zimbabwe gained its independence in 1980.[1272]

5.3 Labour dispute resolution between 1980 and 2003

It is important to this study to ascertain the dispute resolution regime that existed from the time of independence to 2003 as it is assumed a native African government took over and would have acted in the best interests of native Africans. The following however were issues that characterized dispute resolution in Zimbabwe after independence:

- The year 1980 marked the landmark period in which Zimbabwe achieved its political independence from British imperialism. This year saw the shift of power from the white minority rule by the Universal Declaration of Independence (UDI) led by Smith's regime to black majority rule led by ZANU-PF Party's Robert Mugabe as its President. Mugabe has been in power since then to present day Zimbabwe[1273] until he was ousted from power in on 14 November 2017 by his own party in a military coup style.[1274]
- During the 1980 – 1985 a colonial piece of legislation namely the ICA,[1275] remained in force.[1276] The focal point in dispute resolution was however the Industrial Court which was modelled on its counterparts in neighboring South Africa.[1277] There was no meaningful reference to ADR in terms of the Industrial Conciliation Act.[1278]
- In 1985 the Zimbabwean Parliament, introduced a Labour Relations Bill[1279] which was touted the most significant and comprehensive piece of legislation ever produced during the initial five years in independent Zimbabwe.[1280] The Bill essentially regulated employment, remuneration, collective bargaining, the

[1272] Maphosa (1991) 16
[1273] Bertelsmann Stiftung, BTI 2016 (2016) 3
[1274] Ndimande and Moyo (2018) 2
[1275] Act of 1959
[1276] Madhuku (2012) 6
[1277] Ibid
[1278] Act of 1959
[1279] Bill of 1985
[1280] Sachikonye (1985) 7

settlement of disputes, the registration and certification of unions and employers' organisations.[1281]

- In post-independence Zimbabwe, a labour minister lashed out at strikers using language reminiscent of that used by another labour minister in colonial Rhodesia on native Africans such as ("I will crack a whip on them, let them return to work," referring to strikers), among other things.[1282] He in fact unleashed the Army at Wankie Colliery and Hippo Valley Estates at striking protesters getting 13 miners detained at Wankie under the auspices of ICA.[1283] Protesters were in fact shot at by guards at the Rio Tinto Zimbabwe mines as a result.[1284] Picketers were dispersed by police and 400 work seekers were subsequently sacked at Swift Transport in Harare and 1000 staff in total axed with no reparations.[1285] Only 96 staff were rehired selectively.
- The LRB[1286] was eventually enacted into law in 1985, the first piece of labour legislation enacted in independent Zimbabwe. It would be very important for this study to ascertain how such legislation impacted on ADR in labour dispute resolution in Zimbabwe.
- The Labour Relations Act of 1985 herein the ("LRA"),[1287] reframed the rights to workers and unions and provided for fair labour standards. The Act[1288] provided the Labour Minister with wide discretion to determine minimum wages, define unfair labour practices, register or deregister a union, approve or disapprove any dismissals and disallow industrial action, among other things, should occasion demanded.[1289]
- In 1999 for example the government was faced with the collapse of the dialogue with its workers and numerous stay away demonstrations forcing it to invoke the Presidential Emergence Powers thereby banning all such stay away demonstrations.[1290] These measures were taken against the backdrop of action by the ZCTU which broadened its demands to have the army withdrawn from the DRC

[1281] Sachikonye (1985) 7
[1282] Sibanda (1989) 18
[1283] Act of 1959
[1284] Sibanda (1989) 18
[1285] Ibid
[1286] Act No. 16 of 1985
[1287] Bill of 1985
[1288] Act 16 of 1985
[1289] Fenwick, Kalula and Landau (2007) 4
[1290] Sambureni and Mudyawamikwa (2007) 30

war[1291] and an investigation into the National Oil Company of Zimbabwe (NOCZIM) scandal among other 10 pressing economic matters.[1292]

- Arguably,[1293] the post-independence period in Zimbabwe witnessed the struggles between labour and capital escalating to magnitude proportions.
- In 1990 the government of Zimbabwe adopted the popularised Economic Structural Adjustment Programme herein ("ESAP") which essentially deregulated the labour market among other things. At this time, labour laws were particularly relaxed to align with the new economic order.[1294]
- In 1992 the relaxation of labour laws came through the promulgation of the Labour Relations Amendment Act herein the ("LRAA'92").[1295] Furthermore, Statutory Instrument herein ("SI'379")[1296] and SI'404[1297] were also promulgated placing much focus on Employment Codes of Conduct and retrenchment matters respectively.[1298]

Essentially the period under consideration did not contribute significantly to industrial democracy and ADR as it was characterized by the heavy-handedness of the government, the use of executive powers and the military to control dissenting voices of workers. The enactment of the 1985 Labour Bill did not immediately happen. The then Minister of Labour – Kumbirai Kangai - in fact did not see the need to change the colonial piece of legislation saying 'it will be changed only if the need arose.'[1299] The government of Robert Mugabe perpetuated colonial labour standards that afforded workers very little if no say in their plight for better working conditions.

5.4 Labour dispute resolution between 2003 to the present

The year 2003 is a significant period in the labour dispute resolution environment in Zimbabwe. Several changes to the labour legislation were made in Zimbabwe

[1291] DRC stands for a country termed Democratic Republic of Congo
[1292] Sambureni and Mudyawamikwa (2007) 30
[1293] Sibanda (1989) 21
[1294] Sambureni and Mudyawamikwa (2007) 25
[1295] Act of 1992
[1296] Statutory Instrument 379 of 1990
[1297] Statutory Instrument 404 of 1990
[1298] Sambureni and Mudyawamikwa (2007) 25
[1299] Sibanda (1989) 19

including providing for conciliation/mediation, arbitration and the labour court as ADR avenues for settling labour disputes.[1300]

In 2003, the Industrial Relations Act[1301] was renamed the Labour Act of 2003 herein ("LA").[1302] The LA[1303] placed a clarion call on Zimbabwe to align itself to its international law obligations hence a comprehensive labour relations legislative enactment became an urgent imperative.[1304] The LA[1305] affords fundamental rights to employees; favourable conditions of employment; curbing of unfair labour practices; procedures for the formation and operations of a union; employers' organizations, approaches to collective bargaining, and the establishment and functions of a Labour Court herein ("LCZ"),[1306] among other issues.[1307] Several amendments of the Act[1308] have been undertaken though at most minor, to align it with the said purposes.[1309] It is important to consider the installation of ADR vis-à-vis that accompanied the enactment of the Labour Act,[1310] which is in the discussion of the next section.

The Labour Act[1311] provides for conciliation and arbitration as labour dispute settlement approaches. This Act made reference to conciliation and excludes mediation as an ADR option in labour dispute settlement in Zimbabwe.[1312] In terms of the Act[1313] a Labour Officer or designated cadre from a NEC who had failed to dispense with a labour dispute through conciliation was to issue a certificate of failure to settle and therefore refer the matter to an Arbitrator after consulting with a Principal Officer in the region.[1314] This Act[1315] makes conciliation compulsory except where parties elect to go for arbitration, which signifies a departure from the previous one, which made it subject

[1300] Madhuku (2012) 12
[1301] Acts 16 of 1985
[1302] Kalula, Ordor and Fenwick Labour Law Reforms that Support Decent Work: The Case of Southern Africa (2008) 36
[1303] Act of 2003 [Chapter 28:01]
[1304] Ibid
[1305] Ibid
[1306] LCZ stands for Labour Court of Zimbabwe
[1307] Section 2A, Act of 2003 [Chapter 28:01]
[1308] Act of 2003 [Chapter 28:01]
[1309] Kalula et al. (2008) 36
[1310] Act of 2003 [Chapter 28:01]
[1311] Act of 2003 [Chapter 28:01]
[1312] Madhuku (2012) 10
[1313] Ibid
[1314] Sections 93 and 98, Act of 2003 [Chapter 28:01]
[1315] Act of 2003 [Chapter 28:01]

to the discretion of Labour Officer.[1316] The persons responsible for conciliation services are Labour Officers operating under the auspices of the Ministry of Labour and Social Welfare.[1317] The main misgiving levelled against the Act[1318] is its inability to provide guidelines as to how such conciliators were required to handle a conciliation proceedings save to just indicate that they must attempt to settle a dispute.

The Act also provides for arbitration in the settlement of labour disputes in Zimbabwe.[1319] Arbitration generally entails the appointment of an impartial third party, who will use quasi-judicial process and act as the decision maker in a dispute.[1320] The decision is formulated as an arbitration award, which, in general, is final and binding.[1321] The Act[1322] provides for compulsory[1323] and voluntary arbitration.[1324] Whereas compulsory arbitration is to be used when conciliation by a Labour Officer has failed[1325] voluntary arbitration is to be considered if parties elect to avoid conciliation at all and choose the former.[1326] The Act[1327] prescribes compulsory arbitration in labour dispute settlement.[1328] In terms of the Act[1329] a Labour Officer or Designated Agent of an NEC whose conciliation effort was futile and consequently issued a no settlement certificate in the result, ought to appoint an arbitrator after consultations with the most senior Labour Officer in the respective jurisdiction.[1330] As opposed to the situation obtaining in South Africa, in Zimbabwe the arbitrator is seldom part of an institution or independent body (CCMA, for instance) but an individual.[1331] A Labour Officer may escalate a non-essential service matter to compulsory arbitration if disputants are agreeable.[1332] The Labour Officer may also secure the agreement of disputants so as to escalate to compulsory arbitration any form of dispute of right whether within

[1316] Madhuku (2012) 10
[1317] Section 121 (1), Act of 2003 [Chapter 28:01]
[1318] Madhuku (2012) 30
[1319] Ibid
[1320] Coetzee and Schreuder (2010) 470
[1321] Lotter and Mosime (1993) 2
[1322] Act of 2003 [Chapter 28:01]
[1323] Section 93 (3), Act of 2003 [Chapter 28:01]
[1324] Chapter 7:15, Arbitration Act
[1325] Section 93 (5), Act of 2003 [Chapter 28:01]
[1326] Section 93 (1), Act of 2003 [Chapter 28:01]
[1327] Act of 2003 [Chapter 28:01]
[1328] Act of 2003 [Chapter 28:01]
[1329] Ibid
[1330] Maitireyi and Duve Labour arbitration effectiveness in Zimbabwe: Fact or fiction? (2011) 139
[1331] Ibid
[1332] Madhuku (2012) 14

essential service or a non-essential service[1333] or in the alternative, use own discretion to refer it to compulsory arbitration.[1334] However, disputes of interests within essentials services may be referred to compulsory arbitration without agreement of the parties.[1335] When referrals are made the Act directs the Minister of Labour to keep a list of arbitrators who are assigned the responsibility to arbitrate by the Labour Officer to whom the dispute is referred.[1336] It is from the above-mentioned list of arbitrators that Labour Officers may pick a person who will preside over compulsory arbitration of labour disputes when the conciliation process has failed to dispense therewith.[1337] The LA,[1338] of necessity, signifies a departure from the LRA'85[1339] regarding the power of the Labour Officers who are presently seized with the duty to exclusively conciliate but escalate matters for arbitration when such conciliation attempt has failed.[1340] It is highly likely that the enactment of the new Act[1341] was motivated by the fact that the old one[1342] had proved rather unnecessarily laborious.[1343] The LA[1344] whittled down the political power and engrossment of the Minister in dispensing with disputes by way of arbitration.[1345] The Act[1346] also permits legal representation in arbitration, which is not the case in conciliations.[1347] Further, the challenge with arbitration in Zimbabwe is that arbitration awards are not automatically enforceable.[1348] As will be seen below, arbitration awards must still be registered with the court to be enforceable.

[1333] Section 93 (5) (b), Act of 2003 [Chapter 28:01]
[1334] Ibid
[1335] Madhuku (2012) 14
[1336] Section 98 (6), Act of 2003 [Chapter 28:01]
[1337] Section 98 (7), Act of 2003 [Chapter 28:01]
[1338] Ibid
[1339] Act16 of 1985
[1340] Section 93 (5)(b), Act of 2003 [Chapter 28:01]
[1341] Act of 2003 [Chapter 28:01]
[1342] Act 16 of 1985
[1343] Gwisai Labour and employment law in Zimbabwe: Relations of work under neo-colonial capitalism (2007); See Maitireyi and Duve (2011) 140
[1344] Ibid
[1345] Maitireyi and Duve (2011) 140
[1346] Act of 2003 [Chapter 28:01]
[1347] Statutory Instrument (SI) 217/2013
[1348] Madhuku (2012) 41

5.5 Review of the Efficacy of ADR System in Labour Dispute Settlement in Zimbabwe

This section discusses the efficacy of ADR in Zimbabwe with three elements in mind. First the background conditions consist of (1) adequate legislative and political support; (2) supportive institutional and cultural norms; (3) adequate and competent manpower, (4) adequate funding; and (5) parity in the power of disputants.[1349] Second, ADR program design considerations related to (1) planning and preparation[1350] and (2) operations and implementation.[1351] Third, the ADR measures of efficacy, utilising client satisfaction, settlement and enforcement,[1352] upholding privacy, preserving relationships, involving constituencies, linking issues, getting neutral opinion, and setting precedent,[1353] as the focus. In the next section, I deal with all these issues.

5.5.1 ADR Background Conditions

This section reviews the macro-level issues in terms of political support, human resources and financial resources in place to administer ADR in labour dispute settlement in Zimbabwe.

5.5.1.1 Adequate Legislative and Political Support

It is important for this study to consider the legislative and political support for ADR as a contribution towards its efficacy in labour dispute settlement. The Labour Act[1354] has it that all disputes ought to be lodged with a LO to endeavour to settle it by way of conciliation or if disputants are agreeable, escalate it to arbitration if deemed appropriate in the circumstances.[1355] The government of Zimbabwe did not take steps to establish an effective, independent and well-functioning ADR system post 1980.[1356] This is so because the period immediately after independence in 1980 to 1985 the

[1349] Brown et al. (1998) 24
[1350] Ibid 33
[1351] Ibid 40
[1352] Kerbeshian (1994) 383
[1353] Sander and Goldberg (1994) 68
[1354] Section 93(1), Act of 2003 [Chapter 28:01]
[1355] Adams & Adams (2015) 110
[1356] Madhuku (2012) 5

ICA[1357] an imperial statutory legislation remained operational and in force with no reasonable prospect to factor in ADR in the fullest sense of the system.[1358] The focal point in dispensing with industrial disputes was apparently the Industrial Court which the Rhodesian government (as it then was) modelled on its South African counterpart.[1359] The Act[1360] seldom alluded to ADR in any meaningful way.[1361] The successive enactments of labour laws did not make any meaningful changes with respect to ADR except the maintenance of the same system that dominated the space since 1980 to the present.[1362] Even when the government enacted the first LRA'85[1363] in 1985, workers and unions were basically spectators with no say.[1364] There was a general reluctance by the Zimbabwe government to introduce ADR as an independent labour dispute settlement mechanism.[1365] Everything remained in the sole hands and control of the government through its Labour Minister.[1366] The thinking around this state of affairs was reinforced by the promise of the first Labour Minister at independence that there would be no major changes to colonial labour law.[1367] Successive attempts to amend labour laws in 1992 and 2003 respectively comprised only of the renaming of LRA[1368] to the Labour Act[1369] but the arrangements regarding ADR remained the same.[1370] The government controls the dispute resolution from conciliation and arbitration until they are referred to the LCZ for want of settlement.[1371] Arguably, it is asserted that:[1372]

> 'State functionaries were essentially seized with [the] duty to dispense with dispute resolution, by and large, were an appendage to the Minister's political power. Conciliation and arbitration decisions by Labour Officers and IRBs largely mirrored the state's vested interests be it political and/or economic.'

[1357] Act of 1959
[1358] Madhuku (2012) 6
[1359] Ibid
[1360] Act of 1959
[1361] Madhuku (2012) 6
[1362] Madhuku (2012) 6
[1363] Act No. 16 of 1985
[1364] Sibanda (1989) 19
[1365] Ibid
[1366] Sibanda (1989) 19
[1367] Ibid
[1368] Acts No. 16 of 1985
[1369] Chapter 28:01, Labour Act of 2003
[1370] Ibid 18
[1371] Madhuku (2012) 8
[1372] Maitireyi and Duve (2011) 138

The fact that conciliation and arbitration is left to the government labour officers leaves the question of independence and fairness given that third party intermediaries are already imposed on disputants by the system.[1373] Even though there is a view[1374] that the current Labour Act[1375] was drafted under the guidance of the International Labour Organisation herein ("ILO") and was acknowledged by the MPSLSW[1376] and PPCPSLSW,[1377] it is rid of its current misgivings on ADR.[1378] The lack of an independent body that administers ADR points to inadequate political and legislative support in the labour dispute settlement space in Zimbabwe.[1379] Even though there may be a semblance of tripartism reminiscent of a good labour relations system, its effective functioning is undermined by the dominant force of executive government which renders all other actors subordinate to its whims and caprices.[1380] At an international level, the ILO formed in 1919 as a member of the UN sets labour standards that should be adopted by well-run labour systems of UN member states of which Zimbabwe is a part.[1381] Zimbabwe has not fully heed the call of the ILO to reform labour laws to install independent systems of ADR in labour dispute resolution. Zimbabwe has ratified all the relevant conventions that deal with ADR in labour dispute resolution.[1382] The challenge this study is saddled with is whether ratification is followed suit with active implementation of the ratified conventions to give effect to efficacious ADR outcomes in labour disputes in Zimbabwe. This challenge is further exacerbated by the fact that Zimbabwe has not complied with some of the conventions of ILO such as the conventions dealing with abolition of forced labour. This placed the country on the spotlight as a non-compliant member State of the ILO body.[1383] This also coincides with the general lack of commitment towards developing independent institutions

[1373] Maitireyi and Duve (2011) 138
[1374] Mawire Dispute Resolution Mechanisms, with Special Emphasis on Arbitration & Appeal Mechanisms (2009) 3
[1375] Chapter 28:01, Labour Act of 2003
[1376] MPSLSW stands for Ministry of Public Service Labour and Social Welfare
[1377] PPCPSLSW stands for Parliamentary Portfolio Committee on Public Service, Labour and Social Welfare
[1378] Mawire (2009) 3
[1379] Madhuku (2012) 31
[1380] Ibid
[1381] Khabo (2008) 22
[1382] ILO https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103183 Date of use: 06 August 2019
[1383] Ncube https://www.newsday.co.zw/2017/05/zimbabwe-set-appear-ilo/ Date of use: 28 June 2019

modelled after South Africa's CCMA that would dispense with ADR processes in labour disputes among other issues.

Upon a review of cases referred to courts for failure by mediation or arbitration efforts (ADR processes) in place in Zimbabwe, that is, the Labour Department, it is clear that ADR in Zimbabwe has challenges. It is almost conclusive that majority of the matters before the courts were referred by the applicants for registration in order to enforce them or before the Labour Court after they had failed to be enforced directly or mediated or arbitrated upon by the tribunal (the Department of Labour Officers) responsible. This is so because the LA[1384] provides that there is no direct access to the Labour Court regarding employment disputes.[1385] Only matters that have been conciliated or arbitrated upon could be referred to the Labour Court for settlement.[1386] All employment disputes must be conciliated first, except if parties agreed to go straight to arbitration before resort is had to the labour court.

