FREEDOM OF ASSOCIATION FOR PRIVATE SECTOR EMPLOYEES IN ZIMBABWE: A COMPARATIVE ANALYSIS

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submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

in the subject

Mercantile Law

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF. MPFARISENI BUDELI-NEMAKONDE

YEAR OF FINAL REGISTRATION: 2022

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_____ 17th February 2022

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DEDICATION

I dedicate this work to my late father, Mobil Maringe who could not live a little longer to witness the fruits of his labour. May his soul continue to rest in eternal peace. I further dedicate it to my mother and my family for their love and unwavering support. Finally to my children, I say the foundation has been set for you to build on a strong future.

ABSTRACT

The right to freedom of association is very crucial in labour law since all the other employees' rights rest on it. The thesis focusses on the right of private sector employees to freedom of association in Zimbabwe. It further takes a comparative analysis with South African law in order to identify the weaknesses and gaps in the Zimbabwean law with a view to proffering recommendations for the improvement of the right to freedom of association for private sector employees in Zimbabwe.

The thesis traces the development of the right to freedom of association from the pre-colonial to the post-colonial period. It highlights the fact that politics and socio-economic conditions of any given period have shaped labour law together with the right of employees to freedom of association. The introduction of the Zimbabwean Constitution in 2013 brought significant changes to the employees' right to freedom of association as it elevated the rights to organise, to bargain collectively and to strike into the Declaration of Rights under section 65. The impact of the constitutionalisation of these components of the right to freedom of association is evaluated in the thesis. It also assesses the impact of international human rights law and labour law on the development of the right of private sector employees to freedom of association in Zimbabwe.

The provisions of the Labour Act on the right of employees to freedom of association in Zimbabwe are also discussed. The thesis takes a comparative analysis with the provisions of the Labour Relations Act in South Africa. It then concludes by making recommendations on how the gaps and weaknesses in the Zimbabwean law on the right of private sector employees to freedom of association can be addressed.

The thesis reflects the law as at 10 January 2022.

KEY TERMS

Freedom of association; Private sector employees; Employers; Collective bargaining; Strike; Right to organise; International labour law; Declaration of Rights; Collective labour law; Trade unions; Shop floor level; Industry level; Constitutionalisation.

ACKNOWLEDGEMENTS

Thesis writing at this level is one of the most demanding and difficult experiences of learning. Indeed, I thank God with all my heart for enabling me to reach this stage in my life.

I also wish to thank my supervisor, Professor Mpfariseni Budeli-Nemakonde for her patience and guidance throughout the writing of the thesis. I have learnt a lot from her professionalism.

Furthermore, I would like to extend my special thanks to my family for giving me the opportunity to concentrate on this demanding project. Words alone cannot express my sincere gratitude for your support and encouragement.

My final appreciation goes to my typist, Shiella Lishomwa for her commitment and dedication to duty.

LIST OF ACRONYMS

African Charter	African Charter on Human and People's Rights
ANC	African National Congress
AU	African Union
BSAC	British South Africa Company
CC	Constitutional Court of South Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
CCZ	Constitutional Court of Zimbabwe
CEO	Chief Executive Officer
CESCR	Committee on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association
CILSA	Comparative and International Law Journal of Southern Africa
COPAC	Constitution Parliamentary Select Committee
COSATU	Congress of South African Trade Unions
EPA	Emergency Powers Act
ESAP	Economic Structural Adjustment Programme
GNU	Government of National Unity
GPA	Global Political Agreement

H	High Court of Zimbabwe
HRC	Human Rights Committee
ICA	Industrial Conciliation Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILJ	Industrial Law Journal
ILO	International Labour Organisation
Int'l lab rev	International labour review
LAC	Labour Appeal Court of South Africa
LC	Labour Court of Zimbabwe
LC	Labour Court of South Africa
LOMA	Law and Order Maintenance Act
MDC	Movement for Democratic Change
PELJ	Potchefstroom Electronic Law Journal
S	Supreme Court of Zimbabwe
SADC	Southern African Development Community
SADC Charter	Charter of Fundamental Social Rights in Southern African Development Community

SAHRC	South African Human Rights Commission
SAICA	South African Industrial Conciliation Act
SALJ	South African Law Journal
SCA	Supreme Court of South Africa
Stan J Int'l L	Stanford Journal of International Law
Stell LR	Stellenbosch Law Review
TSAR	Tydskrifvir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
UN	United Nations
Yale L Rev	Yale Law Review
Yale LJ	Yale Law Journal
ZANU (PF)	Zimbabwe African National Union (Patriotic Front)
ZAPU	Zimbabwe African People's Union
ZCTU	Zimbabwe Congress of Trade Unions
ZHRC	Zimbabwe Human Rights Commission
ZINWA	Zimbabwe National Water Authority
ZLR	Zimbabwe Law Reports

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.1 Introduction

Zimbabwe has a two-tier labour relations system whereby private sector employees are governed by the Labour Act[1] whilst public service employees are governed by the Public Service Act[2] and the Health Service Act.[3] For this reason, it is imperative to note that the Labour Act does not apply to public service employees.[4] Hence, the research focuses on private sector employees only. The labour law system which regulates private sector employees in Zimbabwe has been well developed over time dating back to the colonial and post-colonial periods. In that vein, it provides a fertile ground for comparative analysis. To illustrate this point, there is no statute which regulates the right to freedom of association for public service employees in Zimbabwe apart from the constitution.[5] In addition to that, there is no statute which provides for the registration of trade unions in the public sector.[6]

To begin with, Zimbabwe adopted a new constitution on 22 May 2013[7] which replaced the 1980 (Lancaster House) Constitution.[8] The Zimbabwean Constitution provides for both the positive right to freedom of association and the negative right to freedom not to associate.[9] Another significant milestone in the Zimbabwean

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1 [Chapter 28:01] (hereinafter referred to as the Labour Act].

2 [Chapter 16:04] (hereinafter referred to as the Public Service Act).

3 [Chapter 15:16] (hereinafter referred to as the Health Service Act).

4 Section 3 reads: "(1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution. (2) For the avoidance of any doubt, conditions of employment of members of the public service shall be governed by the Public Service Act [Chapter 16:04]."

5 Madhuku *Labour law in Zimbabwe* 485.

6 Madhuku *Labour law in Zimbabwe* 485.

7 Constitution of Zimbabwe Amendment (No.20) Act, 2013 (hereinafter referred to as the Zimbabwean Constitution).

8 1979 (S.I.1979/1600 of the United Kingdom) (hereinafter referred to as the 1980 Constitution).

9 Section 58 provides as follows: "(1) Every person has the right to freedom of assembly and association and the right not assemble or associate with others. (2) No person may be compelled to belong to an association or to attend a meeting or gathering."

Constitution is the entrenchment of labour rights in its Declaration of Rights (Bill of Rights).[10] These rights include the right of an individual to form and join trade unions, employee or employer's organisations of their choice and to take part in activities of those trade unions and organisations which are lawful. It is also the employee's right to strike, sit in, withdraw his/her services and take other similar concerted action and the right of every employer's organisation or employee to engage in collective bargaining, to organise and join federations of their respective organisations and unions.[11] It is crucial to highlight that section 65 of the Zimbabwean Constitution is identical to section 23 of the South African Constitution.[12] Accordingly, the similarities have been described as an act of 'constitutional borrowing'.[13]

There are three components of the right to freedom of association for employees which include the right of an individual to establish or join a trade union of his/her choice, the right to collective bargaining and the right to strike.[14] In that regard, section 65 of the Zimbabwean Constitution which provides for the right to freedom of association for employees, employers and their representatives is an extension of the general right to freedom of association in section 58 of the Zimbabwean Constitution. The Labour Act gives effect to these constitutional provisions.[15]

The Zimbabwean Constitution and the Labour Act do not define the term 'freedom of association' and as such, its meaning, significance and scope has to be sought from human rights and labour law jurisprudence. While acknowledging that the term freedom of association is a nebulous concept, Budeli identifies two categories

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10 These rights are provided for in terms of section 65 of the Zimbabwean Constitution.

11 Section 65 of the Zimbabwean Constitution.

12 Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the South African Constitution).

13 See Kondo 2017 *African human rights law journal* 175.

14 Budeli 2010 *Obiter* 21.

15 There are many provisions which recognise the constitutional right to freedom of association. Some of them include section 4 which recognises the employees' entitlement to membership of trade unions; section 27 provides for the right of employees or employers to form trade unions or employers' organisations; section 74 gives trade unions, whether registered or not, the right to negotiate collective agreements; section 104 recognises the right of every employee, workers committee and trade union to collective job action in order to resolve disputes of interest.

of views on its meaning, purpose and scope.[16] The first category's view is that freedom of association is a liberal–political right which emanates from the libertarian notion that recognises the right of all persons to freely associate or not with other persons of their own choice subject only to compelling factors such as national security and public morals.[17] The second category views the right to freedom of association as a functional guarantee which is protected for the purpose of securing a clearly defined social policy, that is, the attainment of equilibrium of bargaining power between employers and employees.[18] According to Mosito, freedom of association is the individual's right to join whichever organisation he/she wishes to join, which implies that the State has an obligation to ensure that such group's existence is not threatened by unjustified restrictions.[19] Emerson takes the right to freedom of association to mean that employees are judicially and morally entitled to form trade unions, to join trade unions of their own choice and to ensure that the trade union functions independently.[20] According to Ewing, freedom of association is indispensable at a general political level as it promotes one of the most important principles of the development of democracy, namely participation in the process of governance and ensuring that those who exercise public power are held to account.[21] It achieves this through the right of individuals to form and join political parties, trade unions and other interest groups.[22] In the context of workers, freedom of association ensures that the workers' voice is heard both at the workplace and in society and that workers, through their trade unions, have a part to play in how they are governed.[23]

Madhuku posits that freedom of association consists of the freedom of the individual to establish, to join or to participate in the lawful activities of the relevant

16 Budeli 2009 *De jure* 137.
17 Budeli 2009 *De jure* 137.
18 Budeli *De jure* 137.
19 Mosito 2013 "The Constitutionalisation of labour law in Lesotho" 43.
20 Emerson 1964 *Yale L Rev* 1.
21 Ewing 1999 *International centre for trade union rights* 20.
22 Ewing 1999 *International centre for trade union rights* 20.
23 Ewing 1999 *International centre for trade union rights* 20.

association.[24] It is the freedom of individuals to come together in order to protect their own interests through the formation of a collective entity that can represent them.[25] In Grogan's words, a basic freedom underpinning all others in any arena of life is freedom of association.[26] Budeli shares a similar view by asserting that all other labour and workers' rights rest on the right to freedom of association which is their bedrock.[27] She further highlights that it promotes democracy at the workplace and in society at large through institutions such as trade unions.[28] In view of the importance of freedom of association to private sector employees in Zimbabwe, the research is justified as it mirrors the extent to which the employees' rights are protected in Zimbabwe.

The Zimbabwean Constitution, just like the South African Constitution, obliges courts and relevant tribunals to consider international law which include all treaties and conventions which bind Zimbabwe as a party when interpreting the declaration of rights. In addition, such a court, tribunal or forum has a discretion to consider foreign law.[29] Zimbabwe ratified all the eight fundamental conventions under the International Labour Organisation (ILO).[30] The ILO conventions are some of the many international treaties and conventions to which Zimbabwe is a part. Of particular interest at this stage is the Freedom of Association and Protection of the Right to Organise Convention[31] and the Right to Organise and Collective Bargaining Convention.[32] Convention 87 is the first major ILO instrument to protect

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24 Madhuku 1999 *Zimbabwe law review* 1.
25 Madhuku 1999 *Zimbabwe law review* 1.
26 Grogan *Collective labour law* 22.
27 Budeli *De jure* 138.
28 Budeli *De jure* 138.
29 See sections 46 (1) (c) and (e) of the Zimbabwean Constitution and sections 39 (1) (b) and (c) of the South African Constitution.
30 https://www:ilo.org>dyn>normlex (Date of use: 11 May 2020). The conventions are as follows: Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No.105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).
31 1948 (No. 87) (hereinafter referred to as Convention 87).
32 1949 (No. 98) (hereinafter referred to as Convention 98).

the right to freedom of association.[33] In terms of Convention 87, workers and employers have a right to establish and be subjected only to the rules of such organisation. In addition, they have a right to join organisations of their own choice without prior authorisation.[34] The right to join an organisation is much wider than the right to join a trade union.[35] However, Convention 87 has been interpreted to provide freedom of association that is specific to trade unions.[36] Convention 98 adds to Convention 87 and it deals with the right to organise and to bargain collectively.[37] Both conventions do not provide an express right to strike. The ILO Committee of Experts and other organs have implied the right to strike from freedom of association.[38] Apart from the fundamental conventions, Zimbabwe ratified the Workers Representative Convention[39] which protects trade union representatives from victimisation as long as they are engaging in lawful activities.[40] These conventions were strengthened by the 1998 Declaration on Fundamental Principles and Rights at Work.[41] Other international human rights instruments which recognise the right to freedom of association include the Universal Declaration of Human Rights[42], the International Covenant on Civil and

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33 Budeli 2009 *De jure* 146. See also Van Nierkerk & Smit *Law@work* at 365 where they describe Convention 87 as the most important Convention.

34 Article 2 of Convention 87.

35 For a further discussion of the differences between the rights to join a trade union and an organisation, see Rubin 1998 *SALJ* 700.

36 Budeli 2009 *De jure* 147.

37 Budeli 2009 *De jure* 149.

38 Budeli 2009 *De jure* 150.

39 1971 (no. 135) (hereinafter referred to as the Workers Representative Convention); https: //www.ilo.org>dyn>normlex (Date of use: 11 May 2020). Grogan *Collective labour law* at 22 asserts that the Labour Relations Act 66 of 1995 (hereinafter referred to as the Labour Relations Act) upholds freedom of association by prohibiting victimisation of employees on account of trade union activities.

40 In the South African case of *NUPSAW v National Lotteries Board* 2014 (3) SA 544 (CC) (hereinafter the *NUPSAW* case), 'lawful activities' were held to exclude activities which are illegal, contravene the law and criminal offences. The Court further noted that the term includes participation by trade union members in activities which are part of the core functions of a trade union. Examples include engaging the employer on the member's complaints or grievances, representing them in grievance and disciplinary proceedings and collective bargaining.

41 https://www.ilo.org>dyn>normlex (Date of use: 11 May 2020).

42 (Hereinafter referred to as the UDHR). It was adopted on 10 December 1948. Article 20 recognises everyone's right to freedom and peaceful assembly and the right not to associate.

Political Rights[43], the International Covenant on Economic, Social and Cultural Rights[44], the African Charter on Human and People's Rights[45] and SADC Charter on Fundamental Social Rights.[46] Courts in Zimbabwe and South Africa have relied on these conventions in interpreting and applying domestic law on freedom of association.[47]

Since the adoption of Conventions 87 and 98, the ILO came to the conclusion that there was a need to set up a supervisory procedure as a measure to enhance compliance with these conventions.[48] In 1951, it set up a Committee on Freedom of Association with the mandate to examine violations of freedom of association and the fact that the country concerned had either ratified the relevant conventions or not is not considered. In nearly 70 years of work, the Committee on Freedom of Association has examined 3300 cases, with more than sixty countries in five continents acting on its recommendations.[49] A good example is its report which

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43 (Hereinafter referred to as the ICCPR). (It was adopted on 16 December 1966). Article 22 recognises everyone's right (including employees) to freedom of association with other persons, which include the right to form and join trade unions of his/her choice in order to protect his/her interests.

44 (Hereinafter referred to as the ICESCR). It was adopted on 16 December 1966. Article 8 recognises the right of an individual to form and join trade unions subject only to the rules of the organisation with restrictions being accepted in the interests of national security, public order and rights of others. It further recognises the right to strike and the right of trade unions to be independent. In addition, trade unions can affiliate to national federations or confederations with the right of the later to join international trade union organisations.

45 (Hereinafter referred to as the African charter). It was adopted on 27 June 1981. Article 10 of the African Charter recognises every individual's right to freedom of association provided that he/she abides by the law. It also provides for freedom not associate.

46 (Hereinafter referred to as the SADC charter). It was adopted on 1 August 2003. Article 4 obliges member States to create a conducive environment that resonates with the ILO conventions on the right to freedom of association, the right to organise and the right to collective bargaining.

47 See *Bankers Association of Zimbabwe v Banking and Finance Managers Union of Zimbabwe & Anor* SC-15-19 (hereinafter the *Bankers Association of Zimbabwe* case); *Netone Cellular (Pvt) Ltd v The Minister of Public Service, Labour and Social Welfare & Anor* HH-211-15 (hereinafter the *Netone Cellular (Pvt) Ltd* case); *S v Makwanyane* 1995 (3) SA 391(CC) (hereinafter the *Makwanyane* case); *SA National Defence Union v Minister of Defence & Anor* (1999)20 ILJ 2265 (CC) (hereinafter the *SANDU (1999)* case); *NUMSA & Others v Bader Bop (Pty) Ltd & Anor* [2003] 2 BLLR 103 (CC) (hereinafter the *Bader Bop* case); *Minister of Defence & Others v SA National Defence Force Union* (2006) 27 ILJ 2276 (SCA) (hereinafter the *SANDU (2006)* case).

48 https://www.ilo.org>lang..en (Date of use: 12 May 2020).

49 https://www.ilo.org>lang..en (Date of use: 12 May 2020).

was adopted by the 285th meeting of the ILO Governing Body which related to serious infringements of principles of freedom of association and trade union rights. In the case of Zimbabwe, the Committee on Freedom of Association examined a raid on the headquarters of the Zimbabwe Congress of Trade Unions[50] by plain clothes representatives of the Zimbabwe Republic Police (ZRP) who dared to resort to the use of force in order to disperse a meeting unless they were allowed to enter the premises. The ZCTU was prevented from proceeding with the meeting. The Committee on Freedom of Association requested the government of Zimbabwe to ensure compliance with principles of non-interference by the state in the internal affairs of trade unions.[51]

1.2 Problem statement

The research undertakes a comparative analysis of the right to freedom of association for private sector employees in Zimbabwe and South Africa, focusing on the right of employees to form and join trade unions of their choice and the rights of trade unions themselves. These rights cut across the right to freedom of association and its components.[52] The research explores the development of employees and trade unions' rights from colonial to post-colonial period showing the connection between the quest for freedom of association and political freedom in Zimbabwe. Furthermore, it analyses the extent to which Zimbabwe has fared in protecting the constitutionally enshrined employees and trade unions' rights. In this regard, international human rights and labour law as well as South African labour law jurisprudence is heavily relied upon. The reason is that Zimbabwe ratified all the important ILO conventions on freedom of association and is a member of important international and regional bodies such as the United Nations, the African Union and Southern African Development Community (SADC). South African labour law jurisprudence is important to Zimbabwe because the two countries'

50 (Hereinafter referred to as the ZCTU).

51 https://www.ilo.org>news>lang..en (Date of use: 12 May 2020).

52 The components of the right to freedom of association include the individual employee's right to form and join a trade union of his choice, the right to collective bargaining and the right to strike.

constitutional provisions on freedom of association are identical. In addition, a lot has been written about South Africa's constitutional labour law since the advent of democracy in 1994.

Zimbabwe's constitutional provisions on employees and trade union rights are still a 'new baby' with little literature about them. Thus, a lot can be learnt from South Africa's most revered constitutional democracy.[53] Finally, the research seeks to ascertain whether labour legislation in Zimbabwe gives full effect to international law and the constitutional provisions on freedom of association. In that light, the research contributes to the existing knowledge on the right of employees to freedom of association in Zimbabwe. The right to freedom of association is particularly important to Zimbabwe as it has experienced economic challenges for a long time which have affected private sector employees. As a matter of fact, it assists in the improvement of working conditions including wages.

A basic freedom underpinning all others is freedom of association.[54] Historically, employees recognise that their strength lies in their collective organisation. To this end, trade unions emerged to displace individualism.[55] Accordingly, freedom of association promotes and advances substantive, economic and social equality.[56] Trade unions have a crucial role to play, not only at the workplace, but in their communities and societies as a whole.[57] They do so through participating and influencing the political, social and economic activities of any given society. Closely related to trade unions is trade unionism, a term which relates to the principles, methods and practices of trade unions.[58] The Labour Act defines a

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53 Ghai 2005 *SALJ* 804; *Issacharoff Texas law review* 82; Davis *International journal of constitutional law* 181.

54 Grogan *Collective labour law* 22.

55 Grogan *Collective labour law* 365; Finnemore *Introduction to labour relations in South Africa* 89; Tsabora & Kasuso *ILJ* at 46 also acknowledge the inequality in bargaining inherent in the employment relationship when they discussed the concept of unfair labour practices.

56 Budeli 2009 *De jure* 137; Welch 1996 *ILJ* 1042; Kleven 2004 *Tenn JL*; Ewing 1999 *International centre for trade union rights* 20.

57 Budeli 2012 *CILSA* 455; Finnemore *Introduction to labour relations in South Africa* 89; Madhuku 1999 *Zimbabwe law review* 2.

58 Budeli 1999 *CILSA* 454.

trade union as any association or organisation that is formed for the purpose of representing or advancing the interests of any employees or class thereof in relation to their employment.[59] From this definition, one can identify a trade union through its purpose, that is, to advance the interests of employees with regard to their employment. However, experience reveals that trade unions go beyond the workplace to influence all the spheres of society.

It is necessary to discuss some of the deficiencies of labour legislation in protecting employees' right to freedom of association in Zimbabwe. The first example is the legal requirement that every member of a workers committee automatically becomes a member of a trade union whose members constitute the majority members of the workers' committee concerned.[60] This majoritarian principle is *prima facie* a negation of freedom not to associate. However, one may argue that it is designed to ensure that every employee at the workplace is represented. It is also designed to strengthen trade unions. Therefore, it may pass the proportionality test. Another example is that a collective bargaining agreement is binding, not only on the parties to the agreement, but also to all parties, contractors, employers and their respective employees in the industry or undertaking to which it relates.[61] Again, this requirement is detrimental to the right of employees not to associate with the trade union that has negotiated the agreement. In addition, given the importance of the right to strike, it is desirable for courts to determine its legality. The major anti-climax in Zimbabwe is that the Minister is given wide powers to deal with *prima facie* unlawful strikes in the form of "show cause orders".[62] The Minister can terminate, suspend or postpone a strike at any stage. This unilateral act can be invoked to delay even a lawful strike. It is a clear negation of employees' right to freedom of association. In sharp contrast, the South African law gives the Labour Court exclusive jurisdiction to deal

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59 See section 2 thereof. See further scholarly definitions by the following authors: Finnemore *Introduction to labour relations in South Africa* 89; Budeli 2012 *CILSA* 455; Landman 1997 *ILJ* 13.