This study picked specific cases in respect of their value in analyzing the issues under consideration regarding efficacy of ADR, let alone, mediation and arbitration in Zimbabwe. Very few matters went to the Labour Court are occasioned by direct reference thereto by the commissioner, but rather, majority are referred as a consequence of failed conciliation or arbitration.[1387]

After an arbitral award is issued it is instructive that such award be registered with the High Court of Zimbabwe.[1388] In terms of the LA[1389] and Model Law[1390] confined in the 2nd Schedule to the Arbitration Act[1391] directs that a submission for registration of an arbitral award ought to be lodged with the High Court or Magistrate Court depending on the jurisdictional value or quantum at issue in the given matter.[1392]

[1384] Act of 2003 [Chapter 28:01]
[1385] Section 93 (1), Labour Act [Chapter: 28:14]
[1386] Ibid
[1387] Section 86 (6), Labour Act [Chapter: 28:14]
[1388] Section 98(14), Labour Act [Chapter 28:14]
[1389] Ibid
[1390] Art 35, Model Law (UNCITRAL 1994)
[1391] [Chapter 7:15]
[1392] Section 98(14), Labour Act [Chapter 28:14]

This study observed at least seven challenges that could be attributed to political and legislative misgivings through the cases discussed. These are discussed in turn.

First, jurisdictional disability of ADR tribunals. The powers of ADR practitioners have been curtailed by the legislature in Zimbabwe.[1393] The arbitrator's powers for instance are limited to issuing an arbitration award and the attendant certification of same but not to enforce it. Enforcement requires other steps and procedures outside of the arbitration process.[1394] Section 98(13) read with (14) of the LA' 03[1395] provides that:

> '(13) At the end of arbitration, arbitrator shall furnish adequate certified copies of arbitral award to disputants affected thereby.
> (14) Any party to whom an arbitral award relates may submit for registration it in terms of subsection (13) to appropriate court of any magistrate seized with jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any Magistrate Court, the Hugh Court,' (emphasis mine).

In the Machote matter[1396] the arbitration award was issued on an unknown date, but was heard at court on 19/11/2015 and subsequently on 13/01/2016. The applicant applied to have the arbitral award to be registered in order to be enforced. Section 98(13) read with (14) effectively limits the jurisdictional power of ADR to certify awards for purposes of enforcement and retains that power with litigation. It necessarily follows that ADR goes as far as issuing an arbitral award and stops there. Enforcement may not be affected without the court, either the magistrate or High Court depending on the value involved.[1397] The court is required for an arbitral award to be submitted for registration to have a writ issued so that an attachment and sale in execution of the property of the losing party can be effected or liquidated. ADR cannot do that outside the court system.[1398] The Learned Judge, Justice Chitapi in the Giya matter[1399] expressed his misgivings with the whole registration of arbitral awards affair and asserted his view as follows:

[1393] Sections 98 (13) (14), [Chapter 28:14]
[1394] Ibid
[1395] Act of 2003 [Chapter 28:14]
[1396] HC 7372/15
[1397] Section 98 (13) (14), [Chapter 28:14]
[1398] Ibid
[1399] [2016] HC 5061/14

> 'It would appear to me that where the requirements for registration have been met as set out in the decided cases which I have adverted to, registration of the award becomes a formality. It is more of a clerical function and one hopes that the legislature will review s 98 (14) in a manner it sees best so that this court is not saddled with applications for registration of arbitral awards for purposes only of enforcement. Whilst the legislature's intentions were obviously noble, the unfortunate result which has come to pass is that most respondents against whom arbitral awards have been granted default in satisfying them and there has been a proliferation of applications for registration to enable enforcement. Such applications have met with spurious defences leading to courts having to hear fully fledged applications unnecessarily and yet what the legislature really intended was to enable a party holding an arbitral award to utilise the services of a Deputy Sheriff or Messenger of Court who can only act upon the issuance of writs authorised by the court. Under the present set up, the Labour Court cannot issue writs of execution to enforce its judgments or orders for payment of money.'[1400]

The meat that can be gleaned from the bones of the foregoing statement is that, first, registration of awards is purely formalistic and essentially clerical.[1401] Second, it is designed for purposes of enforcement only.[1402] Third, to have the two going, registration and enforcement, it is instructive that the award is afforded the issuance of writs to enable its holder to utilize the services of a Deputy Sheriff or Messenger of Court who only act based on such writ as authorized by a court.[1403] Fourth, the labour court does not even have the power to issue writs.[1404] Fifth, the courts are inundated with a proliferation of applications for registration to enable enforcement.[1405] Six, while noble, the intentions of the legislature have been met with a spurious case of a clerical function (registration of arbitral awards) converted into fully fledged court applications unnecessarily, mainly because of reviews and appears lodged by the parties against whom such awards are issued.[1406] Seventh and finally, arbitral awards have been reduced to a fanfare where a winning party will seek to register such award to enforce and liquidate it and the losing party will challenge it for either buying time or mere spite

[1400] [2016] HC 5061/14
[1401] Ibid
[1402] Ibid
[1403] Ibid
[1404] Ibid
[1405] [2016] HC 5061/14
[1406] Section 143 (1), Act 66 of 1995. See also Benjamin (2009) 40

thereof as in the Yobe Wells matter.[1407] There may be genuine cases for which arbitral awards may be challenged but majority are fanfare to evade responsibility by losing parties. An arbitral award is challenged mainly because of dispute of fact, especially that the arbitrator failed to take note and recognize a factual dispute, hence misdirecting him/herself in reaching his or her decision.[1408] In the Yobe Wells matter[1409] it became clear that the court attacked the respondent's attitude in challenging the fact that the legal practitioner had deposed an affidavit on behalf of its client, which though contrary to general practice was understandable in the circumstance and therefore permissible,[1410] then secondly that registering the arbitral award through a chamber application was irregular, was found by the court to be a flimsy excuse by respondent to defy the arbitrator's decision and fail to honour its obligation to pay applicants their dues.[1411] Arbitral awards are usually challenged because they were not correctly registered and administered.[1412] The process of registering arbitral award with the High Court before they can be actioned is in and of itself an additional burden or strain on the already burdensome arbitral process.[1413] It implies that an arbitral tribunal is not an end in itself. It does not have the ability to action its own rulings save to issue and certify them.[1414] It must still depend on court process to have its decisions effected and enforced.[1415] This means the ADR element of arbitration is not purely ADR but pseudo-litigation more like a pretrial hearing. To drive this point home, it is tempting to prematurely (as this is discussed in detail later in the study)[1416] consider the arbitration process in South Africa where a matter is arbitrated, and the tribunal has the power to make a final award which must be actioned and enforced under its auspices. Resort is only sort at court when an appeal is registered by the disputants or losing part, at most.[1417] In Zimbabwe an arbitral award is not enforced by the tribunal that tendered

[1407] [2015] HC 3833/15
[1408] [2016] HC 5061/14 (See HH 191/12)
[1409] [2015] HC 3833/15
[1410] Ibid (See Tian Ze Tobacco Company (Private) Limited versus Vusumuzi Muntuyedwa, [2015] HC 10938/14)
[1411] [2015] HC 3833/15
[1412] [2016] HC 5061/14
[1413] Ibid
[1414] Section 98(13) (14), Act of 2003 [Chapter 28:14]
[1415] [2016] HC 5061/14
[1416] Prematurely because this study is seized with this task in a successive chapter (Chapter 6) where the ADR in the three countries is subjected to comparative analysis. This view is inserted hereto only to make out a point.
[1417] [2016] HC 5061/14

the arbitral award.[1418] At the start of this study it was drummed that ADR is anything short of litigation.[1419] Justice Chitapa[1420] corroborated the views of Justice Chiweshe[1421] in the *Vasco Olympio & four others v Shomet Industrial Development* herein (the Vasco Olympio matter)[1422] in the foregoing statements, the latter who expressed the following sentiment:

> 'All that is required of this court is that it must satisfy itself that the award was granted by a competent arbitrator, that the award sounds in money, that award is still extant and has not been set aside on review or appeal and that the litigants are the parties, the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator validating the arbitral award.'[1423]

That signifies lack of independence of the ADR process from court litigation. Other jurisdictional elements, apart from the cumbersome requirement to register awards before enforcement thereof, common to the ADR is its inability to determine the existence or lack thereof of an employment relationship before hearing the merits of a dispute as in the *Masango & Ors v Kenneth & Anor* herein (Masango matter).[1424] In the Masango Matter[1425] a dispute arose in respect of which applicant was unlawfully dismissed, being an employee, while respondent contented that infect such applicant was only an independent contractor.[1426] The court was seized with both a dispute of fact and law, in which a reading into the contract and fitting it into the frame of the law, that is, whether an employment contract or independent contractor one between principal and contractor existed.[1427]

[1418] Sections 98(13) (14), Chapter 28:14
[1419] Love (2011) 1
[1420] [2016] HC 5061/14
[1421] Ibid
[1422] [2012] HH 191/12
[1423] [2012] HH 191/12
[1424] [2015] S-41-15
[1425] Ibid
[1426] [2015] S-41-15
[1427] [2015] S-41-15. "The contract between master and servant is one of letting and hiring of services (locatio conductio operarum), whereas the contract between the principal and a contractor is the letting and hiring of some definite piece of work (locatio conductio operis). In the former case the relation between the two contracting parties is much more intimate than in the latter, the servant becoming subordinate to the master, whereas in the latter case the contractor remains on a footing of equality with the employer."

It would appear to this study that arbitration (ADR) in the Masango matter[1428] had failed hence resort had to be had to the court. This is a jurisdictional limitation of ADR to determine the status of disputants before dispensing with the issues in dispute.[1429] Some other disputes such as those to determine constructive dismissal disputes are also at issue especially in the *Rainbow Tourism Group v Nkomo* herein (Nkomo matter).[1430] The dispute had failed to be resolved at arbitration and resort was had to be to the Labour Court failing which the Supreme Court was seized with the onus to determine whether the respondent had been constructively dismissed under the LA'03[1431] or otherwise. This matter could not escape the eye of scrutiny in this study in punching holes in the ADR case for its limitations as to matters it can resolve with finality and those it could not. Whether it is the nature of disputants to appeal matters to serve their own purposes even if ADR had competently handled with the matter, in cases where their decisions are confirmed by the court, or that ADR is a weak form of disputing tribunal is a matter of record in the number and nature of matters appealed to the courts.[1432] This also punches holes into the legislative confidence with which legislators seek to make ADR a legitimate and acceptable scheme to end-users and the public at large.[1433]

Second, the crisis of confidence in ADR. ADR in Zimbabwe clearly suffers a user confidence crisis attributed to the manner in which the legislature has conceived its parameters and mode of operations, in that predominantly, employers always appeal its decisions as being arbitrary clearly readable in the *Celsys Ltd v Ndeleziwa* herein the Celsys matter.[1434] The employer clearly appealed decision of NEC, an ADR outfit, even after they had been confirmed by a Labour Court so as to challenge such a determination in the Supreme Court.[1435] The Supreme Court would confirm the NEC had ruled in the favour of an employee that the decision to dismiss respondent was harsh and inappropriate in the circumstances.[1436] The appeal vehemently supported the decision of NEC as had been confirmed by the Labour Court with the following

[1428] [2015] S-41-15
[1429] Ibid
[1430] [2015] S-47-15
[1431] Section 12B (3), Act of 2003 [Chapter 28:01]
[1432] [2015] Section-47-15 (See [2015] S-41-15;
[1433] Brown et al. (1998) 40. See [2016] HC 5061/14 and [2016] HC 5061/14)
[1434] [2015] Section-49-15
[1435] Ibid
[1436] Ibid

sentiment, “The appellant acted unreasonably in dismissing the respondent from employment, and therefore misdirected itself, so entitling the NEC and the Labour Court to interfere.” This however does not shrink the lack of confidence users have of ADR interventions as an arbitrator was rendered crippled by jurisdictional limits in determining matters of equity in the *Delta Beverages (Pvt) Ltd v Murandu* herein Delta-Murandu matter.[1437] Clearly, the Supreme Court brought to the surface the inadequacies of the arbitrator not only in law but competence in that ‘the Labour Court as a court of equity, not the arbitrator, was exclusively vested with authority to engage in the computation and conversion of Zimbabwe dollar currency amounts into US dollars. By converting such back pay, benefits and damages arbitrator’s award to respondent tumbled into a patent error.’[1438] This assertion reflects the limitations of ADR to determine matters of equity in labour disputes in Zimbabwe.[1439] Clearly, the legislature did not vest such power in arbitrators crippling their latitude in so doing seriously casting doubt in the whole ADR system or office of the arbitrator such that users have no choice but to not trust it.[1440]

Third, incompetence of ADR personnel to determine matters. It is readable from several matters especially the Delta-Murandu matter;[1441] Nkomo matter[1442] and the *Banking Employers’ Association of Zimbabwe v Zimbabwe Bank & Allied Workers’ Union* herein the Allied Workers Union matter[1443] in which arbitrators fail to understand their mandate as provided for by the Labour Act and arrived at decisions that reflect incompetence and lack of skills to resolve disputes. While this is an ailment that is attributed to the arbitrator’s own making, the legislature may not be completely absolved of the responsibility to afford such arbitrators the necessary latitude to carry out their full mandate, which appears not to be the case at present.[1444] Arbitrators are not able to determine matters of equity,[1445] determine status as in the existence or otherwise of an employment relationship between parties before issues in dispute are

[1437] [2015] Section-38-15
[1438] [2015] Section-38-15
[1439] [2015] Section-38-15. See [2015] Section-47-15
[1440] Ibid
[1441] [2015] Section-41-15
[1442] [2015] Section-47-15
[1443] [2015] Section-34-15
[1444] [2015] Section-38-15. See [2015] Section-47-15 and [2015] Section-34-15
[1445] [2015] Section-38-15

dispensed with[1446] and they are not able to issue writs for enforcement of awards.[1447] This leaves arbitrators and ADR personnel generally open to doubt by those expected to rely on their judgment in determining decisions to disputes.[1448] This also reduces ADR to a necessary evil parties go through before turning to court litigation where justice will finally be served.[1449] The sentiment emanating from the learned judge of the Supreme Court regarding the inadequacies of the arbitrator in dispensing with equity issues in the Delta-Murandu matter[1450] was that the arbitrator should have disabused himself from converting currencies. The arbitrator in the foregoing statement was not even mandated to determine equity, that is, matters involving money, and further he was not aware of that limitation and still proceeded to carry out the job, not without an aura of incompetence in so doing.[1451]

Fourth, lack of definitive legislative provisions of time frames for dispensing with disputes contributing to inefficiency. While it is proper to assume that some inefficiencies in dispensing with disputes may be attributed to the arbitrator's own competence or lack thereof, the inability of the legislature to impose time limits within which disputes ought to be resolved cannot be overlooked. A compelling view,[1452] asserted that:

> '…. Zimbabwean labour legislation seldom prescribes maximum time limits within which a Conciliator or Arbitrator issues an award or settles a dispute. This constitutes a gap manifest in law which accounts for incessant delays in resolution *of* labour disputes [emphasis mine].'

However, the above view is conflicted by the fact that there is a partial provision with respect to conciliation only, which is afforded a 30 day time limit from the Labour Officer's commencement of the intervention.[1453] The challenge is only with the ambiguous nature with which that provision is crafted.[1454] The 30 day provision is

[1446] [2015] Section-41-15
[1447] [2016] HC 5061/14
[1448] [2015] Section-38-15. See [2015] Section-47-15 and [2015] Section-34-15)
[1449] Ibid
[1450] [2015] Section-38-15
[1451] [2015] S-38-15
[1452] Watadza, Mahapa, and Muchadenyika Effectiveness of Conciliation and Arbitration in the FerroChrome Industry in Zimbabwe (2016) 341
[1453] Section 93 (3), Act of 2003 [Chapter28:01]
[1454] Ibid

computed not necessarily from the time of escalation of matter to a Labour Officer but from such time as Labour Officer resumes an attempt to settle the dispute.[1455] The question then needful of treatise is: when does the Labour Officer begin to attempt to settle a dispute? Is it when such officer acknowledges receipt of the dispute or is it after s/he conducts the first hearing?[1456] The manner in which this provision is worded is not without a challenge for want of a more definitive provision.[1457] According to Watadza *et al.*[1458] over 80% of arbitral awards tendered by ADR practitioners are contested and challenged as a result curtailing timeous resolution of disputes. Taking into account the time it takes for the courts cycle, in the event that awards are referred, which is at most 5 years or more in varied instances, ADR in Zimbabwe leaves a lot to be a desirable system of resolving disputes. As such the contentious view[1459] may be justified that:

> 'Given the centrality of disputes and their negative impacts on productivity, the alternate dispute resolution mechanism is failing to resolve and settle disputes expeditiously and effectively.'

This status of affairs is attributed to, partly, the inability of the legislature to prescribe the maximum time between escalation of a dispute and the time an Labour Officer ought to commence his/her attempt to settle it.[1460] The gap has been remedied by labour regulations, which provide for 90 days from receipt of a dispute to the time s/he must commence his or her attempt at settling it.[1461] The implications of these regulations are that the Labour Officer has been afforded 90 days during which to sit on the matter before s/he starts doing anything about it, which is an unreasonable provision[1462] rendering ADR inefficacious.

Fifth, cavalier reliance on points *in limine* by losing party to evade effecting payment.[1463] Once an arbitral award is registered with either the Magistrate Court or High Court, a

[1455] Madhuku (2012) 11
[1456] Ibid
[1457] Ibid
[1458] Watadza *et al.* (2016) 341
[1459] Ibid
[1460] Ibíd
[1461] Ibid
[1462] Watadza *et al.* (2016) 341
[1463] [2015] Section-38-15

writ is issued in terms of which payment can be effected through a deputy sheriff or messenger of court's actions.[1464] However, it has emerged that the whole spectacle of registering arbitral awards has often turned into a spectacle in which losing disputants especially employers appeal the matter and raise points *in limine* to evade the responsibility to pay awarded dues.[1465] In Delta-Murandu matter,[1466] a point *in limine* was raised in respect of which the applicant contended that the matter had prescribed. Essentially, the appellant or employer had appealed the registration of an award. While awaiting the court to dispense with the appeal the award could not be liquidated. The appellant then finally relied on the fact that by the time the appeal was heard the matter had long since prescribed. The court quashed the argument by appellant and therefore dismissed the point *in limine*.[1467]

Sixth, court perceives registration of awards as mere clerical function but still commits full court resources thereto instead of empowering ADR mechanisms to dispense therewith. On several occasions,[1468] justices have lamented the whole affair of registering arbitral awards[1469] through the courts as being clerical tasks that have been converted into a formal litigation procedure yet the practice is not subjected to legislative review so as to relieve it of the courts which are already inundated with unresolved matters. This would imply instead extending the jurisdiction of ADR to carry out such a function rather than having it performed by courts they keep the burdensome process alive. This casts aspersions on the legislative and political support afforded to ADR in Zimbabwe as well as the efficacy thereof.[1470] As already discussed above, the continued involvement by courts with a clerical function renders such courts 'clerical entities'[1471] as far as arbitral awards are concerned patently depriving the ADR community of users more efficient services that an independent ADR scheme would better dispense with as in the case of CCMA in South Africa.[1472]

[1464] [2015] Section-38-15 (See [2012] HH 191/12; [2016] HC 5061/14)
[1465] Ibid
[1466] Ibid
[1467] [2015] Section-38-15
[1468] [2016] HC 5061/14 (see [2012] HH 191/12)
[1469] Section 98(13) (14), Act of 2003 [Chapter 28:01]
[1470] Brown et al. (1998) 24
[1471] [2016] HC 5061/14 (see [2012] HH 191/12)
[1472] Swanepoel *et al.* (2008) 613.See also chapter 4 of this study

Seventh, the Supreme Court of Zimbabwe in the Nyamande & Another v Zuva Petroleum (Pty) herein (the "Nyamande matter")[1473] also failed to set the correct precedents in a failed ADR matter in terms of which it endorsed what it termed the employer's common law right to terminate employee's contracts by giving notice. This was considered wrong on the basis that it flouted the right to fair labour practices enunciated in section 65(1) of the Constitution of Zimbabwe[1474] apart from violating Convention C150 of the ILO in respect to denying terminated employees any requisite compensation. The workers perceived it as tantamount to the resurrection of the Master and Servant Ordinance of 1905 in which they were not afforded fair labour practices, while employers embraced it as a case that embraces labour flexibility and an entrance to a free market economy.[1475] The significance of this case is that it sets precedence over how future ADR matters especially in ADR would be handled in Zimbabwe. Notably, the employer will have an upper hand in all disputes in which it opens floodgates of potential abuse with which employers would dismiss employees based on the basis of precedence emanating from the decision of the Supreme Court in the Nyamande matter.[1476] This would essentially not lead to efficacious ADR outcomes on the strength that such a decision as that in the Nyamande matter[1477] would be relied upon by ADR practitioners in Zimbabwe to issue rulings that disadvantage workers.

5.5.1.2 Supportive Institutional Capacity and Cultural Norms

In terms of institutional capacity and support ADR in Zimbabwe is housed under the Labour Department through its Labour Officers and the Labour Court.[1478] There exists no independent body or agent that administers ADR in terms of the LA.[1479] This questions the commitment of the government to ADR principles especially the matter of independence and fairness in labour dispute settlement.[1480] This view is

[1473] SC 43/15
[1474] Act No 20, 2013
[1475] Matsikidze (2017) 33
[1476] SC 43/15
[1477] SC 43/15, See also Matsikidze (2017) 33
[1478] Madhuku (2012) 31
[1479] Act of 2003 [Chapter 28:01]
[1480] Act of 2003 [Chapter 28:01]

corroborated[1481] by a finding that there were acute inefficiencies (delays) bedeviling the private security industry in dispensing with labour matters by way of arbitration.[1482] A Labour Officer working under the auspices of government in the ordinary run of things is slower when arbitrating than Independent Arbitrators by virtue of voluminous flow of matters emanating from Government Labour Offices.[1483] These are the obvious disadvantages of lack of an independent dispute resolution body apart from government for dispensing with labour disputes in Zimbabwe.[1484] These views are corroborated by a view[1485] that recommended the establishment of an independent arbitration body in Zimbabwe with jurisdiction to enforce its own decisions without the need for involvements of the courts.[1486] Such a position[1487] is further supported by another view,[1488] which asserts that as long as arbitration gives sway to court litigation it seizes to be an ADR apparatus rendering it inefficacious.[1489] There is also no provision in the Act for garnering community support for ADR programs so as to make them effective.[1490] The foregoing discussion shows that Zimbabwe ADR is still inefficacious for the lack of certain fundamentals such as the existence of an independent body that administers it, and lacks of initiatives to get community buy in for ADR as an alternative to labour dispute resolution. The next discussion deals with adequate and competent manpower.

5.5.1.3 Adequate and competent manpower

The manpower measure comprises both recruitment of ADR officers sufficient to handle the flow of disputes and also the specifications in terms of job skills required to dispense with disputes.[1491] In Zimbabwe Labour Officers are assigned the role of dispensing with conciliation at the failure of which they may refer them to arbitration.[1492]

[1481] Watadza et al. (2016) 340
[1482] Ibid
[1483] Watadza et al. (2016) 340
[1484] Ibid 336
[1485] Chulu http://www.thestandard.co.zw/2011/01/13/brett-chulu-labour-dispute-resolution-lessons-from-sa/ Date of use: 20 November 2017
[1486] Ibid
[1487] Ibid
[1488] Watadza *et al.* (2016) 336 (See Madhuku (2012) 31)
[1489] Ibid
[1490] Madhuku (2012) 34
[1491] Brown et al. (1998) 40
[1492] Madhuku (2012) 34

The LA'03[1493] did not provide for specific minimum requirements in terms of skills to be possessed by conciliators and arbitrators which made it susceptible to incompetent officers.[1494] The lack of prescribed minimum credentials for principal actors seized with conciliation and arbitration intervention in Zimbabwe has a direct impact on resolution of disputes.[1495] Some Scholars[1496] have attributed the failure of ADR to effectively handle disputes to the ineptitude of the cadres presiding over matters.[1497]

An interview conducted at the labour Ministry in Zimbabwe indicated that,[1498] the minimum credentials for a Labour Officer was an academic degree coupled with two years' experience in handling labour related matters.[1499] This was considered a misnomer given that no such regulation had been enacted to provide for such a rendering.[1500] Recent treatise into the matter suggests that the anomaly has been addressed.[1501] A hailed proclamation in the Act[1502] directs that an Arbitrator or a Designated Agent must be in possession of an academic degree at a minimum coupled with 2 years' experience in human resources management or industrial relations field, and /or a diploma in people management.[1503]

In terms of adequacy, it is decried that often such Labour Officers are swamped with caseload beyond their capacity to manage it.[1504] A survey conducted in terms of conciliation and arbitration work under the administration of the National Employment Councils proved effective though buttressed by inadequate numbers of conciliators and arbitrators in Zimbabwe.[1505] This led to referral of cases to independent arbitrators who charge exorbitant fees to dispense with issues. Arbitration by NECs is made favourable by the fact that, being salaried staff, did not charge for their service which lower the cost of such process.[1506] Generally, labour dispute settlement in Zimbabwe

[1493] Act of 2003 [Chapter 28:01]
[1494] Ibid
[1495] Madhuku (2012) 34)
[1496] Watadza et al. (2016) 340 (See Madhuku (2012) 34)
[1497] Madhuku (2012) 34
[1498] Ibid
[1499] Ibid
[1500] Ibid
[1501] Mahapa and Christopher *The dark side of arbitration and Conciliation in Zimbabwe* (2015) 70
[1502] Act of 2003 [Chapter 28:01]
[1503] Statutory Instrument (SI) 173 of 2012, Act of 2003 [Chapter 28:01]
[1504] Madhuku (2012) 33
[1505] Ibid
[1506] Ibid

does not have sufficient manpower to address the caseload that saddles the system which only work to militate against the efficacy of ADR.[1507]

5.5.1.4 Adequate Financial Resources

It suffices to reason that the ADR system is financially catered for by the executive government under the Labour Department and NECs who dispense with labour dispute settlement.[1508] Gleaning from a study conducted in Zimbabwe that showed lack of basic stationary to print awards indicates that ADR is inadequately funded. This undermines the effectiveness of the system.[1509] This study would have been aided immensely by an availability of budget allocation to ADR at Ministry level.[1510]

> 'The Ministry lacks communication resources besides the telephones; no printing paper; photocopier; a vehicle for delivering service documents and no petty cash for postage purposes. The complainant is ought to produce its own copies of notification documents and arrange its own service on the other disputant,' (emphasis mine).[1511]

It is critical for ADR to have sufficient financial backing to be effective at dispensing with labour dispute settlement in Zimbabwe.[1512] This is largely attributed to the collapse of the Zimbabwean economy that hastened after the 1997 collapse of its currency due to poor macro-economic policies of the governing party.[1513] The fact that Labour Officers retain the power to assign an arbitrator is in and of itself problematic.[1514] Granted the existence of several names appearing on the panel the random choice of an arbitrator becomes susceptible to several influences possibly far less than proficient.[1515] One such influence is cutting favours for buddies (a clique of arbitrators) to enhance their money making endeavours thereby.[1516] It is not uncommon to find

[1507] Madhuku (2012) 33
[1508] Ibid
[1509] Brown et al. (1998) 40
[1510] Madhuku (2012) 36
[1511] Ibid
[1512] Brown et al. (1998) 40
[1513] Bertelsmann Stiftung, BTI 2016, (2016) 4
[1514] Madhuku (2012) 38
[1515] Ibid
[1516] Ibid

arbitrators on the panel paying visits to solicit work at the Ministry.[1517] A study[1518] revealed that the ministry operates a roaster for allocating the next arbitrator in line for available matters therewith. Such selection is not completely waterproofed in terms of objectivity, reliability and validity the net result of which is an inefficacious system of arbitration.[1519]

5.5.1.5 Parity in the Power of Disputants

Zimbabwe is generally an unequal society.[1520] At union level, the negative impact of paternalism has generated resentment by labour itself.[1521] The matter of industrial democracy in the workplace has been regrettably a contentious issue lacking in post-independent Zimbabwe's labour relations framework.[1522] The post-independence national centre - the ZCTU - declared that state protectiveness weakened the country and the awarded salary increments did not result from consultation with labour hence acrimonious.[1523] The Executive arm of government has for instance placed draconian restrictions on labour in terms of which the right to strike has been curtailed through invoking Emergence Measures Powers of the President to beat them (labour) into shape or force them into compliance.[1524] In post-independence Zimbabwe, a Labour Minister lashed out at strikers using language reminiscent of that used by a Labour Minister in colonial Rhodesia on native Africans such as ("I will crack a whip on them, let them return to work," referring to strikers), among other things.[1525] He in fact unleashed the Army at Wankie Colliery and Hippo Valley Estates at striking protesters getting 13 miners detained at Wankie under the auspices of Industrial Conciliation Act, a colonial piece of legislation still in force after independence.[1526] Protesters were in fact shot at by guards at the Rio Tinto Zimbabwe mines as a result.[1527] Picketers were dispersed by police and 400 work seekers were subsequently sacked at Swift

[1517] Madhuku (2012) 38
[1518] Ibid
[1519] Ibid
[1520] Mandaza (1986) 258 (see Bertelsmann Stiftung, BTI 2016, (2016) 15)
[1521] Ibid
[1522] Maphosa (1991) 22
[1523] Mandaza (1986) 258
[1524] Sachikonye (1985) 15
[1525] Sibanda (1989) 18
[1526] Act of 1959
[1527] Sibanda (1989) 18

Transport in Harare and 1000 staff in total axed with no reparations.[1528] Only 96 staff were rehired selectively. A certain Kumbirai Kangai, the then Labour Minister pronounced in no uncertain terms the following:

> 'I will crack my whip if they do not go back to work ... They must go back now.'[1529]

A trend is readable from these stances by the state that parity in labour disputes was non-existent and never a priority especially when it makes statements bordering on threats of physical violence against striking workers.[1530] Clearly, the state sided more with capital than labour in all its enactments and actions up to the present.[1531] However, it is clear that the government of Zimbabwe has not taken an initiative to establish an independent body to run a well-funded ADR system.[1532] The current elements of ADR – conciliation and arbitration are awash with challenges, which render them far from efficacious.[1533] Furthermore, after failed ADR efforts in the Nyamande matter[1534] the Supreme Court did not help the labour dispute fraternity as it afforded more power to employers as if promoting capital over the interests of the workers. This is coupled with Zimbabwe's poor standing with the ILO after being charged for allowing forced labour to perpetuate by failing to ratify Convention 105[1535] an international statute which prohibits forced labour.

5.5.2 ADR Program Design Considerations

This section discusses the design considerations for ADR system with respect to planning and preparation and operations and implementation of the process.[1536]

5.5.2.1 Planning and Preparation

[1528] Sibanda (1989) 18
[1529] Ibid
[1530] Ibid
[1531] Ibid 21
[1532] Madhuku (2012) 31
[1533] Ibid
[1534] SC 43/15
[1535] Ncube https://www.newsday.co.zw/2017/05/zimbabwe-set-appear-ilo/ Date of use: 28 June 2019
[1536] Brown et al. (1998) 40

The four elements that are critical for the planning and preparation in ADR system design are: (1) to assess exact needs and requirements for dispute settlement and contextual conditions and outline program goals; (2) engage a participatory design process; (3) to develop the legal basis outlining jurisdiction, prescriptions, procedures, and enforcement, and to define ADR relationship with the formal legal system and (4) forge effective local partnerships.[1537] Concerning the first issue, it is clear that there has not been sufficient treatise on establishment of ADR needs and background conditions in Zimbabwe in legislative enactments that surrounded IRA'85;[1538] LRAA'92[1539]; LA'03[1540] and subsequent amendments to date.[1541] This step is important for establishing the resource and jurisdictional needs of an ADR system.[1542] The existing practice is that ADR is administered by the executive government through its appointed Labour Officers.[1543] They are responsible for conciliation and arbitration and deciding matters that ought to go to the Labour Court, at will.[1544] Such a practice deprives ADR processes in Zimbabwe of the required independence and lack of biasness which are critical to its effectiveness in labour dispute resolution. When the aggrieved part is an employee of government, having Labour Officers employed by government, it does not matter in which ministry, adjudicate the respective disputes rids the system of its independence. The ADR processes have a wide potential for abuse by ADR practitioners as are placed in a position of both referee and player, as in a soccer game. It is not dissimilar to an employee of executive government adjudicating a dispute between another member of the executive government.

Regarding employing a participatory design process which involves all parties,[1545] it is unfortunate that the Zimbabwean situation is characterised by seemingly command political economy that characterised Mugabe's dictatorial 37 year old rule in which the central government runs the show with other players such as unions' mere spectators or rather subordinate voices.[1546] Initially the union movement in Zimbabwe was

[1537] Brown et al. (1998) 33
[1538] Act 16 of 1985
[1539] Act of 1992
[1540] Act of 2003 [Chapter 28:01]
[1541] Madhuku (2012) 5
[1542] Brown et al. (1998) 40
[1543] Maitireyi and Duve (2011) 138
[1544] Madhuku (2012) 8
[1545] Brown et al. (1998) 33
[1546] Maitireyi and Duve (2011) 138

plugged by a leadership crisis and other challenges of embezzlement of funds so that they could not meaningfully participate in the first legislative process during the 1985 enactment of the Industrial Relations Bill and Act respectively.[1547] This situation has not changed to date. This has led to a crisis of expectations on the part of the Zimbabwe government. Nature of disputes referred through the system are predominantly unfair dismissals, compensation and unfair labour practice.[1548] As to whether these are resolved efficiently and effectively cannot be answered with certainty for want of accurate records on the manner in which the Department of Labour administers its activities thereon.[1549]

5.5.2.2 Operations and Implementation

There is no case management system this study is aware of that screens disputes into those within the ambit of Labour Officers and those that are without so as to enhance ADR efficacy in Zimbabwe.[1550] When a dispute arises it is reported to the Labour Officers who must conciliate.[1551] Labour Officers may not entertain any dispute or unfair labour practice claim apart from those escalated to him/her; or those his/her attention has been drawn thereto; and within a space of two years from the referral date of such matter(s).[1552] There is no prescription as to the manner in which the matter must be brought to the attention of Labour Officers and how it must come to his attention as contemplated by such a provision.[1553] Even when reading from the provision of the powers of Labour Officers there is no guidance of case management procedure by which cases must be administered, registered and allocated to conciliators or arbitrators.[1554] It is just stated 'a Labour Officer seized with a dispute or unfair labour practice, or who has become aware of one, ought to attempt reaching settlement thereof by conciliating or, if agreeable to disputants, arbitration,' ostensibly such Labour Officer ought to know what to do.[1555] This exposes such as system to potential abuse. It has already been noted that such officers often allocate cases for arbitration

[1547] Maitireyi and Duve (2011) 138
[1548] Madhuku (2012) 8
[1549] Ibid
[1550] Section 94, Labour Act of 2003
[1551] Ibid
[1552] Section 94, Labour Act of 2003
[1553] Ibid
[1554] Ibid
[1555] Ibid

to friends who solicit such favours for money making or personal economic gain and not on the basis of meritocracy or a relevant logical framework.[1556]

5.5.3 The ADR measures of efficacy

It is important for this study to consider whether ADR in Zimbabwe is efficaciously dispensing with labour dispute resolution. That is the main aim of this study. Pursuant to that aim this section discusses Zimbabwe's ADR systems in terms of measures of efficacy – client satisfaction with the system, settlement rate, efficiency and cost.[1557]

5.5.3.1 Efficiency and time-saving nature of ADR

The Labour Act'[1558] does not provide for prescriptions within which conciliators and arbitrators ought to settle or attempt to settle disputes.[1559] The Zimbabwean system of arbitration generally does not escape the eye of scrutiny in terms of speedy resolution of disputes.[1560] Critical to ADR goals is the time element given that it is alternative to courts, which are known as poor in terms of this element.[1561] This refers to the duration taken to dispense with a dispute through an ADR intervention in comparison to traditional court litigation requires further ado in evaluating ADR efficacy in this study.[1562] The time taken to conclude a matter is also referred to as time to disposition, measured as the total time from filing a complaint to settling the case.[1563] Generally, the Zimbabwean system is inundated with delays and inability to enforce judgements from awards within reasonable time. This renders its ADR system inefficacious.[1564] While there is merit in the argument[1565] that a hurried process without satisfactory settlement and enforcement of a grievance renders it hollow mainly because speedy resolution is not only a goal of ADR but may serve as a sign of competence in those who effectively dispense with matters to finality or the lack thereof as well.[1566]

[1556] Madhuku (2012) 38
[1557] Kerbeshian (1994) 383
[1558] Act of 2003 [Chapter 28:01]
[1559] Madhuku (2012) 36
[1560] Section 98(13) (14), Act of 2003 [Chapter 28:01]
[1561] Love (2011) 2, See also Wiese (2016) 2
[1562] Love (2011) 2, See also Wiese (2016) 2
[1563] Ibid
[1564] Love (2011) 2
[1565] Maitireyi and Duve (2011) 151
[1566] Ibid (See Frimpong (2006) 166

5.5.3.2 Cost effectiveness of ADR

The issue of costs of ADR administered labour dispute settlement cannot be ascertained with certainty in Zimbabwe. This is exacerbated by the challenge of information asymmetry that characterizes the country's cost structure of ADR.[1567] A study by Maitireyi and Duve[1568] revealed a divergent view on cost of arbitration procedure in Zimbabwe the majority (71%) respondents in the employee category hold the view that it is unaffordable and prohibitive while remaining respondents in the employers' category think otherwise.[1569] However, given that the study by Maitireyi and Duve[1570] is rather old, there lacks a study that provides a clear picture of the prevailing situation pertaining to cost of arbitration in Zimbabwe. This makes it difficult to reach a conclusion on this element. The study by Maitireyi and Duve[1571] was limited to measures of arbitration and also was not corroborated by exact measures of cases from time of referral to settlement and this leaves it needful of further enquiry or treatise.[1572] This study established that ADR is regarded as less costly when it comes to taking matters for resolution through NECs with salaried officers than through private arbitrators in Zimbabwe.[1573] However, the use of legal representatives in the system of arbitration renders it inaccessible to the less privileged members of society who (constitute the majority) and may not afford such services.[1574] This is so for the simple reason that ADR is inclined as its inherent nature to dispense with dispute settlement interventions within the labour community at no cost with no lawyers involved.[1575] There are no records available to this study to make out an objective assessment as to the cost of ADR. The study by Maitireyi and Duve[1576] is not corroborated by other evidence in Zimbabwe hence the inability to conclude whether ADR was cost effective or not. It may be surmised though that parties have to pay legal representatives in arbitration making ADR a costly exercise.