60 Section 23 of the Labour Act.

61 Section 82 of the Labour Act.

62 Section 106 of the Labour Act.

with unlawful strikes.[63] South Africa has its own provisions which violate freedom not to associate.[64] The majoritarian principle is also applied in South Africa. Examples include the requirements that the right to elect shop stewards from its membership is the preserve of a majority trade union(s) only[65] and that, only a trade union representative of the majority trade union has the right to disclosure of information by the employer.[66] Moreover, only a majority trade union has a right to establish thresholds of representativeness.[67] All these provisions potentially violate the right to freedom of association for minority trade unions.

Freedom of association entails that a trade union should be in a position to determine and regulate its own membership.[68] The Labour Act provides that every trade union (whether registered or not) should adopt a constitution which provides for the membership's qualifications and membership fees to be paid and the right of any person to be a member of that trade union if he is prepared to be subjected to the rules and conditions for such membership.[69] The Zimbabwean law emphasises on the right of an employee to join a trade union of his choice as long as he is able to meet the conditions of membership.[70] In other words, a trade union does not have the right to deny membership to anyone who is prepared to meet the conditions for joining it. In South Africa, it is a trade union which seeks registration which must meet certain conditions which include a constitution which prescribes qualifications for admission to membership, circumstances for termination of membership and the right of appeal.[71] In Zimbabwe, the trade unions' right to freedom of association is curtailed through prohibiting them from discriminating against members or any class thereof on the grounds of race, tribe,

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63 Section 68 of the Labour Relations Act.

64 Section 26 on closed shop agreements and section 25 on agency shop agreements. These are referred to as union security arrangements. However, such agreements may be justified in the interests of maintaining stronger unions. See Van Niekerk & Smit *Law@work* 371 and Grogan *Collective labour law* 28.

65 Section 14 of the Labour Relations Act.

66 Section 16 of the Labour Relations Act.

67 Section 18 of the Labour Relations Act.

68 Madhuku *Labour law in Zimbabwe* 303.

69 Section 28 thereof.

70 See also sections 4 and 50 of the Labour Act.

71 Section 95 of the Labour Relations Act.

gender, place of origin, political opinion, creed, colour, pregnancy, HIV/AIDS status or any disability.[72] There is a similar provision in South African law although the grounds for non-discrimination are limited to race and sex only.[73]

Other rights of trade unions which have a direct bearing on their right to freedom of association include their right to levy and collect trade union fees. Trade union membership fees are important because they enable trade unions to finance their operations thereby becoming more effective. The Labour Act reserves the right to collect trade union membership fees to registered trade unions only.[74] In addition, the Labour Act also provides for leave for trade union purposes[75] just like in South Africa.[76] The anti-climax of these provisions is the non-recognition of unregistered trade unions. The reason could be that they are not subjected to statutory controls and regulation in the interests of their members. Therefore, this research answers the following questions:

(a) To what extent does labour legislation give effect to the constitutional provisions on the employees' right to freedom of association in Zimbabwe?

(b) What is the effect of constitutionalising the right to freedom of association and its components in Zimbabwe?

(c) What lessons can be drawn from international law and practice on the right of employees to freedom of association in Zimbabwe?

(d) What lessons can Zimbabwe draw from South Africa on the employees' right to freedom of association?

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72 Section 28 of the Labour Act.
73 Section 95 of the Labour Relations Act.
74 Section 29 (4) thereof.
75 Sections 14B and 29 (4) thereof.
76 Section 15 of the Labour Relations Act.

1.3 Aims and research objectives

The aims and objectives of the research are to:

1.3.1 Evaluate the effect of the constitutionalisation of the employees and trade unions rights to organise, bargain collectively and strike in Zimbabwe.

1.3.2 Critically analyse the adequacy of the Labour Act's provisions which deal with the private sector employees' right to freedom of association in Zimbabwe.

1.3.3 Assess whether or not the Zimbabwean Labour Act conforms with the ILO instruments on freedom of association that Zimbabwe has signed and ratified.

1.3.4 Compare Zimbabwean law with South African law in order to highlight the lessons which can be learnt from South Africa on the right to freedom of association for private sector employees in Zimbabwe.

1.4 Scope of the study

The research focuses on a critical analysis of the legal framework in Zimbabwe that governs the right of employees to freedom of association. It investigates the extent to which the law, in its present format, ensures the full realisation of the right to freedom of association of the private sector employees and their trade unions. This is realised through undertaking a comparative approach to the domestic law against international law and foreign law. In this regard, emphasis is on the provisions of the Labour Act which militate against the right to freedom of association and the effect of the constitutional protection of this right. There is a continuous reference to international law, particularly the ILO jurisprudence and the South African law. Finally, the research proffers solutions which have the potential to ensure that the private sector employees' right to freedom of association is fully enjoyed.

1.5 Literature review

The right to freedom of association is too broad and it can be exercised in different sectors of human activity.[77] It follows that the right to freedom of association is not limited to labour law. It can also be viewed from the human rights dimension. Most of the important human rights instruments at both international and regional level include the right to freedom of association.[78] There is a lot of literature on international and regional human rights jurisprudence which is relevant in discussing the right to freedom of association as a human right.[79] In addition, much has been written on international labour law relating to freedom of association and the work of ILO.[80] In Zimbabwe, just like in South Africa, the right to freedom of association is part of the Bill of Rights in the constitution.[81] In addition, section 65 of the Zimbabwean Constitution entrenches the employees' rights to organise, strike and bargain collectively which are components of the right to freedom of association. To this end, the right to freedom of association can also be viewed from a constitutional law perspective. Therefore, labour law, human rights law and constitutional law provide relevant sources on the right to freedom

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77 Budeli 2010 *Obiter* 16.

78 Examples include the UDHR, the ICCPR, ICESCR and the ACHPR.

79 Gordon Brown *The universal declaration of human rights in the 21st century* (2016); Waltz 2002 *Third world quarterly*; Kunz 1949 *The American journal of international law*; De Baets 2009 *History and theory*; Donnelly 2007 *Human rights quarterly*; Marks 1998 *Human rights quarterly*; Hathaway 2002 *Yale law journal*; Ghosal 2010 *The Indian journal of political science*; Leib *Human rights and the environment* (2011); Beitz 2003 *Daedalus*; Olivier 2002 *CILSA*; Ferreira & Ferreira- Snyman 2005 *CILSA*; Keith 1999 *Journal of peace research*; Hernandez- Truyol 1996/97 *The University of Miami Inter-American law review*; Alston & Quinn 1987 *Human rights quarterly*; Kiwanuka 1988 *The American journal of international law*; Akinyemi 1985 *The Indian journal of political science*; Viljoen *Journal of African law*; Odinkalu *Human rights quarterly*; D'sa 1985 *Journal of African law*; Dlamini 1991 *CILSA*; Lindholt 1989 *Mennesker og rettigheter*; Tucker 1983 *Syracuse journal of international law and commerce*; Umozurike 1983 *American journal of international law*.

80 Jenks *International protection of trade union freedom*; Von Potobsky 1981 *International labour review*; MacDonnell 1948 *Canadian bar review*; Seady & Benjamin 1990 *ILJ*; Pouyat 1982 *International labour review*; Regenbogen 2011 *Canadian labour & employment law journal*; Waugh 1982 *Comparative labour law journal*; Milman-Sivan 2009 *Law and ethics of human rights*; Valticos 1996 *International labour review*; Betten 1988 *Netherlands quarterly of human rights*; Gernigon, Odero & Guido 1998 *International labour review*; Hornung-Draus 2018 *Comparative labour law and policy journal*; Zeytinoglu 1986 *Comparative labour law journal*; Simamba 1988 *CILSA*; Schregle 1993 *Comparative labour law journal*.

81 See section 57 of the Zimbabwean Constitution and section 18 of the South African Constitution.

of association. This part does not seek to analyse all literature that has been written on the right to freedom of association because it is impossible to do so. It considers the most important scholarly work for the purpose of this research. However, little has been written in Zimbabwe since the constitutional entrenchment of the employees' rights to organise, to strike and to bargain collectively.

Madhuku[82] identifies two aspects of freedom of association as the freedom of the individual to form, join or participate in the activities of an association and the freedom of the association itself, once formed to be protected from undue outside influence.[83] He briefly discusses the meaning of section 65 of the Zimbabwean Constitution. He argues that the right to form and join trade unions which is given to 'every person'[84] is not restricted to employees. Even non-employees can form and join trade unions.[85] He further argues that the constitutional right to participate in collective job action which is available to employees only, means trade unions cannot claim a constitutionally protected right to strike.[86] He then identifies some of the provisions in the Labour Act which have an impact on the employees and trade union rights to freedom of association. However, he does not discuss the impact of constitutional entrenchment of the right to organise, to strike and to bargain collectively. In addition, he does not provide a clear link between the Labour Act, the constitution and international law. In other words, he does not assess whether the right to freedom of association in its present format is compliant with either the constitution or international law.

Tsabora and Kasuso[87] have also reflected on the effect of constitutionalising labour law. They note that section 65 of the Zimbabwean Constitution is located in that constitution's Declaration of Rights that is entrenched. They further discuss the constitutional obligations of the state and employers to promote, respect, protect and fulfill the rights and freedoms which are contained in the Declaration of

82 *Labour law in Zimbabwe*.
83 *Labour law in Zimbabwe* 275.
84 Section 65 of the Zimbabwean Constitution.
85 *Labour law in Zimbabwe* 282.
86 *Labour law in Zimbabwe* 282.
87 2017 *ILJ* 43-62.

Rights. Finally, they discuss the purposive approach to the interpretation of the Declaration of Rights. Their submissions are useful in understanding the effect of constitutionalising labour rights generally. However, they only deal with the concept of unfair labour practices. They do not deal specifically with the rights to freedom of association, to organise, to bargain collectively and to strike. Machingambi[88] and Gwisai[89] provide a historical background to freedom of association in Zimbabwe. Apart from the legal analysis of the right to freedom of association, some authors have dealt with the historical development of labour relations in Zimbabwe.[90] They also provide insights into the components of the right to freedom of association in Zimbabwe. However, their works preceded the introduction of labour rights in the Zimbabwean Constitution. Hence, there is no link between the constitutional provisions and their views on freedom of association. Mucheche[91] has also dealt with collective bargaining law in Zimbabwe at both workplace and industrial level. In addition, he briefly discusses international and foreign law on collective bargaining, although he does not directly analyse the Zimbabwean law against these international and foreign labour standards.

Besides the work of labour law scholars, a lot has been written about the effect of incorporating socio-economic rights which include labour rights in the Zimbabwean Constitution since its introduction in 2013. Hence, the works are relevant in the discussion of the right to freedom of association and its components. These articles discuss the various obligations which are created by the Zimbabwean

88 *A Guide to labour law in Zimbabwe*.

89 *Labour and employment law in Zimbabwe*.

90 Moyana *Dynamics of history* (1994); Raftopolous & Sachikonye *The labour movement: Politics and economic crisis* (2001); Raftopolous *The labour movement and the emergence of opposition politics in Zimbabwe* (2001); Cooper *Decolonisation and African Society* (1996); Bond *Radical rhetoric and the working class during Zimbabwean nationalism's dying days* (2001); Zvobgo *A history of Zimbabwe*; Sibanda *Industrial relations in Zimbabwe today* (2002); Makambe *The exploitation and abuse of African labour in the colonial economy of Zimbabwe*, 1903-1930 (1994); Austin *Racism and apartheid in Southern Africa: Rhodesia* (1975); Cary & Mitchell *African nationalist leaders in Rhodesia Who's who* (1977).

91 *A guide to collective bargaining law and wage negotiations in Zimbabwe* (2014).

Constitution.[92] What is clear at this point is that little has been written about the new constitution from the labour law perspective. Most of the articles are about constitutional law and human rights law. They do not discuss specific provisions on the right to organise, strike and bargain collectively. Neither do they discuss the right to freedom of association in the workplace specifically.

Zimbabwean literature on the right to freedom of association from the labour law perspective is scarce. It could be that there is not much interest on the subject despite its growing significance. Therefore, the South African literature on the subject is very useful to close the gap. Its relevance emanates from the similarities in the constitutions of Zimbabwe and South Africa. Apart from legislative provisions which are almost identical, Zimbabwe and South Africa share a common history of colonisation. There is scholarly work on the history of trade unionism and freedom of association in South Africa that is useful for comparative purposes with Zimbabwe's own history.[93] In addition, the Roman-Dutch common law has been applied and developed in both countries for a long period of time. Other sources from foreign jurisdictions apart from South Africa are also considered based on their relevance to the research. To this end, a lot of literature has been written about freedom of association and the right not to associate.[94] There is also a lot of literature around the right to strike[95] bargain collectively[96] and organise, as well as

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92 Gwanyanya 2016 *African human rights law journal* 283-299; Mavedzenge & Coltart *Constitutional law guide*; Chitimira 2017 *Stell LR* 354 – 378; Kondo 2017 *African human rights law journal*; Ndhlovu *Protection of socio-economic rights in Zimbabwe: A critical assessment of the domestic framework under the 2013 constitution of Zimbabwe*; Moyo "Zimbabwe's constitutional values, national objectives and the declaration of rights"; Moyo "Socio-economic rights under the 2013 Zimbabwean constitution."

93 Budeli 2012 *CILSA*; Gould 1981 *Stan J Int'l L*; Grogan *Collective labour law* (2014); Judell-Lesha *The effectiveness of South African legislation in dealing with mass industrial action before and after the promulgation of the Constitution Act 108 of 1996* (2016); Smith 2000 *Georgia journal of international and comparative law*; Wood & Harcourt 1998 *Labour studies journal*.

94 Budeli 2003 *Speculum juris* 229; Albertyn 1989 *ILJ* 10; Grogan *Collective labour law* (2014); Van Nierkerk & Smit *Law@work* (2015); Emerson 1964 *Yale LJ* 74; Bendix *Labour relations*: *A South African perspective* (2015); Landman 1996 *Contemporary law rev* 1; Madima 1994 *TSAR* 545; Olivier & Potgieter 1994 *TSAR* 289; Budeli (2010) *Obiter* 16; Landman 1997 *ILJ* 13.

95 Grogan *Collective labour law* (2014); Van Nierkerk & Smit *Law@work* (2015); Finnemore *Labour relations in South Africa* (2009); Bendix *Labour relations: A South African*

other components of the right to freedom of association. Some scholars have researched on the impact of ILO jurisprudence on domestic laws relating to the right to freedom of association and its components.[97] The advantages and disadvantages of constitutional labour rights have also been canvased.[98] All the highlighted authorities from South Africa and other jurisdictions are useful in analysing the Zimbabwean law on the right to freedom of association for private sector employees. However, they are not specific to Zimbabwe. The research analyses the Zimbabwean law in light of the available literature from South Africa in particular and from other jurisdictions in general, thereby, contributing to a better understanding of the Zimbabwean law, including its strengths and weaknesses as far as the right to freedom of association is concerned.

1.6 Assumptions

The research is based on the assumptions set out hereunder:

1.6.1 The colonial history of Zimbabwe had an effect on the development of the right to freedom of association and its components.

1.6.2 Zimbabwe ratified the ILO core conventions and is a member of the ILO, the United Nations, African Union and SADC which gives it certain obligations in the implementation of the right to freedom of association and its components.

1.6.3 In 2013, Zimbabwe adopted a new constitution which entrenches the right to freedom of association and its components.

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perspective (2015); Du Plessis & Fouche *A practical guide to labour law* (2014); Chicktay 2007 *Obiter* 159; Rycroft 2015 *ILJ* 1.

96 Du Toit (2007) *ILJ* 763; Grant (1993) *ILJ* 305; Godfrey *et al Collective bargaining in South Africa* (2010); Anstey, Grogan & Ngcukaitobi *Collective bargaining in the workplace*; Finnemore *Labour relations in South Africa* (2009); Grogan *Collective labour law* (2014); Bendix *Labour relations: A South African perspective* (2015); Bosson *et al Essentials of labour law* (2009); Fergus 2016 *ILJ* 1537.

97 Simamba 1989 *SALJ* 517; Rubin 1998 *SALJ* 685; Welch 1996 *ILJ* 1041; Budeli 2009 *De jure* 136; Shepston 1998 *International labour law review* 137.

98 Beaty 1993 *ILJ* 1.

1.6.4 The Zimbabwean Constitution is the supreme law and any other law, custom, practice or conduct which is inconsistent with it becomes invalid to the extent of that inconsistency.

1.6.5 The right to freedom of association and its components may be limited by a law of general application provided it passes the proportionality test.

1.6.6 The law of general application which gives effect to the constitutional provisions on the right to freedom of association for private sector employees in Zimbabwe is the Labour Act.

1.6.7 The Zimbabwean Constitution and the Labour Act provide for the right to freedom of association but this right may be violated in practice.

1.7 Research methodology

This research adopts a comparative and analytical approach to relevant materials on the right to freedom of association and its components in Zimbabwe. A comparative and analytical approach enables the research to identify the strengths and weaknesses of the Zimbabwean law on freedom of association and its components. The materials include the Zimbabwean Constitution, the Labour Act, any other relevant and applicable legislation, regulations, case law, international law, especially the ILO jurisprudence, articles, journals, common law and authoritative texts. As a member of the United Nations and its agencies including the ILO, Zimbabwe has an obligation to fulfil the aims and objectives of these international organisations. In addition, it has an obligation to implement the treaties and conventions to which it is a party. Therefore, it is necessary to compare the Zimbabwean law on freedom of association against these international standards and gauge the extent to which it complies with them. Furthermore, the research relies on the jurisprudence that has been developed particularly in South Africa and generally in other relevant jurisdictions on the right of employees to freedom of association and its components. With particular reference to South Africa, the reasons for relying on its jurisprudence have already

been explored above. It is apparent that South Africa has developed rich literature on the right to freedom of association. The literature is useful in analysing the Zimbabwean law on the right to freedom of association. Accordingly, the approach to be taken is sufficient to resolve the identified problem statement.

1.8 Chapter organisation

1.8.1 Chapter one: Introduction

This chapter deals with the introduction to the research where issues like the meaning of the right to freedom of association and its legal framework in Zimbabwe are explored. In addition, it deals with the problem statement, aims and objectives of the study, literature review and research methodology. It concludes by dealing with the synopsis of chapters.

1.8.2 Chapter two: Historical development of the right to freedom of association in Zimbabwe

This chapter examines the historical development of the right to freedom of association and its components in Zimbabwe. It reveals how the right to freedom of association is linked to the developments on the social, economic and political fronts at any given historical epoch and how the quest for the right to freedom of association affects or is affected by these conditions. There are interesting lessons to learn from South Africa as Zimbabwe and South Africa share a similar history of colonisation. The developments are traced from pre-independence to the post-independence period. A discussion of this background is justified because it helps to understand the current labour law system and where it is likely to go in future.

1.8.3 Chapter three: International standards on freedom of association applicable in Zimbabwe

This chapter discusses international and regional human rights jurisprudence. It also examines international labour law jurisprudence which emanates from the

work of the ILO. International law has a direct influence in the development of labour laws in both Zimbabwe and South Africa. Both countries are members of the ILO, the UN, the AU and SADC. Accordingly, a discussion of international law adds value to this research since it helps to analyse the extent to which Zimbabwe has managed to fulfil its obligations in terms of international law. Therefore, this chapter together with chapter 2 form a strong foundation for discussion of the chapters which follow.

1.8.4 Chapter four: The constitutional framework in Zimbabwe

This chapter examines the constitutional provisions which are relevant to the right to freedom of association and its components. It adopts a comparative approach by analysing Zimbabwe and South Africa's constitutional provisions on freedom of association. Of particular importance are sections 57 and 65 of the Zimbabwean Constitution which create the right to freedom of association and its components. It also explores views by different scholars on the effect of entrenching labour rights in the constitution. The adequacy of the constitutional provisions in protecting the right to freedom of association is also canvassed. A discussion of the constitutional provisions is justified since the Zimbabwean Constitution is the supreme law of Zimbabwe and a bearer of standards on the right to freedom of association in Zimbabwe.

1.8.5 Chapter five: Freedom of association for private sector employees in terms of the Labour Act

The chapter is a discussion of employees and trade union rights to freedom of association in terms of the Labour Act as the law of general application on these rights. It adopts a comparative approach by analysing Zimbabwe and South Africa's legislative provisions on freedom of association. It further tests the compliance of the legislative provisions with the constitution and international law. The focus is on the nature of trade unions and employees' rights and how they can acquire them. It also examines whether trade unions are adequately protected by the law to effectively represent their members during strike actions or collective

bargaining. Since the Zimbabwean Constitution does not provide a detailed framework on the right to freedom of association in Zimbabwe, it is necessary to deal with the relevant provisions of the Labour Act as an essential component of the research. In addition, the Labour Act provides for the ways in which the right to freedom of association can be exercised by private sector employees in Zimbabwe.

1.8.6 Chapter six: Conclusion and recommendations

This is the last chapter which provides a conclusion. The conclusion incorporates recommendations and findings.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF THE RIGHT TO FREEDOM OF ASSOCIATION IN ZIMBABWE

2.1 Introduction

To begin with, this chapter explores the historical development of the right to freedom of association in Zimbabwe. The chapter is significant because it allows one to understand the past, which in turn allows one to understand the present.[99] In addition, history allows one to compare diverse versions of events and come up with different solutions including the best way forward in any situation.[100] The colonisation of Zimbabwe by the British shaped the development of labour law in Zimbabwe.[101] Before the colonisation of Zimbabwe, the feudal economies of various kingdoms and territories which constitute the present day Zimbabwe had no wage labourers and there was no need to have laws to regulate the offering of services in return for wages.[102] Therefore, it is necessary to dedicate a part of this chapter to a discussion of the colonial occupation of Zimbabwe which is followed by a discussion of various legal instruments which ushered in and shaped labour law in general and the right to freedom of association for private sector employees in particular. Reference is made to the historical development of the right to freedom of association in South Africa whenever necessary based on the reasoning that Zimbabwe and South Africa share a common history of colonisation. In addition, some of the Zimbabwean laws during the colonial era were directly taken from South Africa. An example is the Industrial Conciliation Act, 1934 which was the first piece of legislation to comprehensively deal with employee's right to freedom of association in Zimbabwe.

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99 www.enotes.com>homework-help (Date of use: 17 August 2020); www.medium.com/age of awareness (Date of use: 17 August 2020).

100 www.owlcation.com>academics>teaching (Date of use: 17 August 2020).

101 Gwisai *Labour and employment law in Zimbabwe* 17.

102 Madhuku *Labour law in Zimbabwe* 11.

Secondly, the chapter deals with the actual enjoyment of the right to freedom of association in Zimbabwe before and after independence. This is done in order to ascertain the extent to which this right has been observed in practice in the history of Zimbabwe. The analysis is not limited to the law only but it also looks at other social, economic and political factors which have influenced the development of the right to freedom of association in Zimbabwe. The reason is that it is not possible to undertake a study of the labour law without considering these economic, social and political factors.[103] The right to freedom of association is influenced by the political, economic and social conditions with Zimbabwe's colonial background offering a good example. On the other hand, the political, economic and social conditions can also be influenced by the exercise of the right to freedom of association. The position is illustrated by various strikes by employees before independence in Zimbabwe which became part and parcel of the struggle for political independence. The trend continued after independence and it can be presently noticed where strikes are held just to force the government to address the economic issues.