[1567] Section 98 (8) Act of 2003 [Chapter 28:01]
[1568] Maitireyi and Duve (2011) 151
[1569] Ibid
[1570] Ibid
[1571] Ibid
[1572] Ibid
[1573] Madhuku (2012) 33
[1574] Bendeman (2007) 140
[1575] Ibid
[1576] Maitireyi and Duve (2011) 151

5.5.3.3 Settlement of disputes through ADR

There are no available statistics this study is aware of that provide an assessment of number of referred disputes and those settled in Zimbabwe. This study only has inferences from secondary literature that presumes settlement rate to be poor in Zimbabwe.[1577] Available data was conducted to rate arbitration and none exists that this study is aware of that rates conciliation and mediation services in Zimbabwe Labour dispute settlement performance.[1578] The Zimbabwean government has not publicised data on the matter which makes it difficult for this study to ascertain the efficacy of ADR settlement and enforcement in the country.[1579]

5.5.3.4 Enforcement of ADR outcomes

The issuance of an arbitration award does not signify the end of an ADR process in labour dispute resolution in Zimbabwe.[1580] It is common cause that enforcement is rested on other processes, administrative and legislative that are required for it to consummate.[1581]

In Zimbabwe enforcement of an arbitral award is rested on such award getting registered by either a Magistrate or the High Court of Zimbabwe first, without which such award may not be enforceable.[1582] Whether or not ADR is efficacious depends on several factors one of which is enforcement of an award as an end of justice.[1583]

The main challenge relating to enforcement of arbitral awards is procedural. In Zimbabwe an arbitral decision ought to be lodged with the Magistrate Court or High Court, for registration dependent on the quantum of claims (amount) at issue, in order to be enforced. Except on that basis (registration) it cannot be enforced.[1584] There is a general lack of data that subjects the whole system of registration of arbitration awards

[1577] Maitireyi and Duve (2011) 141
[1578] Maitireyi and Duve (2011) 151, (See Mahapa and Watadza (2015) 70)
[1579] Madhuku (2012) 43
[1580] Sections 98(13) (14), Act of 2003 [Chapter 28:01]
[1581] Findlaw http://adr.findlaw.com/arbitration/arbitration-overview.html Date of use: 22 February 2018
[1582] Sections 98(13) and (14), Act of 2003 [Chapter 28:01]
[1583] Ibid
[1584] Ibid

is performing in Zimbabwe. This makes measurement of efficacy thereof or otherwise untenable. The other challenge to enforcement is the arbitrary use by employers of appeal procedures on grounds of the usual fraudulent conduct, misrepresentation, arbitrariness, or capriciousness[1585] through the Labour Court as a delay mechanism making enforcement a nightmare to winners of awards.[1586]

5.5.3.5 Client satisfaction

Client satisfaction with ADR processes considers elements such as ADR's ability to maintaining privacy, maintaining relationships, involving constituencies, linking issues, getting neutral opinion and setting precedent. There are no records in Zimbabwe this study is aware of that can be referred to ascertain the aspect of client satisfaction with ADR.[1587] The matter of getting a neutral opinion relates to independence of the ADR process. The Zimbabwe ADR system does not provide for such independence for the simple reason that ADR is administered by Labour Officers.[1588] This state of affairs is comparable to and at variance with South Africa where the body that administers ADR is independent of government.[1589] Clearly the labour legislation in Zimbabwe does not provide for the independence of the ADR system particularly for its lack of autonomy from government.[1590] ADR in Zimbabwe does not set any precedence for the fact that it is not operated by a tribunal of record. Instead it is administered by Labour Officers under the auspices of the government and not independent of it.[1591]

5.6 Summary

This chapter discussed the history of labour dispute settlement in Zimbabwe from the pre-independence era to the independence era stretching to the present practices. The early stages of independence in Zimbabwe did not immediately see a transformative approach to labour dispute settlement in an effort to reverse the

[1585] Findlaw http://adr.findlaw.com/arbitration/arbitration-overview.html Date of use: 22 February 2018
[1586] [2015] S-38-15
[1587] Sander and Goldberg (1994) 49-68
[1588] Madhuku (2012) 31, See Maitireyi and Duve (2011) 138
[1589] Ibid
[1590] Maitireyi and Duve (2011) 138
[1591] Sections 93 and 98, Labour Act of 2003

injustices of the past.[1592] The Zimbabwe government maintained the use of the Industrial Conciliation Act[1593] – a colonial legislative chunk for a significant period of time enacting the first post-colonial legislation only in 1985 after, five years of attaining independence from British imperial rule.[1594] This study discussed the reluctance of the Zimbabwean government to relinquish control of dispute settlement functions to an independent body hence clinching to such functions as conciliation and arbitration of labour disputes under the auspices of the state. This renders the ADR system inefficacious. The study then discussed whether or not the Zimbabwe system of ADR is efficacious based on background conditions, such as adequate legislative and political support among other things, ADR design conditions and measures of efficacy such as client satisfaction, settlement rate, cost and efficiency.[1595] This study found that for the lack of an independent ADR body, essentially leaving everything in the hands of executive government, renders ADR in Zimbabwe unable to blossom into a fully functional system that can gain legitimacy and support from interested parties.[1596] Granted it is run by the government, the ADR processes in Zimbabwe are subject to the usual bureaucratic tendentiousness and inefficiencies typical of government operations.[1597] The Zimbabwe situation of ADR is made difficult by information asymmetry. There is a general lack of information on number of cases referred to the system for resolution and settlement and a lack of a case management system essentially renders the whole inquiry crippled.[1598] The challenge is even exacerbated by the fact that arbitral awards require more than just an arbitrator to be affected. After the arbitrator has issued an arbitral award, litigation through either the Magistrate or High Court of Zimbabwe is required, without which the award may not be enforced. This is so because the arbitrator is limited in its ability to issue writs and other procedural orders to get a deputy sheriff to, for instance, execute an arbitral award. The judiciary, while acknowledging the registration of arbitral awards is a clerical function, continue to saddle themselves therewith, rendering their courts clerical. Such clerical function as it is deemed to be, registration of arbitral awards, would be served best if left in the jurisdictional ambit of ADR, had an independent body, rather than the

[1592] Madhuku (2012) 6
[1593] Act of 1959
[1594] Ibid
[1595] Kerbeshian (1994) 383
[1596] Madhuku (2012) 31
[1597] Ibid
[1598] Madhuku (2012) 36

labour ministry of, exited to dispense therewith. The question that remains unattended in this regard, pertaining to Zimbabwe's ADR situation, is: is ADR in Zimbabwe working in the truest sense of the term, which implies resolution of disputes without involving the courts (yet the court is still required to enforce such awards by registering them first to secure a writ)? Throughout this study it became abundantly clear that before independence there was no commitment to enact laws that promoted industrial democracy and efficacious ADR. Post independent Zimbabwe legislation likewise did not show a commitment to form an independent tribunal such as South Africa's CCMA to dispense with labour dispute resolution. This chapter noted that despite ratifying the relevant conventions Zimbabwe still lag behind in terms of implementation of efficacious ADR processes in labour dispute resolution. The country has come under spotlight for failing to enact laws that prohibit forced labour. The Supreme Court of Zimbabwe also failed to set the correct precedents in a failed ADR matter in terms of which it endorsed what it termed the employer's common law right to terminate employee's contracts by giving notice. This was considered wrong on the basis that it flouted the right to fair labour practices enunciated in section 65(1) of the Constitution of Zimbabwe apart from violating Convention C150 of the ILO in respect to denying terminated employees any requisite compensation. There is an implementation gap which renders ADR processes in Zimbabwe unable to achieve efficacy. This study can therefore conclude, based on foregoing discussions in this chapter, that ADR in labour dispute resolution in Zimbabwe is awash with many challenges rendering it far from efficacious.

CHAPTER 6

CRITICAL COMPARATIVE ANALYSIS OF ADR IN BOTSWANA, SOUTH AFRICA & ZIMBABWE

6 INTRODUCTION

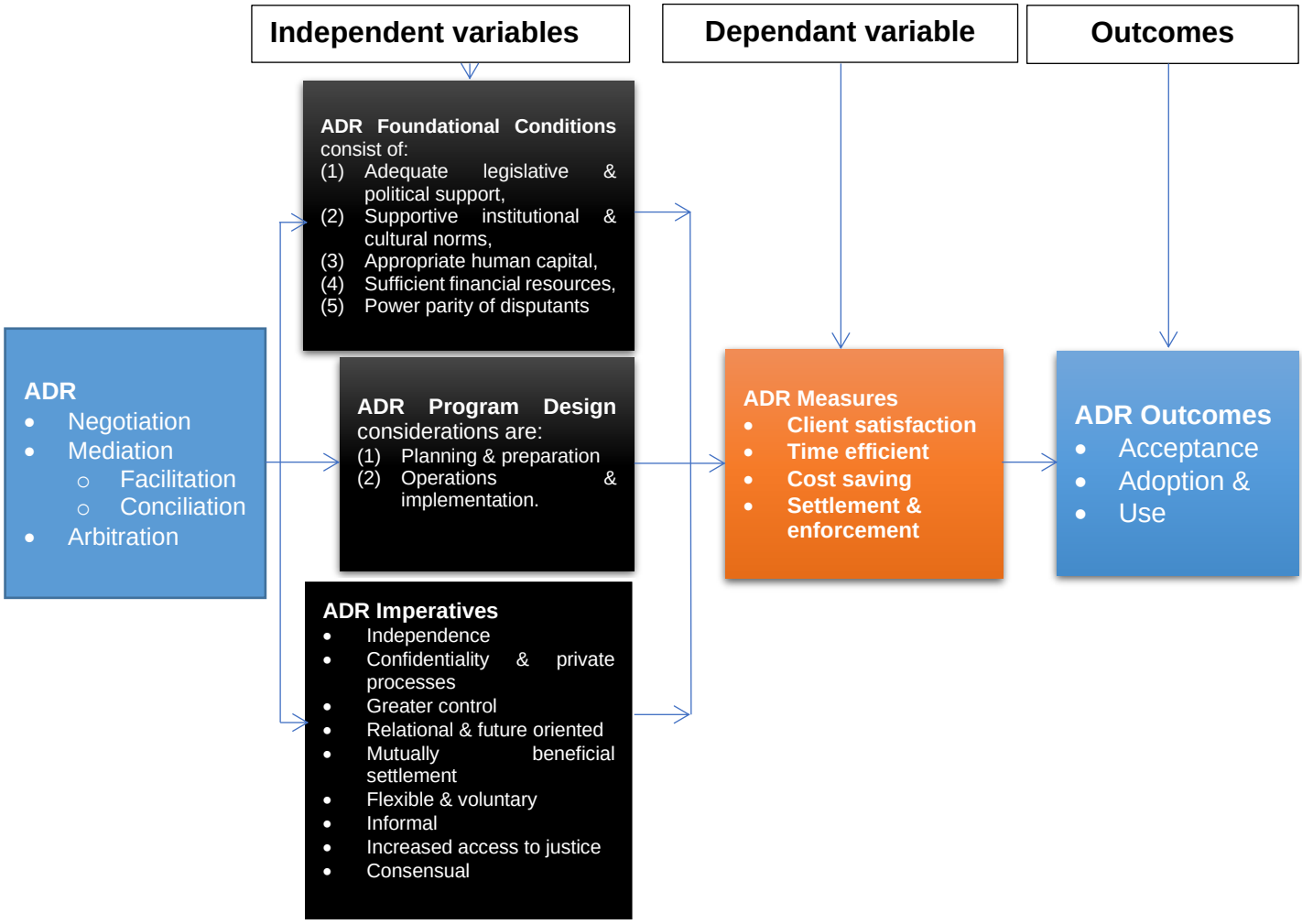
This chapter essentially provides for a critical comparative analysis of the ADR situation obtaining in Botswana, RSA and Zimbabwe. The lack of a framework for conducting such a comparative analysis or rather measuring the efficacy of ADR which confronted the present study is acknowledged by several scholars including Love[1599], Kerbeshian,[1600] Brown[1601] and Shin.[1602] There is also a dearth of research of an empirical nature that comprehensively addresses the effectiveness of ADR, apart from those conducted in the USA.[1603] For example, Bingham[1604] observed that "most scholars and commentators are agreeable on the insufficiency of empirical research on the ADR efficacy comparable to reliance on the traditional court litigation scheme."[1605]

To circumvent the afore-discussed challenges this study relied largely on an adapted hypothetical model termed **ADR Efficacy Model,** as illustrated in figure 6.1 which comprises a three point of analysis structure, namely (1) ADR background conditions constituting *adequate legislative and political support*, *institutional support, adequate and competent manpower, financial resource support and power parity of disputants*[1606] on the one hand and then (2) ADR program design considerations which touch upon *Planning and preparation and Operations and implementation*[1607] then finally (3) ADR measures which constitute *client satisfaction, settlement and enforcement, cost* and *efficiency*.[1608] These are not discussed in this chapter given their

[1599] Love (2011) 5
[1600] Kerbeshian (1994) 383
[1601] Brown *et al.* (1998) 33
[1602] Shin (2011) 13
[1603] Ibid
[1604] Bingham, Nabatchi, Senger and Jackman *"Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes."* (2009) 3
[1605] Ibid
[1606] Brown *et al.* (1998) 33
[1607] Ibid 40
[1608] Kerbeshian (1994) 383

wide exposition in the previous chapters particularly chapter 2 of this study. They are however used as the basis of comparison of the status of ADR in Botswana, RSA and Zimbabwe.

Figure 2 ADR Efficacy Model



(Source: Adapted from Love[1609], Kerbeshian[1610], Brown *et al.*[1611] and Shin[1612]).

[1609] Love (2011) 5
[1610] Kerbeshian (1997) 383
[1611] Brown *et al.* (1998) 15
[1612] Shin (2011) 13

The study picks the above illustrated elements, namely (1) ADR background conditions; (2) ADR program design[1613] and then finally (3) ADR measures[1614] characteristics in that order to analyse the situation in each country.

6.1 ADR Background Conditions in Botswana, South Africa and Zimbabwe

This section compares ADR performance in terms of background conditions in Botswana, RSA and Zimbabwe. This section specifically reviews, in a comparative fashion, the ADR background conditions in Botswana, South Africa and Zimbabwe around the following elements: legislative and political support, institutional support, adequate and competent manpower and financial resource support as a well as power parity of disputants in all the three countries.

6.1.1 Adequate Legislative and Political Support

In terms of legislative and political support of ADR there is clearly an appreciation of the inevitability of out of court settlement (ADR) in all the three countries under investigation herein given the legislative enactments of same vis-a-vis Botswana[1615] RSA[1616] and Zimbabwe.[1617] These pieces of legislation afford ADR to citizens of the respective countries.[1618] This is so given the fact that all three countries have a somewhat similar political history of colonialism and apartheid domination where Native Africans were oppressed and denied political as well as worker's rights by imperial regimes therein.[1619] However, it can be observed that Botswana in 1966[1620] and Zimbabwe in 1980[1621] similarly did not quickly transform the labour dispute settlement schemes upon attainment of independence. RSA on the other hand, immediately transformed its legislative system installing an independent body for resolving labour disputes at independence in 1994 redressing the injustices of the past.[1622]

[1613] Brown *et al.* (1998) 40
[1614] Kerbeshian (1994) 383
[1615] Sections 3, 7 and 8 Act 15 of 2004
[1616] Section 112, Act 66 of 1995
[1617] Sections 93 and 98, Act of 2003 [Chapter 28:01]
[1618] Sections 3, 7 and 8 Act 15 of 2004; Section 112, Act 66 of 1995 and Sections 93 and 98, Act of 2003 [Chapter 28:01]
[1619] Jefferis and Nemaorani (2014) 5 (See Tolcher (2011) 4; Maphosa (1991) 15)
[1620] Kupe-Kalonda (2001) 37
[1621] Sibanda (1989) 18
[1622] Act 66 of 1995

The study must hasten to note that Botswana as does Zimbabwe do not have an ADR system which exists and operates independent of the executive government despite wide acknowledgment of the use of mediation and arbitration, ADR elements, as labour dispute settlement interventions therein.[1623] As a matter of fact, ADR is administered by the Ministry of Labour and Home Affairs under the auspices of the Minister and Commissioner of Labour in Botswana and the Minister and Labour Officers in Zimbabwe, respectively.[1624] The TDA[1625] directs the Minister to establish a panel of mediators and arbitrators whose work in labour dispute settlement is supervised by the Commissioner of Labour in Botswana.[1626] As a matter of fact, this view is corroborated by the popular study of Kupe-Kalonda[1627] who cast doubt on prospects of the establishment of successful ADR techniques in Botswana in the near future as appearing to be slim largely because of (1) the scarcity of private/independent mediation and arbitration services in Botswana and (2) the fact that the Botswana government is the largest employer in the country.[1628] It is unlikely that the government will submit its labour disputes to such private mediation service among other reasons.[1629] This signifies a lack of political will to develop an independent ADR system for labour dispute settlement in Botswana.[1630] In Zimbabwe, likewise ADR runs under the portents of the Labour Department beneath the oversight of the attendant Minister and Labour Officers.[1631] The Zimbabwe government did not take steps to establish an effective, independent and well-functioning ADR system post 1980.[1632] There is an observable general reluctance by the Botswana and Zimbabwean governments to establish an independent body for dispensing with labour disputes.[1633] This underlines the lack of independence of ADR in Botswana and Zimbabwe unlike effective ADR systems obtaining in the UK with its Advisory, Conciliation and Arbitration Services (ACAS) and RSA with its CCMA.[1634]

[1623] Sections 3, 7 and 8 Act 15 of 2004 and Sections 93 and 98, Act of 2003 [Chapter 28:01]
[1624] Section 3 Act 15 of 2004 and Sections 93 and 98, Act of 2003 [Chapter 28:01]
[1625] Ibid
[1626] Ibid
[1627] Kupe-Kalonda (2001) 170
[1628] Ibid
[1629] Ibid
[1630] Ibid
[1631] Madhuku (2012) 5
[1632] Ibid
[1633] Ibid and Kupe-Kalonda (2001) 170
[1634] Madhuku (2012) 11

In RSA, the Act[1635] directs the establishment of an ADR body which is independent and enjoy the autonomy of the state. Section 113[1636] is actually titled 'Independence of Commission' and proceeds to state that:

> "The Commission is independent of the State, any political party, trade union employer, employers' organisation, federation of trade unions or federation of employers' organisations."[1637]

Clearly, RSA has both a legislative and political will and commitment to develop an efficacious ADR system demonstrated in its establishment of an independent body that administers ADR as a labour dispute settlement mechanism.[1638] The LRA[1639] in RSA recognised conciliation, mediation and arbitration as labour dispute settlement mechanisms.[1640]