Finally, the chapter discusses legal developments after independence as far as the right to freedom of association for private sector employees in Zimbabwe is concerned. An important milestone in the development of the right to freedom of association was its inclusion in the 1980 Constitution.[104] This was followed by the enactment of the Labour Relations Act, 1985. The current Labour Act is simply the Labour Relations Act, 1985 and its amendments.[105] Thus, the chapter discusses the effect of the Labour Relations Act, 1985 and each amendment in moulding the current Labour Act. The Zimbabwean Constitution is also discussed. Emphasis is on the place of the Zimbabwean Constitution in the development of the right to freedom of association in Zimbabwe. A detailed analysis of the effect of the right

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103 Madhuku "Trade Unions and the law" 106.

104 Section 21 of the 1980 Constitution.

105 The Labour Relations Act, 1985 has been amended on several occasions and the amendments shall be discussed in due course under this chapter insofar as they affect the right of private sector employees to freedom of association in Zimbabwe.

to freedom of association for private sector employees in Zimbabwe is undertaken in chapter four of this research.

2.2 The colonial occupation of Zimbabwe

Zimbabwe was colonised by the British through Cecil John Rhodes in 1890. There were many reasons for the colonisation of Africa in general and Zimbabwe in particular. The reasons included the growing demand for markets, raw materials and investment opportunities by rapidly expanding European countries during the era of Industrial Revolution.[106] The colonisation of Zimbabwe was made possible through the wealth of Cecil John Rhodes who was involved in diamond mining at Kimberly in the Orange Free State and gold mining at the Witwatersrand in the Transvaal Republic.[107] In addition, Cecil John Rhodes had the political clout to lead the colonisation of Zimbabwe as the then Prime Minister of the Cape Province in South Africa.[108] Cecil John Rhodes was an imperialist who wanted to paint Africa red so that he could spread British civilisation which he believed to be the best in the world[109]. In his own words, he once remarked that:

> I contend that we are the finest race in the world and that the more of the world we inhabit, the better it is for the human race. Just fancy those parts that are at present inhabited by the most despicable specimens of human beings, what an alteration there would be if they were brought under the Anglo-saxon influence.[110]

The above quotation clearly shows Cecil john Rhodes' racial mind set which later defined the colonial labour laws which exploited African employees.

After the discovery of gold in the Rand, South Africa, speculation became rife that there were other gold deposits in Zimbabwe.[111] In addition, the Transvaal Republic became a serious competitor in the scramble for Zimbabwe.[112] In April 1884, Germany declared South West Africa (Namibia) as its protectorate and Cecil John

106 Mlambo *A history of Zimbabwe* 32.
107 Zvobgo *A history of Zimbabwe* 12. Mlambo *A History of Zimbabwe* 36.
108 Mlambo *A history of Zimbabwe* 36.
109 Mukanya *Dynamics of history* 90.
110 Mlambo *A history of Zimbabwe* 36.
111 Mukanya *Dynamics of history* 90; Zvobgo *A history of Zimbabwe* 12; Mlambo *A history of Zimbabwe* 53.
112 Zvobgo *A history of Zimbabwe* 11.

Rhodes became worried that an eastward expansion of South West Africa and a westward expansion of the Transvaal Republic would block British expansion northward.[113] Similarly, South Africa shares a similar history of colonisation which started around 1652 when the Dutch East India Company occupied the Cape.[114] Cecil John Rhodes needed authorisation from the British government before occupying Zimbabwe and he needed treaties of friendship with local Zimbabwean rulers in order to secure such authorisation.[115] To achieve this, he deceived Zimbabwean rulers in the process of colonising Zimbabwe as summarised in Lobengula's letter to CD Helm dated 29 October 1883:

> Did you ever see a chameleon catch a fly? The chameleon gets behind the fly and remains motionless for some time, then he advances very slowly and gently, first putting forward one leg and then another. At last, when well within reach, he darts his tongue and the fly disappears. England is the chameleon and I am that fly.[116]

Mukanya argues that the above quotation shows that Lobengula was aware of the shenanigans of the British but did not do enough to shield the country from colonisation.[117] It is submitted that there was overwhelming evidence of deception by the British as is shown later in this part. It now suffices to deal with the process of colonisation of Zimbabwe which began with the Grobler Treaty of 1887 and was finalised by the actual occupation of Zimbabwe.

2.2.1 The Grobler Treaty (1887)

The Transvaal Boers wanted to occupy the Beira port in Mozambique but they could not do so without taking control of Zimbabwe.[118] The Grobler Treaty was signed in 1887 between Lobengula, who was the Ndebele King and Pieter Grobler, who represented the Boers. The treaty ensured that there was going to be close ties between Lobengula and the Boers which included military assistance, trade

113 Rotberg *The founder: Cecil Rhodes and the pursuit of power* 169.
114 Budeli 2012 *CILSA* 466.
115 Mlambo *A history of Zimbabwe* 39.
116 Mukanya *Dynamics of history* 91.
117 Mukanya *Dynamics of history* 91.
118 Mukanya *Dynamics of history* 90.

and hunting.[119] The significance of this treaty in the colonisation of Zimbabwe is that it pushed Cecil John Rhodes into activity and he sent John Moffat to negotiate a treaty with Lobengula.

2.2.2 The Moffat Treaty (1888)

In November 1887, Cecil John Rhodes sent John Moffat to negotiate a treaty with Lobengula.[120] The purpose of the Moffat Treaty was to reverse the Grobler Treaty and to bring Matebeleland under the British sphere of influence.[121] Under this treaty, Lobengula undertook not to deal with any other foreign power without the knowledge and permission of the British High Commissioner to South Africa.[122] It further affirmed that peace and amity should continue to prevail between Matebeleland and the British.[123] The significance of the Moffat Treaty in the colonisation of Zimbabwe is that it provided a shaky legal basis for the British occupation of Zimbabwe.[124] It was shaky because Lobengula had not surrendered his territory to the British but the treaty was used as a foundation for the steps towards colonisation which followed it.

2.2.3 The Rudd Concession (1888)

The Rudd Concession followed the Moffat Treaty. In September 1888, Cecil John Rhodes sent a delegation to Lobengula consisting of Charles Rudd, Rochfort Maguire and Francis Thompson to negotiate the terms of the concession.[125] Lobengula was promised a payment of £100 per month for an unspecified period, 1000 breech-loading rifles, 100 000 rounds of ammunition and a steamboat to be stationed on the Zambezi river or an option of £500 cash payment.[126] In return, Lobengula agreed to grant the British complete and exclusive charge over all metals and minerals situated in Matebeleland and Mashonaland (covering the

119 Mukanya *Dynamics of history* 90.
120 Palley *The constitutional history and law of Southern Rhodesia* 8.
121 Mukanya *Dynamics of history* 92.
122 Chikuhwa *A crisis of governance* 12.
123 Mukanya *Dynamics of history* 92.
124 Madhuku *Labour law in Zimbabwe* 11.
125 Mukanya *Dynamics of history* 93.
126 Mukanya *Dynamics of history* 93.

whole Zimbabwean territory).[127] He further agreed to exclude any other person who may be interested in Zimbabwe.[128] The Rudd Concession included Mashonaland and other adjoining territories even if Lobengula did not have jurisdiction over these territories because the colonialists wanted to secure future territorial claims.[129]

During the negotiations leading to the signing of the Rudd Concession, Charles Rudd and his colleagues did not disclose Cecil John Rhodes' intention to occupy Zimbabwe as this would have been fatal to the negotiations.[130] Instead, Lobengula was promised that no more than 10 men were going to come and work in Zimbabwe.[131] There were two versions of the Rudd Concession which were different.[132] The first and the most important version was the one which was written in English language and fully accepted by the BSAC and the British government whilst the second version was the oral one which was communicated to Lobengula through CD Helm who was the interpreter.[133] Lobengula was reluctant to sign the Rudd Concession until he was persuaded by CD Helm that it was harmless.[134] Thus, the Rudd Concession was obtained though deception. It can be argued that Lobengula would not have signed it had he known the truth.

The Rudd Concession gave the British full power to do all things they deemed necessary to win and procure their right to metals and minerals in Zimbabwe and this was taken to mean the power to exercise governmental control.[135] The Rudd Concession granted the British mining rights only but not land rights. A Germany adventurer, Eduard Lippert had secured a fraudulent concession from Lobengula which granted him land rights.[136] Cecil John Rhodes bought the Lippert

127 Mlambo *A history of Zimbabwe* 41.
128 Mukanya *Dynamics of history* 93.
129 Mlambo *A history of Zimbabwe* 41; Chikuhwa *A crisis of governance* 13.
130 http://digital.lib.msu.edu/projects/africanjournals (Date of use: 18 August 2020).
131 Mlambo *A history of Zimbabwe* 39, http://digital.lib.msu.edu/projects/africanjournals (Date of use: 18 August 2020).
132 Chikuhwa *A crisis of governance* 13.
133 Chikuhwa *A crisis of governance* 13.
134 Mlambo *A history of Zimbabwe* 38.
135 Madhuku *Labour law in Zimbabwe* 12.
136 Mlambo *A history of Zimbabwe* 43.

Concession in 1894 which enabled him to claim both mining and land rights over the territory of Zimbabwe.[137]

2.2.4 The Royal Charter (1889)

Cecil John Rhodes used the Rudd Concession to apply for the Royal Charter from the British monarch.[138] He formed the BSAC and the company was given authority over the region that was 'north of the Cape colony and the Transvaal and west of the Portuguese territories in East Africa'.[139] Therefore, the Royal Charter covered the territory of Zimbabwe. The BSAC was given the power, for a period of twenty five years, to promulgate laws, maintain a police force and to undertake public works.[140] In terms of the Royal Charter, laws were to be made by the BSAC in three ways, that is, by ordinances which were to be promulgated by the Secretary of State in Britain on the advice of the Board of Directors of BSAC and by proclamations issued by the High Commissioner at the Cape.[141] When Matebeleland was occupied by the British in 1893, they added a third way of law making, namely, regulations by the Administrator.[142] The BSAC then set up a group of people who were to occupy Zimbabwe and the group was named the Pioneer Column. This group occupied Mashonaland in 1890 and Matebeleland in 1893 after the defeat of Lobengula.[143]

2.3 The right to freedom of association under colonial rule in Zimbabwe

The colonialists faced serious shortages of African cheap labour. Africans were not used to a cash economy so they did not value money.[144] Hence, they were coerced to provide cheap labour through repressive legislation and practices for

137 Mlambo *A history of Zimbabwe* 43.
138 Mukanya *Dynamics of history* 94.
139 Mukanya *Dynamics of history* 94.
140 Mukanya *Dynamics of history* 94.
141 Madhuku *Labour law in Zimbabwe* 12.
142 Madhuku *Labour law in Zimbabwe* 12.
143 Mukanya *Dynamics of history* 95-100.
144 Mukanya *Dynamics of history* 104; Mlambo *A history of Zimbabwe* 52.

the colonialists to attain more profits.[145] District Commissioners and traditional leaders were used to recruit 'able-bodied men' who were then distributed to farms, mines and businesses.[146] Forced labour which was popularly known as "chibharo" was also rampant. At the early stages of the development of labour law, there was no right to freedom of association which was clearly provided for in terms of legislation. The employees' right to freedom of association was introduced by the ICA, 1934, although it only benefited the white minority.[147] The ICA, 1959 extended the right to freedom of association to particular sections of African employees. However, it is necessary to trace the development of labour law from its earliest stages in order to understand the motivations behind the suppression or promotion of the right to freedom of association at each stage.