The Labour Act[1641] in Zimbabwe recognises the inevitability of ADR in the form of conciliation/mediation and arbitration as labour dispute mechanism.[1642] However, in the case of Botswana and in Zimbabwe there is no independent body that administers ADR.[1643] Conciliation and arbitration of disputes are administered by the government through its Labour Officers or in the alternative NECs in the case of union related matters.[1644] The element of independence and unbiased decisions are an unlikely possibility if there is a dispute between an organ of government and its employee for instance. This becomes a troublesome challenge especially when the adjudicator of such a dispute is also a government employee from a sister ministry who ordinarily would be careful not to rule against his or her employer as the saying goes 'he has to remember where his bread is buttered' or 'not to bite the hand that feeds him'.[1645] It sounds more like a cat being appointed a Commissioner of an enquiry into the

[1635] Act 66 of 1995
[1636] Ibid
[1637] Section 113, Act 66 of 1995
[1638] Ibid
[1639] Act 66 of 1995
[1640] Sections 135 and 136, Act 66 of 1995
[1641] Labour Act of 2003
[1642] Sections 93 and 98, Act of 2003 [Chapter 28:01]
[1643] Madhuku (2012) 31
[1644] Ibid
[1645] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5

disappearance of mice.[1646] A Labour Officer may not be best placed to display independence when it come to a matter against executive government which also happens to be his or her employer.[1647] The political will to establish an independent ADR body is a well-commended step towards ADR efficacy. This is one of the most important characteristic elements that determines the effectiveness of an ADR system, among other things.[1648] RSA has done well in this regard[1649] compared to its neighbours, Botswana and Zimbabwe, respectively.[1650] This study found that the Botswana legislature have denied ADR functions the jurisdiction to determine equity disputes.[1651] In Zimbabwe, for instance, such sentiment was affirmed by the learned Judge of the Supreme Court regarding the inadequacies of the arbitrator in dispensing with equity issues in the Delta-Murandu matter.[1652] A similar sentiment emerged in the Montle matter[1653] discussed in chapter 3 of this study in which the learned Judge alluded that mediators and arbitrators in Botswana had not been afforded the latitude to determine equity matters in the TDA.[1654] It was inferred that because the TDA was silent on whether arbitrators and mediators could hear matters that required monetary determination as a form of compensation then the Act[1655] did not intended that they saddle themselves with same.[1656] There is therefore a striking similarity in Botswana[1657] and Zimbabwe in legislature's lack of commitment to afford ADR wide powers to determine matters of equity,[1658] which are afforded compatriots in the South African system.[1659] In RSA, an arbitrator can make an order for monetary compensation,[1660] which are matters of equity not afforded Botswana and Zimbabwe Labour Officers jurisdiction to handle. This is attributed to the possible lack of willpower in the legislature of these two countries to provide.[1661] In Zimbabwe for instance the

[1646] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5
[1647] Ibid
[1648] Brown *et al.* (1998) 40
[1649] Madhuku (2012) 11
[1650] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5 (See Brown *et al.* (1998) 40)
[1651] Section 25 (1) Act 15 of 2004 and
[1652] [2015] S-38-15 (*Gift Bob David Samanyau & 38 Others v Fleximail HH 108/11; Terence Alan Blake & Anor v TABS Lighting (Pvt) Ltd SC 13/10)*
[1653] [2010] 2 BLR 120 IC
[1654] Section 25 (1), Act 15 of 2004
[1655] Ibid
[1656] Ibid. See also [2010] 2 BLR 120 IC and [2015] S-38-15)
[1657] Section 25 (1), Act 15 of 2004 and Section 87 (2)(b)(iii), Act of 2003 [Chapter 28:01]
[1658] Section 87 (2)(b)(iii), Act of 2003 [Chapter 28:01]
[1659] Section 193 (1) Act 66 of 1995
[1660] Ibid
[1661] Section 87 (2)(b)(iii), Act of 2003 [Chapter 28:01] and Section 25 (1), Act 15 of 2004

legislature have saddled the Magistrate and High Courts with the duty to carry out a clerical function of registering arbitral awards[1662] after arbitrators have issued same.[1663] This somewhat usurps the already curtailed powers of the arbitration scheme and saddles the court which is supposed to be relieved of such rather flimsy roles which ought to have been ordinarily left to ADR.[1664] The argument for registering those awards with the courts is so that writs may be issued to allow for the Messenger of Court or the Deputy Sheriff to execute or liquidate the awards.[1665] This is tantamount to a burden of enforcement taken back to the courts which are supposed to be relieved by ADR from the already congested court litigation system.[1666] In RSA the legislature enacted an amendment to the Act[1667] which now affords CCMA powers to enforce its own awards including the issuance of writs for enforcement purposes after the awards are certified by the director of CCMA.[1668]

Botswana, South African and Zimbabwe are members of the ILO, who have proceeded to sign and ratify Conventions and Treaties in respect of establishing International Labour Standards in their respective countries. These conventions essentially provide the basis for fair labour practices enshrined in the respective constitutions of the three countries. In actual fact South Africa at its independence in 1996 benefited greatly through the capacity building initiatives of the ILO in respect of which its first cohort of workers for the CCMA body were trained by ILO. The establishment of an independent labour dispute resolution body was motivated by ILO. On the contrary despite signing and ratifying ILO conventions both Botswana and Zimbabwe have been accused of flouting some of the standards. The Botswana government for instance has been accused of arm-twisting the laws such as its amendment of the Trade Disputes Act of 2015[1669] to extend the scope of essential services so as to curtail the right to strike was considered unfair. The prison service was unfairly piled under essential services against the recommendations of the ILO. Botswana has therefore appeared before the ILO disciplinary committee to answer for

[1662] Section 98 (13) (14), [Chapter 28:14]
[1663] Ibid
[1664] [2016] HC 5061/14
[1665] Section 98 (13) (14), [Chapter 28:14]
[1666] Ibid
[1667] Section 143 (3), Act 66 of 1995 (as amended in 2014)
[1668] Ibid
[1669] Bill No. 21 of 2015

its acts of labour criminality especially its poor compliance of the ILO labour standards as reported at the current Geneva June 106th session by the Committee of Experts.[1670] Zimbabwe on the other hand has also been accused of failing to ratify an international statute which prohibits forced labour under Convention 105.[1671] Further, the Supreme Court of Zimbabwe wrongfully decided in Nyamande matter[1672] in affording employers the so called common law right to terminate employment contracts of employees by way of notice. This violates the Constitutional right to fair labour practices and Convention 150[1673] dealing with the right to compensation in termination of employment. Botswana and Zimbabwe have not had a good record with enforcement of International Labour Standards despite ratifying the conventions they are accused of flouting. South Africa has ratified most of the conventions ratified by Botswana and Zimbabwe but has achieved many strides and milestones both in terms of institutional building and attaining industrial democracy.[1674]

According to Steadman:[1675] "The ILO[1676] helped to establish the CCMA in 1996 as an independent institution for dispute settlement. The ILO, working with the representatives of government, business and labour in South Africa, convened a CCMA Establishment Secretariat comprising of a range of experts, and then played a key role in setting up the institutional structures, trained over 100 full-time and 300 part-time conciliators and arbitrators, and over 300 support staff, and developed an electronic case management system that deals with over 100 000 cases each year."[1677] There is a lot to learn for Botswana and Zimbabwe especially in letting go of the clenched fist when it comes to establishing independent systems for administering ADR processes in labour disputes and providing sufficient funding for it. That is the only hope of establishing efficacious ADR processes for labour dispute resolution in the respective countries.

[1670] Mmegi https://www.mmegi.bw/index.php?aid=69405&dir=2017/june/09 Date of use: 28 June 2019
[1671] Ncube https://www.newsday.co.zw/2017/05/zimbabwe-set-appear-ilo/ Date of use: 28 June 2019
[1672] SC 43/15, see also Matsikidze (2017) 33
[1673] Convention (C150), ILO
[1674] Steadman (2011) 43
[1675] Ibid
[1676] ILO/Swiss Project on Regional Conflict Management and Enterprise Competitiveness Development in Southern Africa was implemented in the six Southern African countries under the aegis of tripartite task forces. The project which ended in 2006 was implemented in two phases: from 2000 – 2002 and from 2003 – 2006, with funding from the Swiss Government
[1677] Steadman (2011) 43

6.1.2 Supportive Institutional Capacity and Cultural Norms

Supportive institutional and cultural norms determine the ability of a system to be accepted as a legitimate way of resolving disputes.[1678] It captures elements of autonomy and independence of the system.[1679] Whether or not ADR will be acceptable is heavily dependent on involvement of stakeholders in its design and implementation.[1680] Questions of whether ADR is professionally run and dispensing with disputes in a manner considered just and fair is a case in point.[1681]

The strikes that saddled Botswana in 1992 coupled with the economic structural adjustment programmes that swept across SADC countries led to a rethink of labour legislation.[1682] In Botswana the dispute resolution system is not independent as it is still operated within the grip of the central government's ministries in particular the DoL hence the lack of an adequate institutional support for ADR.[1683] This is unlike some countries, for example RSA, where the system has been separated from government and functions as an autonomous body.[1684] Administration of ADR processes in labour disputes remains the prerogative of the Botswana executive arm of government, that is, through its Labour Officers and Commissioner of Labour.[1685] The question of independence in terms of administration of ADR is not fully recognised especially in an environment where unions and civic organisations in general are considered as weak and subservient to the government.[1686] While the step to institute ADR in the labour dispute settlement space signifies the need for legislative processes that advocate for establishment of an independent agent or body, this has not been addressed in Botswana and Zimbabwe labour laws.[1687] The ADR system is not completely free from impartiality and potentially arbitrary decisions especially if the disputants before it include the government as a disputant against an employee for instance.[1688]

[1678] Brown *et al.* (1998) 40
[1679] Ibid
[1680] Ibid
[1681] Ibid
[1682] Kupe-Kalonda (2001) 44
[1683] Ibid 170
[1684] Section 113, Act 66 of 1995
[1685] Section 3, Act 15 of 2003.See also Kupe-Kalonda (2001) 170
[1686] Motshegwa and Bodilenyane (2012) 72
[1687] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5
[1688] Ibid (See Kupe-Kalonda (2001) 170)

South Africa, has reinforced strong supportive institutional and cultural norms notably, through the establishment of the CCMA, an independent statutory body with a governing board which is fully-funded by the state.[1689] As such the availability of information on status of dispute settlement in RSA is obtainable and available.[1690] The CCMA is always undergoing transformation to cater for the changing needs of the labour dispute settlement regime.[1691] In Botswana however, the lack of institutional support has made availability of information on the status of dispute settlement an impossible or tenuous endeavour.[1692] Accessing information regarding the number of disputes that go through the government scheme of dispute settlement proved a non-starter to this study.[1693] This is the reason why this study relied on case law particularly selected court cases, discussed in chapter 3 in the case of Botswana and chapter 5 in the case of Zimbabwe. These cases represent disputes that were escalated to the courts for review, having failed to be resolved by ADR processes (mediation and arbitration) in Botswana and Zimbabwe, respectively. This step was taken in this study as an important effort to glean for characteristic elements of the ADR efficacy status in Botswana, South Africa and Zimbabwe.[1694] This is so with Zimbabwe. Information on the status, that is, nature, quantum of disputes that go through the government scheme of dispute settlement proved unattainable.[1695] This study had to rely on reported court cases, discussed in chapter 5 at 5.5.1.1 of this study, matters which also failed to have resolve at ADR vis-a-viz arbitration and conciliation.[1696]

This study analysed relevant case law in Zimbabwe and Botswana to generate a profile of why such matters failed to be resolved by the respective Departments of Labour seized with that responsibility in the two countries and identifying the key themes emanating therefrom.[1697] In so doing the study was able to pick issues such as jurisdictional limitations of ADR;[1698] the misdirection of arbitrators and mediators when

[1689] Benjamin (2013) 4
[1690] CCMA (2016) 18
[1691] Benjamin (2013) 4
[1692] CCMA Annual Report 2015-2016 (2016) 54 (See Benjamin (2013) 4)
[1693] Madhuku (2012) 36
[1694] [2004] (1) BLR 250 (IC); [2007] (1) BLR 307 (IC) and [2009] 1 BLR 135 C
[1695] Madhuku (2012) 36
[1696] [2015] CC-8-15 ([2015] HH-707-15; [2015] HH-714-15; [2015] S-46-15 and [2015] S-47-15)
[1697] [2015] CC-8-15 ([2015] HH-707-15; [2015] HH-714-15; [2015] S-46-15; [2015] S-47-15); [2004] (1) BLR 250 (IC); [2007] (1) BLR 307 (IC) and [2009] 1 BLR 135 C
[1698] Section 25 (1), Act 15 of 2004 and Section 87 (2)(b)(iii), Act of 2003 [Chapter 28:01] (See also [2015] S-38-15)

dispensing with disputes which became a matter of record through court records of same;[1699] lack of competences among ADR practitioners in the two respective countries;[1700] and the cavalier reliance by employers on *in limine* processes by way of appeals at court to evade compensating winners of awards among others. The study also considered the courts as reluctant to let go clerical functions such as registering arbitral awards, which should have been left to the ADR processes to determine and dispense with in the case of Zimbabwe;[1701] and the lack of latitude to dispense with disputes requiring monetary compensation in Botswana and Zimbabwe respectively, among other issues.[1702] These pinpoint the reluctance of legislature to provide support to the ADR regime.[1703] While both Botswana[1704] and Zimbabwe[1705] may be credited with the establishment of courts as institutions that dispense with disputes the schemes under government supervision are not adequate in giving ADR the full scrum status it should ordinarily enjoy.[1706] Courts may aid ADR but may also stifle speedy resolution of disputes as they are already categorized as inundated with matters and unable to achieve efficacy.[1707] Be that as it may, in the case of RSA's CCMA the Act[1708] specifically provides that as one of its main functions the CCMA must:

> "…compile and publish information and statistics about its activities."[1709]

This mandate[1710] has been clearly executed, as this study was able to access information about the nature of disputes that go before the CCMA accompanied by a review of ADR performance in RSA, something that could not be ascertained with ease in the case of Botswana and Zimbabwe, respectively.[1711] CCMA publishes annual reports detailing its ADR activities in labour dispute resolution in South Africa from the

[1699] [2015] S-38-15 and Ntumy (2016) 56
[1700] Section 25 (1), Act 15 of 2004 and S 87 (2)(b)(iii), Act of 2003 [Chapter 28:01]. See also [2015] S-38-15)
[1701] Ibid
[1702] Ibid
[1703] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5
[1704] Section 15 (1), Act 15 of 2003
[1705] Section 84(1), Act of 2003 [Chapter 28:01]
[1706] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5
[1707] Love (2011) 1. See also Brown *et al.* (1998) 1; Kupe-Kalonda (2001) 170 and Madhuku (2012) 5)
[1708] Section 115 (1)(d), Act 66 of 1995
[1709] Section 115 (1)(d) Act 66 of 1995 (See CCMA (2016) 54)
[1710] Section 115 (1)(d) Act 66 of 1995
[1711] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5

time it was established to the present.[1712] CCMA has been accused by Venter & Levy[1713] of reporting successes which are not a correct reflection of what is transpiring on the ground. This is so especially that on its settlement rate it piles conciliation and arbitration outcomes yet conciliations are attributed to the parties to resolve and not necessarily in the power of CCMA to decide.[1714] This implies CCMA reports should record its success rate as reflecting arbitration matters settled given that those are the matters it does resolve and not conciliations. From the foregoing discussion one can deduce that the contention of the meaning of settlement and settlement rate suffers from vagueness and uncertainty. The annual reports published by the CCMA detailing its successes are far from perfect and provide a blurred picture in thinking with the aim of this study to ascertain ADR efficacy in labour dispute resolution. One cannot but foresee that a large amount of technical and unnecessary battle exists as a result of this anomaly – primarily this is an interpretation problem. It however does not help this study to ascertain with certainty, the meaning of efficacy of ADR in labour disputes.

In Zimbabwe, much like the Botswana cases, the ADR processes are recognised but curtailed by the fact that they are being administered under the auspices of the executive government.[1715] This underlines the concept of independence that underpins an ADR efficacy as potentially compromised.[1716] Ideally, ADR would work well outside the auspices of executive government and the judiciary given its conceptual construction as an 'out of court settlement' regime.[1717] Clearly, Zimbabwe has not taken steps to develop institutions that would ensure an efficacious administration of ADR with such autonomy and independence as would have been desirable.[1718] This is the same inadequacy levelled against the Botswana government, which has been reluctant to develop an independent institution for dispensing with labour disputes but rather opt to saddle this with the executive government.[1719]

[1712] CCMA (2016) 54
[1713] Venter & Levy (2011) 47
[1714] Ibid
[1715] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5
[1716] Brown *et al.* (1998) 40
[1717] Love (2011) 1. See also Brown *et al.* (1998) 1 and Wiese (2016) 2)
[1718] Madhuku (2012) 5
[1719] Section 3(2), Act 15 of 2004

6.1.3 Adequate and Competent Manpower

In Botswana, the Trade Dispute Act[1720] directs the Minister of Labour, Home Affairs and Social Security to oversee the establishment of a panel and attendant appointment of mediators and arbitrators to mediate on labour disputes.[1721] In terms of the Act[1722] the Minister ought to establish a panel of mediators and arbitrators competent in matters of labour law or labour relations or other relevant specialist areas of expertise.[1723] However, the Act[1724] does not state the minimum qualifications required for a person to qualify as a panel member such as short course, certificate, diploma, or degree which leaves it open to ambiguity.[1725] The panel is to be comprised of a mix of full time and part time mediators and arbitrators appointed by the Minister after conferring with the Board.[1726] The panel will discharge its statutory duties, under the direction or control of the Commissioner of Labour employed by the Department of Labour (emphasis mine).[1727] The Act[1728] restricts direct access to the Industrial Court herein (the IC").[1729] Regard must be had to the mediation and /or arbitration processes before resort is had to the IC.[1730] However, there has been an outcry of lack of adequately skilled manpower to dispense with labour disputes hence the increase in unresolved disputes across all the regions in Botswana.[1731]

In RSA, the LRA[1732] directs the CCMA to appoint competent persons as Commissioners on the strength of their experience and expertise to perform the functions of Commissioner in labour dispute settlement.[1733] The CCMA conducts capacity building programmes for its Commissioners who carry out the work of labour dispute settlement on a regular basis. For example, it has been reported that:[1734]

[1720] Act 15 of 2004
[1721] Section 3(3), Act 15 of 2004
[1722] Act 15 of 2004
[1723] Ibid
[1724] Act 15 of 2004
[1725] Section 3(3), Act 15 of 2004
[1726] Section 4, Act 15 of 2004
[1727] Section 3(4), Act 15 of 2004
[1728] Act 15 of 2004
[1729] Section 3(3), Act 15 of 2004
[1730] Section 15(1), Act 15 of 2004
[1731] Kupe-Kalonda (2001) 44
[1732] Act 66 of 1995
[1733] Section 117, Act 66, of 1995 As Amended
[1734] CCMA Annual Report 2015-2016 (2016) 54

> ‘During the period under review, sixty-three (63) training interventions carried were out involving, two thousand eight hundred and twelve (2,812) CCMA employees in capacity-building initiatives. Of that number, one thousand one hundred and ninety-two (1,192) were Commissioners who attended labour law amendments and Commissioner capacity-building programmes. A significant amount of work was carried out to further capacitate Commissioner in specialist areas. This target was qualitatively and quantitatively achieved’.[1735]

Clearly, from the foregoing, RSA has a commitment to establish a successful ADR system of labour dispute settlement which adequately equips its human resource base to equal the task.[1736] This is one of the ways that enhances the effective adjudication of cases successfully, enhancing ADR efficacy in line with the aim of this study.

In Zimbabwe conciliation was the priority of the Labour Officers to dispense with until the award, which could only be challenged at arbitration or Labour Court. However, the law only changed in 2006 when it was amended to give regard to the fact that Principal Officers had only a mandate to attempt to resolve disputes by facilitating dialogue.[1737] When they fail to settle they are directed by the Labour Act[1738] to refer the matter to arbitration.[1739] The position that when Labour Officers fail to facilitate resolution of disputes through conciliation must escalate them to arbitration was corroborated by a code that was gazetted on 27th January 2006.[1740] The position that was taken through such code was to ensure that Labour Officers did not become self-imposing on disputants but limited their role to facilitation and referral as the case may be.[1741] Clearly, Botswana and Zimbabwe have challenges pertaining to manpower to administer ADR processes while South Africa has done significantly well on the same issue.

[1735] Ibid
[1736] CCMA Annual Report 2015-2016 (2016) 54
[1737] Section 8(7), Statutory Instrument 15 of 2006
[1738] Act of 2003 [Chapter 28:01]
[1739] Ibid
[1740] The National Employment Code of Conduct Regulations, 2005 (2006)
[1741] Section 8(7) Statutory Instrument 15 of 2006

6.1.4 Adequate Financial Resources

In Botswana, there is no provision for funding of ADR in the Trade Disputes Act herein TDA.[1742] It would be assumed that since most of ADR processes are administered under the Department of Labour, the executive government would incorporate the system under such Department of Labour's budget allocation.[1743] The idea earlier alluded to by Kupe-Kalonda[1744] that the ministry could not cope with cases referred to it could attributed to the lack of adequate funding in the case of Botswana.[1745]

In RSA, ADR is fully funded by the executive government though not housed under Department of Labour.[1746] That CCMA is fully funded which makes the body able to achieve over 75% settlement rate of cases brought before it.[1747] The body is composed of chief financial officer herein the ("CFO")'s office seized with the role of oversight over four (4) component roles, namely: financial management, supply chain management, risk management and financial information systems.[1748] The office of the chief financial officer is responsible for financial reporting and accounting for finances of the institution among other things.[1749] This is an important factor for this study as it speaks to the ability to make ADR processes affordable to the common man who requires labour dispute resolution and access to justice.

In Zimbabwe, there is no provision for funding of ADR processes except that these functions are carried out under the auspices of the government budget as part of normal operations of the state.[1750] However, the Act[1751] empowers the Labour Officers to assist in ascertaining party costs between disputants.[1752] An empirical review of the situation on the ground showed that there lacked basic office stationary such as bond paper for printing, lack of a photocopier and motor vehicles for purposes of conveying documents and lack of funds for postage uses save telephones in offices of Labour

[1742] Act 15 of 2003
[1743] Section 3, Act 15 of 2003
[1744] Kupe-Kalonda (2001) 170
[1745] Ibid
[1746] Benjamin (2013) 6
[1747] Ibid
[1748] CCMA Annual Report 2015-2016 (2016) 82
[1749] Ibid
[1750] Maitireyi and Duve (2011) 138
[1751] Act of 2003 [Chapter 28:01]
[1752] Madhuku (2012) 36

Officers who administered ADR roles.[1753] It is discernible from the foregoing analysis that Zimbabwe's ADR is not adequately resourced and funded which has negative implications on its efficaciousness in resolving labour disputes.

6.1.5 Parity in the Power of Disputants.

Botswana is considered an unequal society where the government has dealt a heavy hand on labour issues and those that promoted dissent such as unions.[1754] Thus Botswana has a weak civic society and such inequalities make ADR generally skewed towards wielders of power especially the capitalists.[1755] The unions for instance bargained from a constricted position given the government tendency to deal a heavy hand on dissent[1756] and particularly the handling of all ADR functions without need to shed it to an independent body.[1757] A case in point is that in the early 80s, 1991 and 2011 strikes in Botswana saw many people lose their jobs and the government making drastic decisions on wages as well as limiting the right to strike.[1758] The right to strike was limited by increasing the number of categories of workers who fell under what are termed as essential services.[1759] This was viewed as exercising a heavy hand.[1760] The reluctance to institute an independent ADR body has been viewed as the hesitance by government to submit itself under an independent body should it be brought before such tribunal by its own workers in labour disputes.[1761] This has pretty been much the same as in Zimbabwe where a post-colonial government used colonial language on striking workers and promised to crack a whip on them if they did not return to work.[1762] Over the years the right to strike has been restricted by summon emergency powers of the President of Zimbabwe rather than resort to industrial democracy – for instance the Presidential ban on stay-aways in 1999 is a case in point.[1763] This generally weakened the labour dispute settlement system in Zimbabwe rendering it

[1753] Ibid
[1754] Bertelsmann Stiftung (2016) 25
[1755] Bertelsmann Stiftung (2016) 25
[1756] Motshegwa and Bodilenyane (2012) 72
[1757] Kupe-Kalonda (2001) 170
[1758] Mwatcha (2015) 45
[1759] Ibid
[1760] Ibid
[1761] Kupe-Kalonda (2001) 170
[1762] Sibanda (1989) 18
[1763] Sambureni and Mudyawamikwa (2007) 30

inefficacious.[1764] The amendments of 2003 further developed the ADR elements to entrench mediation and arbitration.[1765] However, in terms of performance of ADR Botswana system of dispute settlement, lacks adequate legislative and political support.[1766] Buy-in from other actors is very weak given that they government uses a prescriptive approach, with a heavy hand, which tends to relegate unions to the status subordinates and not equal partners.[1767]

The RSA is also regarded as an unequal society.[1768] This may have an effect on the ability of ADR to achieve its objectives. Already it is noted by CCMA commissioners that internal dispute settlement schemes in the workplaces are weakened by power play between players therein especially that employers have a general preference for arbitration so as to reaffirm their dominance.[1769] Reliance on grievance procedure in that light is perceived as a threat to management power, which perception needs correction.[1770] This already signifies that the lack of power parity in the country generally has a negative bearing on the system of labour dispute settlement.[1771] Unfortunately, this study has no specific data on which to substantiate the argument that there may be lacking power balance in ADR systems in RSA. One can however surmise that affordable access to justice is an attempt taken by the government to ease the pressure on the common man who otherwise would not have recourse in dispute situations.

In Zimbabwe it has already been indicated that the government plays a heavy hand on all systems of society often characterised by a weak labour movement (union) and a consequent lack of industrial democracy.[1772] This undermines the levelling of the playing field that would make it unpalatable with the ideals of ADR.[1773] Reports[1774]

[1764] Ibid (See also Sibanda (1989) 18)
[1765] Sections 8 and 9, Act 15 of 2003
[1766] Kupe-Kalonda (2001) 170
[1767] Sibanda (1989) 21 (See also Madhuku (2012) 31; Maphosa (1991) 22; Kupe-Kalonda (2001) 40 and Ntumy (2016) 59)
[1767] Kupe-Kalonda (2001) 170
[1768] Lings (2014) 15
[1769] Bendeman (2007) 157
[1770] Ibid
[1771] Ibid
[1772] Maphosa (1991) 22
[1773] Ibid
[1774] Madhuku (2013) 38

indicate that there is favouritism in allocation of arbitrators by Labour Officers. The Supreme Court of Zimbabwe in Nyamande matter[1775] gave the employers unbridled power to the disadvantage of employees in respect of which it stated that employers had a common law right to terminate employment contracts by issuance of a no-fault notice to such employees. This does not help in generating power parity in labour dispute resolution which is a prerequisite for efficacious ADR processes in labour disputes. All the three countries have some inadequacies in regards to power-parity though South Africa has attempted to shield society from abuse by the establishment of an independent body for dispensing with disputes,[1776] Botswana and Zimbabwe respectively have lagged behind in this regard.[1777]

6.2 ADR Program Design Considerations

It is important for this study to ascertain how the planning and implementation of processes compares in the three countries in relationship to the aim of the study. This section therefore discusses ADR design considerations within Botswana, South Africa and Zimbabwe with specific focus on planning and preparation as well as operations and implementation.[1778]

6.2.1 Planning and Preparation

In terms of jurisdictional elements of ADR there is a clear elaboration of matters that must go through to mediation and arbitration in Botswana.[1779] The RSA Act[1780] directs the Commissioner of Labour to determine which matters go through mediation and which ones go through arbitration.[1781] There is no specific definition of those matters that must fall within the jurisdiction and in fact, the Act[1782] directs that the mediator may determine with questions concerning whether a dispute has been referred in terms of

[1775] SC 43/15, see also Matsikidze (2017) 33
[1776] Section 112, Act 66 of 1995
[1777] Kupe-Kalonda (2001) 170 and Madhuku (2012) 5
[1778] Brown *et al.* (1998) 40
[1779] Sections 7 and 8, Act 15 of 2003
[1780] Section 113 (1), Act 66 of 1995
[1781] Sections 7 (1) (a)(b), Act 15 of 2003
[1782] Act 15 of 2003

section 7; the date on which the disperse was referred and the mediator's jurisdiction to mediate the dispute.[1783] The Act provides for both right and interest disputes.[1784]

The RSA has adequate legislative enactments on jurisdiction of ADR bodies.[1785] South African legislation as in Botswana's case does not define with exactitude the cases that are within the jurisdiction of mediators and arbitrators.[1786] The Act[1787] directs that a Commissioner of Labour must conciliate matters referred to it in terms of the Act.[1788] It is actually contended that the CCMA is inundated with matters outside its mandate as many as 20-25% of total referrals each year.[1789] The most common non-jurisdictional matters needing referral elsewhere comprise bargaining council matters, grievances arising under the Basic Conditions of Employment Act herein ("BCEA"), and sector matters falling within the ambit of the labour inspectorate housed in the Department of Labour.[1790] There are matters about which the employer may subsequently raise jurisdictional queries such as applicant was never their worker but rather an independent contractor, or simply that the applicant resigned and was not dismissed.[1791] These issues take centre stage at the commencement of the arbitration process.[1792]

Zimbabwe also suffers the challenge of not having a clear definition of matters that fall within the jurisdictional scope of conciliators/mediators.[1793] The role has been left to Labour Officers to determine.[1794] In the provision, that delineates the powers of Labour Officers the Act[1795] states:

[1783] Section 8 (5) (a) (iii), Act 15 of 2003
[1784] Section 2, Act 15 of 2003
[1785] Section 115, Act 66 of 1995
[1786] Section 115, Act 66 of 1995 and Sections 7 and 8 Act 15 of 2003
[1787] Section 115, Act 66 of 1995
[1788] Section 115 (1) (a), Act 66 of 1995
[1789] Benjamin (2013) 14
[1790] Ibid 15
[1791] Benjamin (2013) 14
[1792] Ibid
[1793] Section 93, Act of 2003 [Chapter 28:01]
[1794] Ibid
[1795] Ibid

> "A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration."

There is no reference to specific matters defined as those that must be brought to the Labour Officer except for unfair labour practice which in and of itself is also laden with vagueness as to its exact meaning.'[1796]

6.2.2 Operations and Implementation

There is no record this study is aware of a case management system administered in Botswana's Department of Labour – dispute resolution unit to whom matters are referred.[1797] This could imply that a manual system of reporting and dispensing with labour cases is at play given that the Act[1798] does not specify the manner of referring of cases and administration thereof.[1799]

In RSA, through its CCMA body, runs a case management system which tends to screen cases against those that are within its jurisdiction and the non-jurisdictional ones.[1800] This helps to expedite dispute resolution in the cases that falls within CCMA's ambit.[1801] The case management system is used to screen cases and further send short message services to disputants on case dates and place of meeting and other communication needs.[1802]

In Zimbabwe, it was confirmed that disputes are recorded and dealt using a manual system controlled by Labour Officers given the lack of a case management system.[1803] In that case a duty officer is placed in the Ministry whose role is to listen to the stories and complete a complaint form.[1804] The duty officer ought to collect the form and submit it to the Provincial Labour Officer who allocates it to the labour officer in line through a

[1796] Ibid
[1797] Sections 7 and 8, Act 15 of 2003
[1798] Ibid
[1799] Ibid
[1800] CCMA (2016) 11
[1801] Ibid
[1802] Ibid
[1803] Madhuku (2013) 35 and Sections 7 and 8, Act 15 of 2003
[1804] Ibid

roaster system for resolution.[1805] The Labour Officers files notifications using Form L.R. 6 (SI217/2003).[1806] Apparently, disputants must do their own notification given the lack of resources such as transport and postage at the Ministry.[1807] Comparatively, CCMA in RSA uses an electronic system where parties can be notified using email and short message service.[1808] This is corroborated in a study conducted by Benjamin,[1809] which states:

> "The development and tailoring of an electronic Case Management System has enabled it to enhance the efficiency of its processes, while at the same time being a source of key labour market information. The CCMA has embraced technology in a number of aspects of its operation, for instance, by using SMSs to notify parties of hearings."[1810]

Botswana and Zimbabwe have to consider using the information age to use electronic systems for administering and dispensing with labour disputes.[1811] A lot can be learned from the RSA example who despite its attendant challenges have attempted to establish an effective scheme for effectively dispensing with labour disputes therein.[1812]

6.3 The ADR Measures of Efficacy

This section compares Botswana, RSA and Zimbabwe in respect to ADR measures of efficacy with specific focus on client satisfaction, settlement and enforcement, efficiency in terms of time as well as cost effectiveness.[1813]

[1805] Ibid
[1806] Ibid
[1807] Ibid
[1808] Benjamin (2013) 46
[1809] Ibid
[1810] Benjamin (2013) 46
[1811] Madhuku (2013) 35
[1812] CCMA Annual Report (2016) 11 (See Benjamin (2013) 46)
[1813] Kerbeshian (1994) 383

6.3.1 Time Efficiency of ADR

Efficiency measures timeliness of settlement of disputes.[1814] The duration taken to have a matter dispensed via the ADR scheme relative to traditional court litigation generates interest in measures of ADR efficacy.[1815] This is also regarded as disposition time, measured as the total time from lodgment to settling a matter.[1816]

In Botswana, the matter of efficiency has not been reported given that there is no information, this study is aware of, regarding settlement rate.[1817] This makes it difficult for this study to know if ADR in Botswana is efficient in its administration of ADR processes.

In RSA efficiency is rated from time data is referred to CCMA and the time it took to settle. Table 2 indicates that on average between 2011 and 2016 conciliations against the standard of 30 days to settle have been settled on average of 24 days while arbitration using a standard measure of 60 days within which to settle have taken 59 days on average in 2011, 61 days in 2012, 2014 and 2015 and 68 days in 2013.[1818] There is evidence of improvement but the CCMA has only met its standard once in five years.[1819]

In Zimbabwe, there is also a challenge of information asymmetry as is the case with Botswana regarding efficiency of settlement.[1820] The government, which is solely responsible for settlement of labour disputes, has not provided data on settlement, which is unavailable to this study.[1821] The only information available to this study is secondary literature, which apparently focused only on arbitration ratings and not on other elements of ADR for instance conciliation or mediation.[1822] Arguably, efficiency in labour dispute settlement is problematic in Zimbabwe granted that even through

[1814] Kerbeshian (1994) 383 (See Love (2011) 3)
[1815] Love (2011) 3
[1816] Ibid
[1817] Gumede http://www.africanlii.org/content/swazilands-benchmarcks-conciliation-mediation-and-arbitration Date of use: 10 April 2017
[1818] CCMA (2016) 11
[1819] Ibid
[1820] Gumede http://www.africanlii.org/content/swazilands-benchmarcks-conciliation-mediation-and-arbitration Date of use: 10 April 2017
[1821] Maitireyi and Duve (2011) 141
[1822] Ibid

arbitration processes were timely but did not bring finality to disputes.[1823] Awards issued to winning parties still have to go through the cumbersome clerical process of registering them with the Magistrate Court or High Court to enable obtainment of writs of execution before enforcement and liquidation can be attained.

Alternative Dispute Resolution must be conducted within reasonable time in order to dispense with disputes which is a far outcry of the litigation process which takes forever to do the same.[1824] The argument that ADR saves time compared to court litigation is an argument widely endorsed by ADR scholars.[1825] Some of the ways in which time saving nature of ADR can be determined is through setting prescription times by which matters in dispute must have been resolved.[1826] Botswana[1827] and RSA[1828] have time limits within which disputes must be resolved and Zimbabwe does not have. For example, 30 days, that are to be taken to resolve a matter with respect to mediation and arbitration.[1829] This study found that both in Botswana and RSA an arbitrator or mediator is required to resolve a matter through mediation within 30 days of its enrolment with him/her.[1830] When s/he has failed to do so within 30 days he is obligated by statute to issue a certificate of failure to settle which ought to be returned to the commissioner for re-direction.[1831] If a matter is for instance committed to mediation and fails to be settled at that level, it may be committed to arbitration as shown in table 3.[1832]

[1823] Ibid
[1824] Love (2011) 5
[1825] Love (2011) 5, (See also Sander and Goldberg (1994) 68 & Wiese (2016) 2)
[1826] Ibid
[1827] Section 8(1), Act 15 of 2003
[1828] Section 135 (2), Act 66 of 1995 (As amended)
[1829] Section 8 (1), Act 15 of 2004 and Section 135 (2), Act 66 of 1995 (As amended)
[1830] Section 8 (1), Act 15 of 2004 and Section 135 (2), Act 66 of 1995 (As amended)
[1831] Section 135 (5)(a), Act 66 of 1995 (As amended) and Section 8 (1), Act 15 of 2004
[1832] Ibid

Table 2 Prescriptions for dispensing with ADR

ADR process	Countries Provisions		
	Botswana	South Africa	Zimbabwe
Mediation	30 days[1833]	30 days[1834]	None
Arbitration	30 days[1835]	60 days[1836]	None

Once a matter is committed to arbitration, it must be resolved within 30 days at the end of which an arbitration award must be made.[1837] However, some of the challenges levelled against mediators in Botswana is that they fail to differentiate between failing to settle a matter and failing to attempt to settle a matter.[1838] In certain respects mediators do not even attempt to intervene in the given dispute which is a disservice to the ADR community.[1839] They wait for the 30 day period to finish and issue a certificate of failure to settle and that is essential a miscarriage of the mediation mandate is.[1840] The general undertaking is that mediation must have taken place first before it is rendered as having failed to resolve a dispute, not failing to even mediate at all.[1841] Zimbabwe does not have the same prescription requirements set and directed towards saving time in ADR officiated disputes.[1842] This study also found that RSA has a system that traces the performance of its ADR system from the time a case is referred to the time it gets settled.[1843] On record RSA has a 75% settlement rate over the past five years.[1844] Botswana and Zimbabwe both lack data, at least available at the time of conclusion of this study to ascertain the performance of the ADR system.