2.3.1 The Proclamation of 10 June 1891

The proclamation of 10 June 1891 is crucial in the development of labour law in Zimbabwe because it shaped the legal system of the new colonial state. It provided that the law to be applied in Zimbabwe was the law in force at the Cape of Good Hope as at the 10th of June 1891.[148] The law which was applicable at the Cape of Good Hope on that date was largely Roman-Dutch law with some English law elements.[149] A Dutch sailor, Jan van Riebeeck, who was employed by the Dutch East India Company, is credited with bringing Roman-Dutch law to the Cape in 1652.[150] The Roman-Dutch law was fused with some English law aspects when the British took over control of the Cape in 1806.[151] Therefore, the legal significance of the proclamation to labour law was that the contract of employment in Zimbabwe was to be governed by the Roman-Dutch common law. The common

145 Makambe *The exploitation and abuse of African labour in the colonial economy of Zimbabwe, 1903-1930* 81.
146 Mukanya *Dynamics of history* 107.
147 Gwisai *Labour and employment law in Zimbabwe* 20.
148 Madhuku *Labour law in Zimbabwe* 12.
149 Madhuku *An introduction to Zimbabwean law* 19-20.
150 Redgment *Introduction to the legal system of Zimbabwe* 1-18.
151 Madhuku *An introduction to Zimbabwean law* 19-20.

law has stood the test of time to the extent that it is resorted to where legislative provisions are unclear, vague, silent or inconsistent.[152]

In the case of *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd & Anor*[153], the Supreme Court of Zimbabwe held that it is an established principle of statutory interpretation that a given statute cannot alter the common law without saying so explicitly.[154] Thus, it held that the employer retained his common law right to terminate any employment contract on notice because there was no explicit provision in the Labour Act taking that right away. Although the case dealt with individual labour law, it is important in highlighting the importance of common law up to this day. Hence, the proclamation of 1891 has remained important in labour law. Even the Zimbabwean Constitution recognises the role of the common law in Zimbabwe's legal system through a provision which requires courts to develop the common law in line with its spirit and objectives.[155] The effect of the common law is also seen in the exercise of the right to strike. It does not recognise such right as it is viewed as a breach of the employee's duties to provide service and to act in good faith.[156] In addition, employees who are not covered by legislation can resort to the common law for protection.[157]

In some cases, the common law has been codified to become part of a statute to the extent that courts have to apply the Roman-Dutch common law principles when interpreting the statute.[158] The Roman-Dutch common law classified the contract of employment under the Roman concept of *locatio conductio* which had three contracts namely, *locatio conductio rei* (letting and hiring that involves a

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152 Gwisai *Labour and employment law in Zimbabwe* 36.

153 SC-43-15 (hereinafter the *Nyamande v Zuva Petroleum* case).

154 See also *Hama v NRZ* 1996 (1) ZLR 664 (S) (hereinafter the *Hama v NRZ* case); *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) (hereinafter the *United Bottlers v Kaduya* case).

155 Sections 46 (2) and 176 of the Zimbabwean Constitution.

156 Machingambi *A guide to labour law in Zimbabwe* 204; *Wholesale Centre (Pvt) Ltd v Mehlo & Others* 1992 (1) ZLR 376 (hereinafter the *Wholesale Centre v Mehlo* case); *Lanchashire Steel (Pvt) Ltd v Mandevana & Others* S-29-95 (hereinafter the *Lanchashire Steel v Mandevana* case); *Marievale Consolidated Mines Ltd v NUM & Others* (1986) 7 ILJ 108 (W) (hereinafter the *Marievale Consolidated Mines* case).

157 Le Roux & Jordaan *Contract of employment* E1-2.

158 The *Nyamande v Zuva Petroleum* case.

specific item in return of money payment), *locatio conductio operis* (an independent contractor letting and making available for hire his/her services) and *locatio conductio operarum* (the letting and hiring of personal services in return for the payment of money).[159] Thus, the modern day contract of employment can be classified as *locatio conductio operarum*. The common-law contract of employment did not recognise many labour rights of the employee apart from the employee's right to be received into the service by the employer, the right to safe working conditions and the right to remuneration.[160] The common-law contract of employment ensures that the relationship between the employer and the employee is uneven with the employee occupying the weaker position.[161] The right to freedom of association was not clearly protected under the common law. This explains why there was legislative intervention in order to clearly provide for such right in Zimbabwe.[162] Van Nierkerk & Smit argue that the importance of the common law is diminishing in employment relationships.[163] However, it continues to influence the modern-day contract of employment including the enactment and interpretation of legislative provisions.

2.3.2 The Hut Tax Ordinance 5 of 1894

Since the colonialists did not bring their own labour, they had to rely on the African labour. Africans were unwilling to take wage employment.[164] Thus, the Hut Tax Ordinance[165] was introduced as a way of forcing Africans into wage labourers.[166] The Hut Tax Ordinance required every African adult to pay a hut tax of ten shillings per year and it was amended in 1901 to require cash payments only and to criminalise tax evasion.[167] African employees who refused to get employment had

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159 Basson *et al Essential labour law* 19; Rycroft & Jordan *A guide to South African labour law* 34; *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) (hereinafter the *Smit v Workmen's Compensation Commissioner* case).

160 Jordaan *Contract of employment* E19-34; Grogan *Workplace law* 53-57.

161 Davies & Freedland *Labour law* 18; Deakin & Morris *Labour law* 752.

162 See sections 58 and 65 of the Zimbabwean Constitution and the Labour Act generally.

163 Van Niekerk & Smit *Law@work* 5.

164 Mlambo *A history of Zimbabwe* 70.

165 5 of 1894 (hereinafter referred to as the Hut Tax Ordinance).

166 Mukanya *Dynamics of history* 104; Madhuku *Labour law in Zimbabwe* 13.

167 Gann *A history of Southern Rhodesia* 174.

their cattle, sheep and goats seized by the colonialists.[168] The whole idea of taxation in order to force Africans to become cheap labourers was mooted by Cecil John Rhodes in 1892.[169] Besides the hut tax there were the poll tax and the dog tax which were also payable in cash.[170]

In 1895, the colonialists introduced the Registration of Natives Regulations and the Vagrancy Regulations which were meant to augment the Hut Tax Ordinance. The two set of regulations had an impact on the labour law because Africans were required to obtain permits or passes before they could seek for jobs in urban areas.[171] In addition, Africans could only stay in urban areas if they had proof of employment.[172] African employees were paid wages which were very low and unattractive.[173] During the early years of colonial rule, Zimbabwe was governed by the BSAC, a private company, whose main aim was to make huge profits. The use of taxation in order to acquire cheap African labour shows that the legal system was oppressive to the poor Africans. It is submitted that this was the beginning of a racially divided labour law system as the taxes targeted African employees. It further explains the absence of the right to freedom of association in Zimbabwe at that time.

2.3.3 The Southern Rhodesia Order-in-Council, 1898

The Order-in-Council completed the British occupation of Zimbabwe by introducing a clear governance structure. The BSAC retained the responsibility to administer Zimbabwe.[174] It also established a Legislative Council to make laws which were subject to the approval of the British High Commissioner of South Africa.[175] A High Court of Southern Rhodesia was established as a court of record with full

168 Mukanya *Dynamics of history* 104.
169 www.thepatriot.co.zw (Date of use: 21 August 2020).
170 Malaba 1980 *Review of the African political economy* 9.
171 Machingambi *A guide to labour law in Zimbabwe* 11.
172 Machingambi *A guide to labour law in Zimbabwe* 11.
173 Makambe *The exploitation and abuse of African labour in the colonial economy of Zimbabwe 1903-1930* 81.
174 See section 7 of the Sothern Rhodesia Order- in-Council 1898.
175 See section 36 of the Southern Rhodesia Order-in-Council 1898.

jurisdiction both criminal and civil over all matters and persons within Zimbabwe.[176] The common law to be applied by the High Court and any magistrates' court was the Roman-Dutch law as modified by the English law. A Supreme Court was also established to deal with appeals from the High Court.[177] The establishment of a court system is significant in this research as it ensured that a dispute settlement mechanism was put in place to deal with any future disputes relating to the exercise of the employees' right to freedom of association.

The Southern Rhodesia Native Regulations were annexed to the Southern Rhodesia Order-in-Council. In terms of these Regulations, an Administrator-in-Council was given all the political power and authority over all the natives in Zimbabwe.[178] He had the power to appoint Chiefs.[179] Zimbabwe was sub-divided into districts which were headed by Native Commissioners.[180] The Native Commissioners were responsible for allocating huts, gardens and grazing land to Africans and were also responsible for collecting hut tax.[181] The Regulations are significant in this research because they ensured that Africans continued to be a clear source of cheap labour with no collective bargaining rights. The enforcement of taxes by Native Commissioners ensured that Africans were forced to become wage labourers. Under the conditions of forced labour as it were, there was no room for the right to freedom of association for employees.

2.3.4 The Natives Employment Ordinance, 1899

The demand for labour grew immensely after the occupation of Zimbabwe. The Natives Employment Ordinance[182] was enacted in order to 'regulate employment of natives within Southern Rhodesia and for controlling the removal of natives for employment beyond its borders'.[183] In 1903, the Labour Board of Southern

176 See section 49 of the Southern Rhodesia Order-in-Council 1898.
177 See section 60 of the Southern Rhodesia order-in-Council 1898.
178 Section 2 of the Regulations.
179 Section 2 of the Regulations.
180 See part III of the Regulations.
181 See part III of the Regulations.
182 9 of 1899 (hereinafter referred to as the Natives Employment Ordinance).
183 See the Ordinances' preamble.

Rhodesia was set up and it acted as a recruitment agency and regulated the labour market.[184] In terms of the Ordinance, employment agencies which recruited African employees were required to be registered and licenced.[185] One was criminally liable for acting as an agent without a licence.[186] As a matter of fact, an agent was not allowed to enter into an agreement for the employment of an African outside Zimbabwe without its approval by the responsible Native Commissioner.[187] The Ordinance also introduced a system of labour inspections and the inspectors were required to enquire and deal with the grievances by natives.[188] Above all, they were responsible for the discipline of native employees.[189]

It is apparent that the ordinance was meant to deal with labour shortages in Zimbabwe. It had nothing to do with advancing the rights and interests of employees. By requesting the inspectors to deal with the grievances of employees, the Ordinance left no room for the exercise of the employees' right to freedom of association and its components. During the early days of occupation of Zimbabwe, there were very poor working conditions which were characterised by inadequate health facilities, poor diets, high rates of accidents, non-payment of wages, ill-treatment of workers and low wages.[190] In 1904, the British government complained that there were high rates of mortality in Zimbabwe in mines such as Gaika mine, Globe and Phoenix mine, Selukwe mine, Red and White Rose mine and Morven mine due to diseases and accidents.[191] It is sufficient evidence of the exploitation and abuse of African employees who had no right to freedom of association which could have helped to improve their living and working conditions. The Natives Employment Ordinance was replaced by the Labour

184 Sachikonye 1985 *Zambezia* 3.
185 Section 3 of the Ordinance.
186 Section 21 of the Ordinance.
187 Section 12 of the Ordinance.
188 Madhuku *Labour law in Zimbabwe* 14.
189 Madhuku *Labour law in Zimbabwe* 14.
190 Makambe *The exploitation and abuse of African labour in the colonial economy of Zimbabwe 1903-1930* 81.
191 Makambe *The exploitation and abuse of African labour in the colonial economy of Zimbabwe 1903-1930* 83.