[1833] Section 8 (1), Act 15 of 2004
[1834] Section 135 (2), Act 66 of 1995 (As amended)
[1835] Section 9 (9), Act 15 of 2004
[1836] Section 139 (1) (a), Act 66 of 1995 (As amended)
[1837] Section 136 (1) (b), Act 66 of 1995 (As amended) and Section 9 (6), Act 15 of 2004
[1838] Frimpong (2006) 116
[1839] Frimpong (2006) 116
[1840] Ibid
[1841] Ibid
[1842] Madhuku (2012) 11
[1843] CCMA *Annual Report* (2016) 31
[1844] CCMA (2016) 31

6.3.2 Cost Effectiveness of ADR

Several studies[1845] have reviewed ADR efficacy especially in so far as it is assumed it reduces costs of dispute resolution when held in comparison to court litigation.[1846] Cost estimates as regards savings tend to vary significantly from study to study, depending on the type of ADR scheme under review, nature of dispute, the intervention used, and the conditions at the local level in each jurisdiction.[1847]

In Botswana, there is no cost that disputants incur to have their disputes mediated and arbitrated. The TDA[1848] is silent on cost except only for penalties imposed on parties or their representatives for offences such as contempt for instance and also instances in which a party employs the services of an attorney in arbitration proceedings.[1849] The Act[1850] directs that the arbitrator may not dispense with order of costs in arbitral awards except in circumstances where disputants are agreeable thereto; or a disputant or representative behaved indignantly, frivolously or in a manner vexatious during proceedings.[1851] In RSA, ADR is less costly given that there is no payment charged for persons who utilise the services of CCMA granted that it is fully funded by the government.[1852] However, ADR offered by private entities costs an arm and a leg, which are beyond the affordability level of individual workers and small employers.[1853]

Arbitration in Zimbabwe was inaccessible to the simple man for want of simplicity of the process confirmed by 60% of those surveyed especially that 71% respondents in the worker category opined that arbitration was unaffordable and therefore prohibitive to disputants due to cost.[1854]

[1845] Love (2011) 3 and Folberg and Rosenberg (1994) 1488
[1846] Kerbeshian (1994) 383 (See Rosenberg and Folberg (1994) in Shin (2011) 4 Love (2011) 3 and Wiese (2016) 2)
[1847] Wiese (2016) 2, See Love (2011) 1
[1848] Act 15 of 2003
[1849] Section 8 (11) (a), Act 15 of 2004
[1850] Act 15 of 2003
[1851] Section8 (11) (a), Act 15 of 2004
[1852] Benjamin (2013) 6
[1853] Bendeman (2007) 142
[1854] Maitireyi and Duve (2011) 141

6.3.3 Settlement and Enforcement

Settlement and enforcement of disputes is regarded as an important element in ADR efficacy.[1855] Alternative Dispute Resolution has potential to aid the justice system in a country running more efficiently. It could save costs and time while increasing user satisfaction. A study by Genn and others[1856] conversed an involuntary ADR scheme, regarding instant escalation of matters to mediation, at play in London.[1857] Of as many as 1,232 matters escalated to the program, about 14 percent were mediated; the rest returned to the courts.[1858] Those successfully settled amounted to only 55 percent in the no-objection category while 48 percent matters had disputants persuaded to mediate.[1859]

In Botswana, data number of labour disputes that go through the Ministry and those that are settled expeditiously is scant.[1860] The only information available to this study is the sporadic data on number of cases that go through the system.[1861] If there is settlement rate it would help measure the rate at which labour cases are being resolved. This study learnt that the Ministry which runs the ADR system in inundated with caseload for want of speedy settlement.[1862]

In RSA, not only is there a system that tracks performance of ADR but rates the performance of CCMA including its ability to settle cases.[1863] Table 2 shows that CCMA has achieved a settlement rate of 75% on average.[1864] This signifies an effective system of labour dispute settlement to be emulated by other developing countries though it requires reframing of settlement around consensus driven approaches.[1865] Since it is not CCMA commissioners who settle conciliation disputes it should not be registered as CCMA settlement success. What is not in dispute is arbitration disputes

[1855] Kerbeshian (1994) 383. See also Love (2011) 6)
[1856] Genn, Fenn, Mason, Lane, Bechai, Gray and Vencappa *"Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure"* (2007). See also Love (2011) 6)
[1857] Genn et al. (2007). See also Love (2011) 6)
[1858] Ibid
[1859] Genn et al. (2007). See also Love (2011) 6)
[1860] Kupe-Kalonda (2001) 44
[1861] Ntumy (2016) 56
[1862] Kupe-Kalonda (2001) 44
[1863] CCMA Annual Report (2016) 11
[1864] Ibid
[1865] Benjamin (2013) 45

where the commissioner reaches a verdict. South Africa has also, on a positive note, enacted section 143 to the Labour Relations Act[1866] which seeks to shorten the process of enforcing an arbitration award. In terms of that section a winner can get the director of CCMA to certify the award and that will effectively convert it into an order of the Magistrate Court as opposed to the past approach where after receiving it, one took it to court to be converted into such an order. The Department of Labour in South Africa is also paying the cost of disputing for those employees who cannot afford to enforce their awards. These are positive steps South Africa has put in place as a push in the right direction especially in making ADR in labour disputes, efficacious.

Table 3 Number of disputes referred to CCMA 20011 - 2016

Referrals	**2011-2012**	**2012-2013**	**2013-2014**	**2014-2015**	**2015-2016**
Total referrals	161 588	168 434	170673	171854	179528
Jurisdictional cases	**126 504**	**131 564**	**134 943**	**137 479**	**145 728**
Non-Jurisdictional	35 084	36 870	35 730	34 375	33 800
Pre-conciliations heard	16%	17%	17%	15%	17%
Pre-conciliations finalised	8%	9%	11%	11%	11%
Corn/Arb finalised	36%	36%	40%	38%	37%
Conciliations heard and closed	96%	96%	96%	96%	96%
Arbitrations finalised	95%	95%	95%	95%	95%
Late Awards - by commissioner	0%	0%	0%	0%	0%
Late Awards - sent to parties	7%	1%	0%	0%	0%
Postponements/Adjournments	5%	5%	4%	5%	5%
Process reworks (8%)	7%	6%	5%	6%	6%
Turnaround time - conciliation (30 days)	24	24	24	23	23
Turnaround time - Arbitration (60 days)	59	61	68	61	61
Settlement rate	70%	73%	75%	76%	74%

Source: CCMA *Annual Report (2016) 31-32*

In Zimbabwe as in Botswana there is no data this study is aware of that reports on settlement rate of cases.[1867] This study only has inferences from secondary literature that presumes settlement rate to be poor in Zimbabwe.[1868] Available data was

[1866] Act 66 of 1995 (Amended)
[1867] Mahapa and Watadza (2015) 75. See also Madhuku (2012) 17 and Kupe-Kalonda (2001) 44)
[1868] Maitireyi and Duve (2011) 141

conducted to rate arbitration and none exists that this study is aware of that rates conciliation and mediation services in Zimbabwe Labour dispute settlement performance.[1869]

6.3.4 Client satisfaction

Elements of client satisfaction revolved around the goals of ADR namely its ability at: maintaining privacy, preserving relationships, involvement of constituencies, linking issues, getting neutral opinion, setting precedent, accessibility to disputants and degree of informality, among other things.[1870] Among direct ADR impacts observed is clients' higher satisfaction levels deriving from outcomes of use of ADR.[1871] Other aspects might comprise served jobs instead of losing them during disputes.[1872] There exists no data that specifically measures this element in Botswana, RSA and Zimbabwe though inferences in several studies[1873] have been made which are here discussed.

In Botswana there are no data this study is aware of which measures client satisfaction with respect to the labour dispute settlement process.[1874] The only indications that would give a picture of the performance of the ADR are that the Ministry is inundated with high caseload, thus, it is unable to dispense with cases expeditiously as can be gleaned from Kupe-Kalonda's study.[1875] The establishment of an independent body has been stayed for supposed lack of funds and political will by the Botswana government.[1876]

In RSA, there is an abundance of information on settlement rate but none on client satisfaction with the ADR this study is aware of.[1877] Indications are that usually the CCMA body battles the challenge of non-attendance by both or either party to a

[1869] Ibid. See also Mahapa and Watadza (2015) 70)
[1870] Maitireyi and Duve (2011) 141
[1871] Folberg and Rosenberg (1994) 1488
[1872] Love (2011) 4
[1873] Kupe-Kalonda (2001) 44. See also Benjamin (2013) 18; Bendeman (2007) 142 and Madhuku (2013) 35)
[1874] Kupe-Kalonda (2001) 44
[1875] Kupe-Kalonda (2001) 44
[1876] Ibid 170
[1877] CCMA (2016) 11. See also Benjamin (2013) 46)

dispute at ADR administered tribunals.[1878] It remains to be established whether non-attendance especially by employers is an indication of dissatisfaction or (rather spite of) with the system or lack of preference for it.[1879] Although the scheme is often characterised as mandatory, a commissioner does not have the latitude to dismiss a matter due to non-attendance at the conciliation stage.[1880] Many employers are in the habit of deliberately avoiding attendance at conciliation.[1881] In the years 2010/2011 for instance a total 15 per cent conciliation interventions resulted in non-attendance and the employers were absent for 75 per cent of the time.[1882] The other element that needs attention is that CCMA administered ADR has not promoted job retention.[1883] The CCMA does not enjoy a good track record of reinstating dismissed workers.[1884]

In Zimbabwe, this study only established the dissatisfaction expressed against arbitration proceedings and none on conciliation/mediation proceedings.[1885] The main bone of contention is enforcement of awards which does not happen expeditiously except through registration with the Magistrate Court or High Court even if awards have been confirmed and ordered by the Labour Court.[1886] In a study[1887] conducted in Zimbabwe a total of 65% respondents surveyed in the employer category believed that arbitrators were almost always biased in their judgments whilst a total of 68% surveyed respondents in the workers categories contended that they were unprepared to accept any rulings by arbitrators against them.[1888]

6.4 Summary

This chapter compared the performance of ADR systems of labour dispute settlement in Botswana, RSA and Zimbabwe. This study relied largely on three points of analysis, namely ADR background conditions constituting *adequate legislative and political support*, *institutional and cultural support, adequate and competent manpower,*

[1878] Benjamin (2013) 18
[1879] Benjamin (2013) 18
[1880] Ibid
[1881] Ibid. See also Bendeman (2007) 142)
[1882] Benjamin (2013) 18
[1883] Bendeman (2007) 142
[1884] Ibid
[1885] Mahapa and Watadza (2015) 75. See also Madhuku (2012) 17)
[1886] Madhuku (2012) 17. See Maitireyi and Duve (2011) 151)
[1887] Maitireyi and Duve (2011) 141
[1888] Maitireyi and Duve (2011) 152

adequate funding support and parity in the power of disputants[1889] on the one hand and then ADR program design considerations which touch upon *Planning and preparation and Operations and implementation*[1890] then finally ADR measures which constitute *client satisfaction, settlement and enforcement, cost* and *efficiency*.[1891] The study found that generally on all scales RSA has a well-established ADR system of labour dispute settlement compared to Botswana and Zimbabwe on all counts.[1892] For example in terms of adequate legislative and political support Botswana and Zimbabwe have weak labour movements that are almost subordinate to the governments making them weaker partners in determining labour policy.[1893] RSA on the other hand had strong civic movement that supported industrial democracy despite being regarded as an unequal society.[1894]

Regarding ADR design, RSA relies on an electronic system for managing the dispute settlement scheme which affords it a basis for efficiency[1895] while Botswana and Zimbabwe still rely on manual systems administered by Labour Officers which tends to stifle efficiency.[1896] RSA has been able to record the number of matters that pass through its system since inception[1897] while such records are unavailable in the case of Botswana and Zimbabwe.[1898] RSA has therefore been able to establish the matters that have been dispensed with at its level and those escalated to the courts and those that have been weeded out of its mandate for want of jurisdiction.[1899] The only information that is unavailable in the case of RSA is the levels of satisfaction of disputants going through the body to have their disputes resolved.[1900] Such statistics have not been made available in the case of Botswana and Zimbabwe, respectively particularly because, in part, the Acts[1901] therein do not make it a requirement, which is different from RSA, which makes it mandatory.[1902] This chapter also noted that the

[1889] Brown *et al.* (1998) 33
[1890] Ibid 40
[1891] Kerbeshian (1994) 383
[1892] Madhuku (2012) 11. See also Kupe-Kalonda (2001) 44)
[1893] Madhuku (2012) 11. See also Kupe-Kalonda (2001) 44)
[1894] Lings (2014) 15
[1895] Benjamin (2013) 46
[1896] Madhuku (2013) 35 and Sections 7 and 8 Act 15 of 2003
[1897] CCMA (2016) 11
[1898] Madhuku (2012) 11 and Kupe-Kalonda (2001) 44
[1899] CCMA (2016) 11
[1900] Bendeman (2007) 142
[1901] Act of 2003 [Chapter 28:1) and Act 15 of 2003
[1902] Section 115 (1)(d), Act 66 of 1995. See also CCMA (2016) 54)

three countries under consideration in this study are members of the ILO, and have ratified conventions and treaties that enjoins them to enforce international labour standards. It would appear to this study that South Africa has done well in establishing more efficacious ADR processes that were powered by ILO while Botswana and Zimbabwe have not fared well in the same regard. Botswana and Zimbabwe have been charged for violating international labour standards in respect to unfairly determining essential service categories and limiting the right to strike and at the same time failing to enforce statutes against forced labour respectively. Nevertheless, it can be concluded that RSA, despite its own inadequacies[1903] has a more efficacious ADR system of labour dispute settlement than in Botswana and Zimbabwe.[1904]

[1903] Benjamin (2013) 46. See also Bendeman (2007) 142)
[1904] Madhuku (2012) 11

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7 INTRODUCTION

This study was conducted to critically review, in a comparative and comprehensive fashion, the ADR schemes in three countries namely, Botswana, RSA and Zimbabwe so as to establish its efficaciousness or otherwise in labour dispute settlement. This particular chapter concludes the study with a discussion of conclusions and recommendations thereto. The objectives set out in chapter 1 are put to test in this chapter. The chapter's conclusions and recommendations collect around the objectives set out herein which sought to answer questions of this study. This chapter also discusses recommendations for future studies giving regard to its own limitations leading to a conclusion.

The questions of the study this chapter seeks to provide answers to are set out at the start of this research, as follows:

- Is there a problem with ADR in labour dispute resolution in Botswana, RSA and Zimbabwe?
- What initiatives have been undertaken to make ADR mechanism efficacious in labour dispute resolution in Botswana, RSA and Zimbabwe?
- Are there any challenges faced with the use of ADR in labour dispute resolution in Botswana, RSA and Zimbabwe?
- Which among the various factors are pertinent to the efficacy of ADR in labour dispute resolution in Botswana, RSA and Zimbabwe?

To answer these questions this study transformed the above questions into objectives which are relied upon to conclude this study. The following objectives were set out for this study to answer to the above questions:

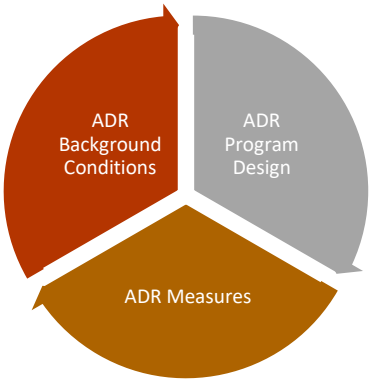
- to examine the efficacy of ADR in resolving labour disputes in Botswana, RSA and Zimbabwe;
- to assess the initiatives undertaken to make ADR mechanism efficacious in resolving labour disputes in Botswana, RSA and Zimbabwe;
- to examine the challenges faced with measurement of ADR efficacy in resolving labour disputes in Botswana, RSA and Zimbabwe; and finally;
- to establish the factors pertinent to the effectiveness of ADR in resolving labour disputes in Botswana, RSA and Zimbabwe.

The study conducted a review of literature on the subject of ADR efficacy in Botswana, RSA and Zimbabwe in chapters 2 to 5. The objective was to set out a framework for conducting this study. Issues and views emanating from the experts reviewed in chapters 2, 3, 4 and 5 were used to assess the status of ADR in the three countries for purposes of comparison at the end of which thereafter was used to compare the existing practices (secondary data) to reach conclusions. In order to address the above outlined questions and objectives of the study, this study relied largely on an adapted hypothetical model termed the **ADR Efficacy Model,** as illustrated in figure 4 which comprises a three basis point of analysis, composed of (1) ADR background conditions constituting *adequate legislative and political support*, *institutional support, adequate and competent manpower, sufficient funding support and power parity of disputants*[1905] on the one hand and then (2) ADR program design considerations which touch upon *Planning and preparation and Operations and implementation*[1906] then finally (3) ADR measures which constitute (a) *client satisfaction, (b) settlement and enforcement, (c) cost* and *(d) efficiency*.[1907] These are not discussed in detail in this chapter given their wide exposition in the preceding chapters and particularly chapter 2 to this study. They are however used as the basis for reaching conclusions and recommendations pertaining the status of ADR in Botswana, RSA and Zimbabwe in this chapter.

[1905] Brown *et al.* (1998) 33
[1906] Ibid 40
[1907] Kerbeshian (1994) 383

The study picked the above illustrated elements, namely (1) ADR background conditions; (2) ADR program design[1908] and then finally (3) ADR measures[1909] characteristics, in that order to analyse the situation in each country and this chapter is poised to conclude on the attendant findings.

Figure 3 ADR Efficacy Framework



Adapted from Brown *et al*[1910] and Kerbeshian[1911] and Wiese[1912]

7.1 Conclusions

The first objective of this study was to ascertain the efficacy (effectiveness and efficiency) of the ADR interventions used to settle labour disputes in Botswana, RSA and Zimbabwe. This study was crippled by the lack of standard measures of efficacy of ADR as a universal problem as noted by Shin's study.[1913] The second challenge faced in regard to this objective was lack of data on the basis of which to make evaluations particularly in Botswana and Zimbabwe,[1914] a challenge which is fairly not acute in RSA.[1915] The information used was mainly based on inferences from secondary literature that was available to the study such as reported court cases, journal outputs and CCMA annual reports in the case of RSA.[1916] However, in the main, efficacy could not be ascertained only on measurable criteria such as client

[1908] Brown *et al.* (1998) 40
[1909] Kerbeshian (1994) 383
[1910] Brown *et al.* (1998) 15
[1911] Kerbeshian (1994) 383
[1912] Wiese (2016) 2, See also Love (2011) 5
[1913] Shin (2011) 13 (See also Love (2011) 5 and Brown *et al.* (1998) 40)
[1914] Madhuku (2012) 31
[1915] CCMA *Annual Report* (2016) 31
[1916] Ibid

satisfaction, settlement and enforcement; efficiency and cost-saving but also on other factors termed critical success factors in this study in agreement with Kerbeshian's[1917] findings. Critical successful factors looked at ADR conditions which revolve around the context in which ADR is established namely adequate legislative and political support, institutional and cultural capacity, adequate and competent manpower and sufficient funding support and power parity among disputants.[1918] Another set of critical success factor considered is ADR design factors which collected around the planning elements as well as the implementation elements.[1919]

On the basis of the review of ADR background conditions, this study found that ADR in RSA had gained phenomenal support given the involvement of stakeholders comprising a tripartite body such as the Unions, Business Community and Government from its inception in 1995. The CCMA is independent and governed by a tripartite Governing Body in charge of administering ADR processes in labour dispute resolution in South Africa."[1920] ADR in RSA is fully funded by the government[1921] which works well for its effectiveness and its Commissioners are continually trained.[1922] Further, RSA has been able to develop and provide for the development of institutions[1923] that aid the administration of ADR such as providing for the certification of independent ADR bodies like Tokiso who provide private ADR services.[1924] A very important element contributing towards RSA ADR framework is its ability to rope in all partners in industry to the table and have them contribute towards industrial democracy goals.[1925] The RSA also continually makes inroads in making ADR more efficacious by giving CCMA the same powers afforded to a court of law to issue writs for enforcing arbitration awards.[1926] In terms of the LRA, an arbitration award issued by a CCMA Commissioner is final and binding and may be enforced as if it was an order of the Magistrate Court in respect of which a writ has been issued, with the exception of advisory arbitration awards such as orders for performance, other than

[1917] Kerbeshian (1994) 383
[1918] Brown *et al.* (1998) 40
[1919] Brown *et al.* (1998) 40
[1920] Benjamin (2013) 6
[1921] Ibid
[1922] CCMA (2016) 31
[1923] Swanepoel *et al*. (2008) 613
[1924] Benjamin (2009) 42
[1925] Section 23, Act 108 of 1996 (See also Ferreira (2004) 76)
[1926] Section 143 (3), Act 66 of 1995 (As amended in 2014)

payment of money, for instance, reinstatement.[1927] Such a development was quite important in 2014 especially that an arbitration award may be certified by a CCMA Director[1928] and thus it becomes unnecessary to approach the Magistrate Court in terms of the LRA.[1929] The fact that an award gets certified by the CCMA director means that the time needed to get it certified by the courts for enforcement purposes is saved making ADR time efficient. These are positive steps that work in the favour of ADR legislative and political support towards ADR efficacy in South Africa labour dispute resolution.

The RSA's ADR has had scathing attacks for its own inadequacies such as inability to maintain relationships after CCMA administration of disputes.[1930] The CCMA has not registered a good track record of employee reinstatement after dismissal.[1931] ADR interventions administered by private entities or individuals other than the government are rather costly, rendering it not affordable to majority of the ordinary workers.[1932] This implies that the ADR system in RSA does not focus on restorative relationships beyond the dispute settlement.[1933] The question to this study is, do those inadequacies render ADR in RSA inefficacious? This study holds the view that the positive aspects of ADR in RSA outweigh its inadequacies particularly when looked at in comparison to Botswana and Zimbabwe's respective ADR schemes.[1934] In the main ADR in RSA has registered 75% percent success on record of settlements which is a commendable feat.[1935]

On the other hand, the situation has been different in Botswana and Zimbabwe where the government has been accused of exerting a heavy hand influence in the labour dispute resolution regime and other partners are rather weak.[1936] The Botswana government for instance has been reluctant to establish an independent body that

[1927] Section 143 (3), Act 66 of 1995 (As amended in 2014)
[1928] Ibid
[1929] Section 158(1)(c), Act 66 of 1995 (As amended in 2014)
[1930] Benjamin (2009) 42
[1931] Ibid
[1932] Ibid
[1933] Ibid
[1934] Brown *et al.* (1998) 33 (See also CCMA *Annual Report* (2016) 31; Swanepoel *et al*. (2008) 613 and Benjamin (2009) 44
[1935] CCMA (2016) 31
[1936] Kupe-Kalonda (2001) 40

administers ADR rather preferring to rely on the arm of government to do so.[1937] Botswana for instance lacks an established culture and history of civic engagement when compared to countries like RSA, civil society is therefore considered relatively weak.[1938] The government of Botswana has single handedly determined salaries, curbed strikes and declared many sectors of the economy essential services so as to inhibit dissent.[1939] The administration of ADR by the Labour Officer's has also had its fair share of problems including lack of skills,[1940] poor coordination, using manual systems;[1941] higher levels of caseloads which cannot be handled by existing capacity;[1942] incessant escalation of matters to Industry Court because of mistrust of ADR decisions;[1943] failure to attempt to mediate and escalation of matters unnecessarily.[1944] In Botswana, problems have also flowed from the terms of engagement of part-time mediators, which apparently requires that they should not also act as advocates in mediation or arbitration.[1945] As noted, the government has only recently created new positions for full time Labour Officers, some of whom might carry out this work.[1946] The Industrial Court has highlighted poor judgment among ADR practitioners such as in the Montle matter[1947] in which a mediator's inability to understand its own role especially that s/he did not have jurisdiction to hear matters that resounded in money as provided by Section 25 of Botswana's Trade Dispute Act is a case in point.[1948] These issues render Botswana's ADR still far from being efficacious when comparing it to RSA's. This study holds the view that Botswana's ADR is inefficacious.[1949]

In Zimbabwe, the dominant role of the government in labour dispute resolution weakens the efficacious administration of ADR processes as the government tends to take the position of both referee and player in disputes involving government as a party

[1937] Section 3, Act 15 of 2003
[1938] Bertelsmann Stiftung, BTI 2016 (2016) 6
[1939] Mwatcha (2015) 44
[1940] Ntumy (2016) 58
[1941] Centre for Employment & Labour Relations Law (2006) 7
[1942] Gumede http://www.africanlii.org/content/swazilands-benchmarcks-conciliation-mediation-and-arbitration Date of use: 10 April 2017
[1943] Ntumy (2016) 58
[1944] Frimpong (2006) 116
[1945] Centre for Employment & Labour Relations Law (2006) 7
[1946] ibid
[1947] [2010] 2 BLR 120 IC
[1948] Section 25(1), Act 15 of 2004
[1949] Kupe-Kalonda (2001) 40; Frimpong (2006) 116; Ntumy (2016) 58 and Mwatcha (2015) 43)

(employer) thereto.[1950] Much like the Botswana situation ADR is administered by the Labour Officers who are essentially members of the executive government.[1951] This study holds the view that RSA's ADR is far efficacious achieving 75% settlement of its matters[1952] whereas Botswana and Zimbabwe has not made an effort to establish an independent entity that ensure such efficacious attainment of ADR goals is made possible.[1953]

The second objective of this study was to examine the challenges of ADR program in Botswana, RSA and Zimbabwe. The study found that challenges include legislative and political, administrative, funding, client satisfaction, enforcement and skilled manpower to administer ADR effectively.[1954] As already highlighted in the above discussion in objective 1, ADR is administered by the executive government in Botswana and Zimbabwe countries which potentially undermines its effectiveness as far as independence and autonomy is concerned.[1955] The usual government bureaucracies are undermining the effectiveness of labour dispute resolution in Botswana and Zimbabwe due to inadequate manpower and skilled ADR practitioners.[1956] This could also be attributable to limited financial resources to administer ADR from the coffers of the Department of Labour and Social Security[1957] and Department of Labour[1958] in Botswana and Zimbabwe respectively.[1959]

In Zimbabwe, for instance arbitrators and mediators are accused of favouritism and Labour Officers dishing out cases to their friends to aid their money making agenda rather than dispensing with disputes effectively.[1960] The adjunct provision for registering awards with courts has derailed the enforcement of awards in Zimbabwe.[1961] Employers have used the appeals process to allow awards to prescribe

[1950] Maphosa (1991) 22; Mandaza (1986) 243; and Bertelsmann Stiftung, BTI 2016 (2016) 4)
[1951] Section 93, Act of 2003 [Chapter 28:01]
[1952] CCMA (2016) 31
[1953] Kupe-Kalonda (2001) 40 and Madhuku (2012) 31
[1954] Kerbeshian (1994) 383
[1955] Brown *et al.* (1998) 25
[1956] Kupe-Kalonda (2001) 40 and Mandaza (1986) 125
[1957] Madhuku (2012) 36
[1958] Kupe-Kalonda (2001) 166
[1959] Madhuku (2012) 36 and Kupe-Kalonda (2001) 166
[1960] Madhuku (2012) 38
[1961] Sections 13 and 14, Act 2003 [Chapter 28:01]

while being escalated for appeal, actions clearly prejudicial to workers.[1962] Studies[1963] conducted in Zimbabwe have revealed that arbitration is disdained by workers for being inhibitive and costly.

In RSA, ADR is generally widely supported by all actors in the legislative and political front, and also well resourced.[1964] There are systems of measurement in place which ensures efficacy of ADR in RSA.[1965] In RSA the LRA'[1966] makes it mandatory for CCMA to:

> "…compile and publish information and statistics about its activities."[1967]

This is seldom the case in Botswana and Zimbabwe, at least based on information available to this study at its conclusion.[1968] In terms of institutional support of ADR RSA has done far much better than Botswana and Zimbabwe – especially establishing an independent body that administers the system of labour dispute settlement.[1969] RSA still has to address concerns around non-attendance at ADR meetings by employers as well as frivolous cases and what other commentators call too prescriptive and fixed approaches,[1970] rather parties to a dispute need to be afforded flexibility in considering approaches for resolving their disputes.[1971]

The third objective of this study was to ascertain the efforts and initiatives to make ADR efficacious in Botswana, RSA and Zimbabwe. RSA has continually made efforts to make ADR efficacious including improving case management systems for administration of disputes, training of commissioners for ensuring they are competent in handling disputes.[1972] RSA has managed to continually repeal its legislation to factor it new developments and to ease the ADR regime. For instance, the enactment of

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[1962] [2015] S-38-15 (See also [2012] HH 191/12; [2016] HC 5061/14)
[1963] Madhuku (2012) 38. See also Maitireyi and Duve (2011) 141)
[1964] Benjamin (2013) 6
[1965] Section 115 (1)(d), Act 66 of 1995 (See also CCMA (2016) 54)
[1966] Ibid
[1967] Ibid
[1968] Kupe-Kalonda (2001) 40 and Madhuku (2012) 31
[1969] Swanepoel *et al*. (2008) 613
[1970] Bendeman (2007) 141
[1971] Ibid
[1972] CCMA (2016) 31

Section 143 into the LRA'95[1973] afore-discussed in terms of which an arbitration award may be certified by a CCMA Director[1974] and thus it becomes unnecessary to approach the Courts is a case in point, which is not the case in the other two jurisdictions.[1975] Botswana and Zimbabwe still need to put effort in this regard.[1976] Zimbabwe has attempted to aid the ADR regime by requiring arbitrators to have an academic degree before they could act as such.[1977] An interview conducted at the labour Ministry in Zimbabwe indicated that,[1978] the minimum credentials for a Labour Officers was an academic degree coupled with a two years' experience in handling labour related matters.[1979] This was considered a misnomer given that no such regulation had been previously enacted to provide for such a rendering.[1980] Recent treatise into the matter suggests that the anomaly has been addressed.[1981] A hailed proclamation in the Act[1982] directs that an Arbitrator or a Designated Agent must be in possession of an academic degree.[1983] The aforesaid initiatives are efforts undertaken to support ADR though it does not make the scheme shy away from the inherent bias of the clenched fist with which the state runs it. It would be ideal for the government to create in independent body such South Africa's CCMA to administer ADR in labour dispute resolution.[1984] The Industrial Court in Botswana for instance has endorsed ADR in Kekgosi matter[1985] by asserting that the matter needed to go through mediation and arbitration first before audience for it was sought with the court. The court further asserted that there is no reference that the matter had been mediated upon and issued with a certificate of failure to settle issued or urgency[1986] or the minister,[1987] or the Commissioner[1988] or parties or before being directed to the Industrial Court.[1989] There are semblances of changes and initiatives in the ADR scheme in labour dispute settlement in Botswana

[1973] Section 143, Act 66 of 1995 (Amended in 2014)
[1974] Ibid
[1975] Sections 13 and 14, Act of 2003 [Chapter 28:01] and
[1976] Kupe-Kalonda (2001) 40 and Madhuku (2012) 31
[1977] Mahapa and Watadza (2015) 70
[1978] Ibid
[1979] Mahapa and Watadza (2015) 70
[1980] Ibid
[1981] Ibid
[1982] Act of 2003 [Chapter 28:01] (See also Mahapa and Watadza (2015) 70)
[1983] Mahapa and Watadza (2015) 70
[1984] Ibid
[1985] [2010] 3 BLR 714 IC
[1986] Section 20(3), Act 15 of 2004 (As amended)
[1987] Section 14(1), Act 15 of 2004 (As amended)
[1988] Section 13, Act 15 of 2004 (As amended)
[1989] [2010] 3 BLR 714 IC

and Zimbabwe but not sufficient to generate ADR efficacy.[1990] The main changes required relates to (1) ADR background conditions; (2) ADR program design[1991] and (3) ADR measures[1992] already discussed in detail above. The changes noted above do not even come close to addressing the many challenges emanating from Botswana and Zimbabwe ADR regimes.[1993] RSA on the other hand, has achieved much in that space and could only continue to improve.[1994] In the result, RSA's ADR is considered efficacious.[1995]

The fourth and final objective of this study was to establish and discuss the critical Success factors for ADR efficacy in Botswana, RSA and Zimbabwe. This study established critical success factors that ought to be seriously reviewed and factored into the three countries – Botswana, RSA and Zimbabwe for the efficacious administration of ADR in labour dispute settlement. These are ADR background conditions constituting *adequate legislative and political support*, *institutional and cultural support, adequate and competent manpower, funding and parity in the power of disputants*[1996] on the one hand and then ADR program design considerations which touch upon *Planning and preparation and Operations and implementation*[1997] and then finally ADR measures which constitute *client satisfaction, settlement and enforcement, cost* and *efficiency*.[1998] It can be concluded from an analysis of this objective that RSA far outpaced the other two in terms of this criteria.[1999] This is so because South Africa has a legislature who firstly saw the need to establish an independent body to administer ADR, and continue to make amendments such as section 143 for ease of enforcement of arbitration awards among other things. RSA's ADR is also free of charge, and information on its performance is made publicity available through annual reporting, which is not the case in the two counterpart countries. RSA has a far more

[1990] Kupe-Kalonda (2001) 40 and Madhuku (2012) 31
[1991] Brown *et al.* (1998) 40
[1992] Kerbeshian (1994) 383
[1993] Kupe-Kalonda (2001) 40 (See also Madhuku (2012) 31; Mahapa and Watadza (2015) 70 and Maitireyi and Duve (2011) 141)
[1994] CCMA (2016) 31
[1995] Ibid
[1996] Brown *et al.* (1998) 33
[1997] Ibid 40
[1998] Kerbeshian (1994) 383
[1999] CCMA (2016) 31 (See also Kupe-Kalonda (2001) 166; Madhuku (2012) 31; Mahapa and Watadza (2015) 70 and Maitireyi and Duve (2011) 141)

efficacious ADR system for labour dispute settlement[2000] which Botswana and Zimbabwe can emulate in developing their own to acceptable levels.[2001]

Notably, Botswana, RSA and Zimbabwe are members of the ILO and have ratified conventions and treaties that enjoin them to protect and promote international labour standards in their countries. South Africa has utilised the International Labour Standards to build strong ADR processes. As already pointed out, South Africa had its first employees who worked for its CCMA body trained by ILO and its system is running effectively compared to other countries in the region. Botswana and Zimbabwe have unfortunately not fared well in enforcing ILO conventions including those they ratified. The two countries ought to consider following the example of South Africa in enforcing legislation that aligns with international labour standards in so far as ADR processes are concerned. This helps in developing efficacious ADR processes especially the creation of independent tribunal than the current practice of administering it through government departments, funding and capacitating its workforce to competently deliver on the mandate.

7.2 Recommendations

Based on the findings and conclusions of this study the following recommendations are advanced:

- It is recommended that the Botswana and Zimbabwe governments consider establishing an independent body in their respective countries that administers ADR to remove the bureaucratic bottlenecks that undermine speedy resolution of disputes as the case may be at present.
- Botswana; RSA and Zimbabwe labour market partners should strike to enhance institutional and cultural development towards a culture of civic engagement and consensus driven (ADR_ rather than combative (litigious)) approaches to resolve dispute settlement.
- The Botswana and Zimbabwe governments ought to level the playing field and allow parties such as unions to exercise their roles without heavy handedness from statement machinery. This calls for a reduction in power disparities

[2000] CCMA (2016) 31 (See also Kupe-Kalonda (2001) 166; Madhuku (2012) 31; Mahapa and Watadza (2015) 70 and Maitireyi and Duve (2011) 141)
[2001] Ibid

between employers, employees, unions and management organisations and other key partners in the dispute settlement space.

- It is recommended that RSA strengthens its ADR scheme to enhance job retention after dispute settlement.
- It is recommended that the Botswana and Zimbabwe governments provide adequate financial resources for the establishment of an independent ADR body (if it is established as recommended a quo) to ensure that it is administered effectively.
- It is recommended that a commission is established to ascertain the relationship between ADR and court litigation systems in RSA so as to curb potential resistance by the latter that ADR is usurping society of judiciary precedence given its nature as a private and confidential procedure.
- Botswana and Zimbabwean governments ought to level the play field characterised by industrial democracy and consensus driven rather than the current heavy-handedness.
- The legislature in Botswana, RSA and Zimbabwe ought to consider prescribing minimum skills requirements for ADR practitioners particularly conciliators, mediators and arbitrators within the legislative enactments to ensure that their dispute settlement systems are clothed with skilled cadre who can dispense with causes expeditiously.
- The legislatures in Zimbabwe ought to consider prescribing minimum time thresholds for dispensing with conciliation and arbitration that would guide practitioners and disputants for the purposes of expedience. This practice is present in Botswana and RSA helping to advance the role of efficiency in terms of time-saving nature of ADR.
- The legislatures in Botswana and Zimbabwe ought to delineate the exact roles of ADR practitioners so that there is clarity on matters of their exact roles in mediation and arbitration and what they are also not mandated to do to ward off confusion.
- It is recommended that the legislatures of Botswana and Zimbabwe respectively develop an online case management system to ensure that ADR administered disputes are settled within reasonable time rather than the current systems that are left to the discretions of government officers.

- Botswana and Zimbabwe ought to consider enhancing the power of arbitrators to enforce awards as if they were court orders. Currently in Zimbabwe arbitral awards have to be enforced through registering them through the Magistrate and High Court depending on the jurisdictional amount involved.
- RSA ought to consider reviewing the prescriptive nature of ADR functions to ensure that it produces outcomes that are acceptable to all stakeholders that rely on the system for labour dispute settlement.
- Botswana and Zimbabwe ought to make data on ADR performance within easy reach of researchers and the public domain.
- South Africa ought to consider reviewing the effectiveness of the Essential Services Committee, in determining essential services.
- Zimbabwe ought to enjoin its judiciary to reach correct rulings in respect to termination of employment contracts to line up with convention (C150).
- Botswana and Zimbabwe ought to enforce international standards in respect to establishing efficacious ADR processes in labour dispute resolution.

7.3 Suggestions for future research

Future research ought to consider collecting data on ADR practices in Botswana, RSA and Zimbabwe so as to capture the experiences of ADR practitioners as well as disputants. This may help formulate policy and contribute towards theory development in ADR development. Future research also could focus on development of measurable criteria that is used to determine with exactitude the effectiveness and efficiency in labour dispute settlement program. Future research ought to also consider development of sustainable funding models for ADR efficacy. Another area which is still grey is enforceability of ADR outcomes in the Botswana and Zimbabwe. In South Africa one might want to see the effectiveness of the section 143[2002] while in the other two countries one needs to ascertain what informs enforcement of ADR awards as both the legislation and case law is somewhat silent on the matter. Future studies ought to consider the role of ILO in establishing efficacious ADR processes in labour disputes in SADC countries especially in Botswana and Zimbabwe. Further studies might need to consider efficacy of specialized bodies dealing about dispute settlement

[2002] Act 66 of 1995 (Amended)

like ELRC which are specific to education labour disputes as well as private bodies like Tokiso and Education Labour Relations Council (ELRC).

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