Regulation Ordinance of 1911 which made it more difficult to recruit natives for work outside Zimbabwe.[192]

2.3.5 The Master and Servants Ordinance, 1901

The Master and Servants Ordinance[193] was passed in 1901 amid growing calls to stabilise the labour market.[194] Because of the absence of the right to freedom of association for African employees, they resorted to mass actions such as the commission of offences by a large number of employees at the same time.[195] The offences were usually committed during the planting or harvesting period in order to disrupt production. In addition, most African employees did not want to take full time employment.[196] It was against this background that the Master and Servants Ordinance was enacted.[197] It was modelled along the Master and Servants Act 15 of 1856 of South Africa which had been enacted to deal with rights and duties of employers and employees in the Cape Province of South Africa. It did not deal with collective labour rights but it only dealt with individual labour rights.[198] The Master and Servants Ordinance relied on the criminal law and state to enforce employment relationships and more than half of the Ordinance's provisions were penal sanctions.[199] When the Master and Servants Ordinance was enacted, there was a belief among the colonialists that Africans were not afraid of imprisonment. To this end, the Master and Servants Ordinance did not emphasise on the longer periods of imprisonment for breach of an employment contract but on penalties to make the life in prison unbearable such as hard labour, spare diet and solitary confinement in addition to heavy fines.[200] Breaches of the employment contract which were criminalised included absence from work without a lawful excuse,

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192 Madhuku *Labour law in Zimbabwe* 14.
193 No 5 of 1901 (hereinafter referred to as the Master and Servants Ordinance).
194 Mlambo *A history of Zimbabwe* 72.
195 Yoshikuni *African urban experiences in colonial Zimbabwe* 115.
196 Mlambo A *history of Zimbabwe* 72.
197 Yoshikuni *African labour experiences in colonial Zimbabwe* 115.
198 Madhuku *Labour law in Zimbabwe* 15.
199 Gwisai *Labour and employment law in Zimbabwe*; www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020); Yoshikuni *African urban experiences in colonial Zimbabwe* 116.
200 Yoshikuni *African urban experiences in colonial Zimbabwe* 116.

intoxication during working hours, disobedience to a lawful order and refusal to commence duty at the appointed time.[201]

The Master and Servants Ordinance also provided that a written contract of employment could not exceed three years, a one month notice period to terminate a contract of employment and a one month paid sick leave.[202] Trade unions, strikes and collective bargaining were expressly prohibited.[203] Its provisions had the effect of making African labour the property of the white masters.[204] The 'master' and the 'servant' were put on an unequal footing and the only freedom that was available to the servant was to determine who to work for but this freedom was again limited by poverty and tax obligations which forced Africans to seek wage employment.[205]

Furthermore, the Master and Servants Ordinance created a racially divided labour law system as it only applied to 'natives' whilst the general law and the common law were reserved for the white employees.[206] However, Gwisai argues that the Master and Servants Ordinance was meant to avoid outright slavery and to maintain an employment relationship.[207] In the case of *R v Millin*[208] the court had to convict an employer who had failed to pay wages to his employees which brings out the beneficial side of the Master and Servants Ordinance.

2.3.5.1 Freedom of association after the enactment of the Master and Servants Ordinance

After the promulgation of the Master and Servants Ordinance, there was no other law which allowed for the exercise of the right to freedom of association for both African and white employees. The legal recognition of such right among the white

201 Madhuku *Labour law in Zimbabwe* 15.
202 Madhuku *Labour law in Zimbabwe* 15.
203 Gwisai *Labour and employment law in Zimbabwe* 18.
204 Malaba 1980 *Review of African political economy* 9.
205 Malaba 1980 *Review of African political economy* 19.
206 Gwisai *Labour and employment law in Zimbabwe* 18.
207 Gwisai *Labour and employment law in Zimbabwe* 18.
208 1914 SR 171 (hereinafter the *R v Millin* case).

employees only came through the ICA, 1934. However, both African and white employees resorted to many collective industrial actions outside the parameters of the law. White employees formed the Rhodesia Railway Workers' Union which organised the 1919 railway strike in Bulawayo which was also supported by African employees.[209] The African employees also organised the Wankie strike of 1912, although these early strikes were isolated and quickly crushed.[210] The white employees in South Africa had already embraced the idea of forming trade unions and the first known trade union, the Carpenters and Joiners Union, was formed in 1881.[211] The white employees became more conscious as they got influence from developments in Europe and other countries which had already developed the employees' right to freedom of association.[212]

The year 1927 marked an important milestone in the development of the employees' right to freedom of association in Zimbabwe as it saw the formation of the first black trade union which was named Industrial and Commercial Workers' Union (ICU).[213] This union was led by a Malawian, Robert Sambo and its formation was influenced by another Malawian, Clement Kadalie who had formed the South African Industrial and Commercial Workers Union (SAICU) in 1919.[214] The ICU was different from all organisations which had been formed earlier as it sought to unite all African employees regardless of race and origins.[215] Between the first and the Second World War, the ICU was the most visible organisation to the extent that its leaders were regularly harassed and arrested.[216]

The most notable strike which was organised by the ICU in Zimbabwe was the 1927 Shamva Gold Mine strike.[217] About 2500 African employees participated in

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209 Gwisai *Labour and employment law in Zimbabwe* 19.
210 Gwisai *Labour and employment law in Zimbabwe* 19.
211 Budeli 2012 *CILSA* 466.
212 See Budeli 2012 *CILSA* 466 and Gwisai *Labour and employment law in Zimbabwe* 19.
213 Mukanya *Dynamics of history* 160; Gwisai *Labour and employment law in Zimbabwe* 19; Mlambo *A history of Zimbabwe* 131; Karekwaivanane *The struggle over state power in Zimbabwe* 38.
214 Mukanya *Dynamics of history* 160.
215 Mlambo *A history of Zimbabwe* 131.
216 Karekwaivanane *The struggle over state power in Zimbabwe* 38.
217 Mlambo *A history of Zimbabwe* 131.

the strike where they were protesting against the exploitative nature of the Master and Servants Ordinance, dangerous working conditions, low wages, poor quality food rations and overcrowded compounds.[218] However, the grievances of African employees went beyond the workplace as highlighted by one of the striking employees who was quoted as saying:

> The white man came to the mine a poor man. His duties were apparently to watch the native do the work and was able to purchase cattle. The natives had to perform all the dangerous work in which some of them had been killed, whereas the white man suffered no injury.[219]

The above quotation shows that the employees' struggle from the onset was not only about poor working conditions but also their political and economic exploitation by the colonialists. The army was sent to thwart the strike as it was illegal under the Master and Servants Ordinance.[220] Throughout 1929, the ICU led its activities in Bulawayo in general and the Bulawayo council in particular where it was also concerned about issues to do with the improvement of service delivery.[221]

Just like the SAICU, the ICU in Zimbabwe disintegrated during the Great Depression and the major reasons were that Africans did not have the right to form trade unions at the time and the trade union was dominated by foreigners with no sufficient local backing.[222] Its formation is a clear testimony that the idea of trade unionism was growing within the African population despite the existence of laws which prohibited it.

2.3.6 The Industrial Dispute Ordinance, 1920

Before the enactment of this Ordinance, no attempt had been made to deal with collective labour disputes. All the previous pieces of legislation only dealt with individual labour law and issues to do with the recruitment of African employees.

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218 Malaba 1980 *Review of African political economy* 22.
219 Malaba 1980 *Review of African political economy* 22.
220 Mlambo *A history of Zimbabwe* 132.
221 Ranger *City versus State in Zimbabwe* 164.
222 Mukanya *Dynamics of history* 160.

By 1920, Zimbabwean industries had grown and employees had become more organised which created a source of conflicts between labour and capital.[223] The Ordinance was enacted in order to provide a system of disputes settlement in collective labour disputes between employers and employees. Conciliation boards were created which were appointed by the Administrator and their role was to resolve disputes which were referred to them by the Administrator.[224] Madhuku argues that the Ordinance marked the beginning of a system of collective bargaining although the focus was on wage disputes.[225] It is submitted that the colonialists were reluctant to recognise the employees' right to freedom of association at the time. They were just introducing piecemeal reforms in order to appease the employees who were becoming more organised. It explains why there was no statute which clearly recognised the employees' right to freedom of association and its components.

2.3.7 The Industrial Conciliation Act, 1934

The 20th of July 1934 was historic in that the ICA, 1934 became operational. The ICA, 1934 is widely regarded as the first piece of legislation to fully recognise the employees' right to freedom of association.[226] It was borrowed from the South African Industrial and Conciliation Act, 1924 (SAICA, 1924). The SAICA, 1924 also became South Africa's first comprehensive piece of labour legislation.[227] Through the ICA, 1934, the colonialists sought to protect the jobs of white employees by granting them the right to freedom of association to the exclusion of African employees and this intention was aptly captured in the then Prime Minister Godfrey Huggins' own words:

223 Madhuku *Labour law in Zimbabwe* 15; Mukanya *Dynamics of history* 139.
224 Madhuku *Labour law in Zimbabwe* 15.
225 Madhuku *Labour law in Zimbabwe* 15.
226 Gwisai *Labour and employment law in Zimbabwe*, Sachikonye 1985 *Zambezia* 3; Madhuku *Labour law in Zimbabwe* 15.
227 Budeli 2012 *CILSA* 468; Grogan *Collective labour law* 4.

> The Europeans in the country can be likened to an island in a sea of blacks, with the artisan and the tradesman forming the shores and the professional class, the highland in the centre. Is the native to be allowed to erode the shores and gradually attack the highland? [228]

The quotation meant that it was undesirable for the African employees to be allowed to gradually take away jobs from white employees. Thus, it informed the promulgation of the ICA, 1934. It clearly introduced a racially determined dual labour law system through the definition of an employee as 'any person engaged by an employer to perform (for hire or reward) work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include a native'.[229] Hence, African employees were excluded from its ambit. There was a similar provision in the SAICA, 1924 which also introduced a racially determined labour law system in South Africa.[230] The SAICA, 1924 came after the 'Rand Rebellion' of 1922 which was organised by white miners who wanted to protect their jobs against African employees in South Africa.[231]

The ICA, 1934 provided for the registration of trade unions and employers' organisations.[232] It also recognised the rights of employees to strike, to bargain collectively and to join trade unions.[233] In addition, African employees were prevented from skilled jobs as they could not become apprentices.[234] The ICA, 1934 is also credited for introducing the long-standing principle of 'one industry one union' which was only abolished in 1992. According to the ICA 1934, a trade union could not be registered if there was already in existence another trade union which was 'sufficiently representative of the interests concerned'.[235] The ICA, 1934 also created Industrial Councils which preceded the current National Employment Councils. Industrial Councils became platforms for collective bargaining. Strikes

228 Mukanya *Dynamics of history* 139.
229 Section 4 of the ICA, 1934.
230 Budeli 2012 *CILSA* 468.
231 Gould 1981 *Stan J Int'l L* 101; Grogan *Collective labour law* 3.
232 Madhuku *Labour law in Zimbabwe* 15.
233 Gwisai *Labour and employment law in Zimbabwe* 20.
234 www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020).
235 Section 5 of the ICA, 1934.

were not allowed in situations which were covered by an industrial council agreement or involved essential services.[236]

The major anti-climax of the ICA, 1934 was that it excluded African employees who continued to be governed by the Master and Servants Ordinance.[237] It meant that it merely benefited the minority white employees. In addition, the principle of 'one industry one union' placed a limitation on the employees' right to freedom of association as they could not choose a trade union to join. Despite the apparent prohibition of African trade unions, employees continued to organise themselves. A glaring example was the formation of the Rhodesian Railway African Employees Association in 1944.[238] It managed to organise the 1945 strike by railway employees. About 2708 participated in that strike and it spread to other cities.[239] Even in South Africa, African employees did not remain quiet when they were banned from enjoying the right to freedom of association but they formed unofficial trade unions.[240] Therefore, African employees were determined to exercise the right to freedom of association outside the oppressive colonial labour law framework. The struggle for better working conditions became part of the general struggle against oppression.

2.3.8 The Industrial Conciliation Act, 1945

The Industrial Conciliation Act[241] was enacted in order to provide a detailed framework for the regulation of collective labour law. The ICA, 1934 had laid down an important foundation for the further development of this important branch of labour law. The ICA, 1934 was repealed but its key contents like the exclusion of African employees from its application were retained. Hence, it perpetuated a racially determined labour law system. Conciliation Boards were also established

236 Gwisai *Labour and employment law in Zimbabwe* 20.
237 Austin *Racism and apartheid in Southern Africa* 63; www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020).
238 Mlambo *A history of Zimbabwe* 141.
239 Mlambo *A history of Zimbabwe* 141.
240 Grogan *Collective labour law* 4; Budeli 2012 *CILSA* 468.
241 No. 21 of 1945 (hereinafter referred to as the ICA, 1945).

to augment the efforts of Industrial Councils and they were tasked with resolution of disputes through mediation and conciliation.[242]

African employees continued with their pursuit for the right to freedom of association. It culminated in the 1948 general strike which was the first general strike in the history of Zimbabwe.[243] African employees were gathering more courage and unity to fight for their rights.[244] It appears that there was no other option that was open to African employees to fight for their rights as they continued to suffer under oppression with no right to freedom of association. To this end, the 1948 general strike was firstly organised by the Bulawayo Municipal African Employees Association who protested against inadequate salaries before it spread to other parts of Zimbabwe.[245] Prior to that strike, a number of strikes had taken place in different sectors of the economy.[246]

2.3.9 The Industrial Conciliation Act, 1959

After the successful 1948 general strike the attitude of the colonialists towards African employees' grievances changed as summarised by the then Prime Minister Godfrey Huggins as follows:

> What we are seeing is nothing new. It happened in Europe 100 years ago. We are witnessing the emergence of a proletariat, and in this country, it happens to be black. We shall never be able to do much with these people until we have established a native middle class.[247]

Therefore, it was the growing trade unionism by African employees which forced the colonialists to take positive reforms. Apart from the 1948 general strike, there

242 Sections 38-51 of ICA, 1945.
243 Gwisai *Labour and employment law in Zimbabwe* 22; Mlambo *A history of Zimbabwe* 144; Malaba 1980 *Review of African political economy* 22; www.zctu.zw>aboutzctu (Date of use: 22 August 2020).
244 Mukanya *Dynamics of history* 161.
245 Mlambo *A history of Zimbabwe* 144.
246 Malaba 1980 *Review of African political economy* 22.
247 Gwisai *Labour and employment law in Zimbabwe* 22.

were many other strikes in the 1950s.[248] In addition, the number of unregistered African trade unions had remarkably grown.[249]

The most important effect of the ICA, 1959 was that it removed the racially determined labour law system through the inclusion of Africans in the definition of the employee.[250] It provided a detailed framework for the formation and registration of trade unions.[251] For the first time, Africans were expressly allowed to form or join trade unions since they had been included in the application of the ICA, 1959. It promoted the registration of trade unions in respect of either a trade, undertaking or particular classes of work.[252] Madhuku correctly argues that section 39 of the ICA, 1959 meant that employees could still belong to different trade unions based on their trade or class of work thus effectively maintaining racially divided trade unions.[253] He further opines that a provision deeming all registered trade unions under the ICA, 1945, to have been already registered had the effect of maintaining white-dominated trade unions.[254] Trade unions were prohibited from funding or being affiliated to any political party.[255] The provision was designed to hinder African trade unions from becoming part and parcel of the general struggle for independence by Africans.[256] In addition, the ICA, 1959 clearly recognised the right to strike subject to laid down restrictions.[257]

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248 Malaba 1980 *Review of the African political economy* 22.

249 Gwisai in *Labour and employment law in Zimbabwe* at 21 identifies the following African trade unions which existed at the time; the Reformed Industrial and Commercial Workers Union, the Rhodesian Railway African Employees Association, Federation of African Workers Union, the African Trade union Congress and the Southern Rhodesia Trade Union Congress.

250 Madhuku *Labour law in Zimbabwe* 16.

251 See generally Part III of the ICA, 1959.

252 Section 39 of the ICA, 1959.

253 Madhuku "Trade unions and the law" 109.

254 Madhuku "Trade unions and the law" 109.

255 Section 46 of the ICA, 1959.

256 Gwisai in *Labour and employment law in Zimbabwe* at 22 posits that, the Southern Rhodesia African National Congress which later became ZAPU was formed by trade unionists such as Joshua Nkomo, Joseph Msika and Jason Moyo.

257 See generally Part IV of the ICA, 1959.

The Registrar of Trade Unions could not register a trade union if another registered trade union 'sufficiently represented' the interests concerned.[258] The sufficiency of such representation was solely determined by the Registrar and one would argue that it was a severe restriction of the employees' right of freedom of association as it was easier for the Registrar to turn down an application for registration on this ground. The worst part of it was that the provision could be abused in order to curtail the proliferation of African trade unions. On a positive note, the ICA, 1959 also recognised the right of all employees who fell under it to engage in collective bargaining.[259]

The major antithesis in the quest for African employees' right to freedom of association was the exclusion of employees who worked in mines, farms and households. Malaba posits that 85% of the African employees were employed in agriculture, mining and households.[260] He furthers asserts that a number of reasons were given by the colonialists for such exclusion ranging from inherent challenges in providing comprehensive conditions of service for workers in these categories, the need for a large inspectorate to enforce the conditions of service for the excluded employees, seasonal fluctuation of labour in mines and the cost of maintaining industrial councils in these categories.[261] It is submitted that all the stated reasons by Malaba are far from convincing and the colonialists were determined to deny the majority of African employees the right to freedom of association. Such unpleasant conditions led to the registration of only two African trade unions by 1960.[262] The colonialists were actually giving the right to freedom of association with the right hand while taking it away with the left hand.

In South Africa, the African employees also fought hard against the racially determined labour law system. An important milestone in that fight came in 1973 where about 60 000-100 000 employees went on strike over poor working

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258 See section 41 (2) of the ICA, 1959.
259 Gwisai *Labour and employment law in Zimbabwe* 22.
260 Malaba *1980 Review of African political economy* 23.
261 Malaba *1980 Review of African political economy* 23.
262 www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020).

conditions.[263] Another important event was the Soweto uprising of 1976 which led to the arrests and banning of key trade union members.[264] The strikes continued until 1977 as employees protested against the killing of Soweto students and to force the release of political prisoners.[265] The unrestrained black militancy led the government to capitulate and it appointed the Wiehahn Commission which was headed by Professor Nicholas Wiehahn. The Commission recommended far-reaching reforms which led to the amendment and renaming of the South Africa Industrial Conciliation Act, 1956 to become the Labour Relations Act, 1956.[266] African employees were now allowed to form or join trade unions, to bargain collectively and to strike.[267] After the extension of the right to freedom of association to African employees, the number of black trade unions increased in South Africa leading to the formation of important trade union congresses.[268]

In a nutshell, the ICA, 1959 did not grant the full right of employees to freedom of association in Zimbabwe. Its provisions were either oppressive to the intended beneficiaries or left out an important constituency of African employees in farms, mines and households. In addition, it did not come on a silver platter but it came out of African struggles against oppression which went beyond the workplace. These developments were also apparent in South Africa where Africans had to pay the ultimate price in order to get the limited right to freedom of association.

2.3.10 Southern Rhodesia Constitution, 1961

The 1961 Southern Rhodesia Constitution which was adopted by Zimbabwe at that time had a strong influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1951 and the Nigerian

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263 Judell - Lesha *The effectiveness of South African labour legislation in dealing with mass industrial action before and after the promulgation of the Constitution Act 108 of 1996*.

264 Smith 2000 *Georgia journal of international and comparative law* 599.

265 Wood & Harcourt 1998 *Labour studies journal* 79.

266 Grogan *Collective labour law* 5.

267 Wood & Harcourt 1998 *Labour Studies Journal* 80.

268 Budeli in 2012 *CILSA* at 472 notes that COSATU was formed in 1985 with the support of ANC, UWUSA was formed in 1986 and was linked to IFP and AZACTU was formed in 1986 and it later joined CUSA to form NACTU.

constitution.[269] It created a justiciable Bill of Rights.[270] Most importantly, the Bill of Rights recognised the rights of Zimbabweans to freedoms of assembly and of association.[271] The right of employees to form and join trade unions was recognised as a constitutional provision in Zimbabwe for the first time in its history although it was not absolute.[272] The antithesis of these positive developments was the ICA, 1959. As already highlighted, employees did not have the full right to freedom of association. The most affected employees were African employees. It was inconceivable that they could have enjoyed the full right to freedom of association as this was inimical to the objectives of colonialism. The colonialists were mainly after cheap labour.

Furthermore, the gains of the Southern Rhodesia Constitution were temporary as they were reversed by the 1965 Unilateral Declaration of Independence Constitution when Ian Douglas Smith led a rebellion against the British government and declared independence on 11 November 1965.[273] The Bill of Rights which had a section on the right to freedom of association was removed from the constitution. The aim of the Smith government was to delay majority rule.[274] The government enacted pieces of legislation which were designed to deal with militant trade unions and to prevent them from participating in the struggle for independence. The most notorious statutes were the Law and Order Maintenance Act[275] and the Emergency Powers Act[276] which criminalised illegal strikes and other concerted actions.

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269 Palley *The constitutional history and law of Southern Rhodesia* 573.
270 Chikwekwe *A critique of second-generation rights in light of the constitutional reforms in Zimbabwe* 15.
271 Section 66 (1) of the Southern Rhodesia Constitution, 1961.
272 Section 66 (2) of the Southern Rhodesia Constitution, 1961.
273 Linington *Constitutional law of Zimbabwe* 11.
274 Gwisai *Labour and employment law in Zimbabwe* 22.
275 [Chapter 65] (hereinafter referred to as the LOMA).
276 [Chapter 81] (hereinafter referred to as the EPA).

2.3.11 Constitution of Rhodesia, 1969

The Constitution of Rhodesia, 1969 restored the Bill of Rights which had been removed by the 1965 Constitution. The Bill of Rights contained civil and political rights which included the freedoms of assembly and association.[277] In addition, the right of employees to form and belong to trade unions was guaranteed.[278] The anti-climax of the Bill of Rights was that it was not justiciable.[279] The non-justiciability of the Bill of Rights was clearly designed to protect draconian pieces of legislation like the LOMA and the EPA from being subjected to constitutional scrutiny. The net effect of the provision was to render the constitutional recognition of employees' right to freedom of association useless. Coupled with the ICA, 1959 which stifled the right to freedom of association and the Master and Servants Ordinance which criminalised any breaches of an employment contract by African employees, it is clear that there was no right to freedom of association in practice.

2.4 The right to freedom of association after independence in Zimbabwe

Zimbabwe's independence was a result of a protracted armed struggle in which African employees played a part in fighting minority rule. It also involved political parties namely, ZANU and ZAPU. The British government called for talks between the warring parties at Lancaster House in 1979. The political transition to majority rule meant that laws were also going to change in order to reflect the new reality. Thus, in the first decade of independence, Zimbabwe experienced major changes on all aspects of life.[280] The transformation began with the enactment of the 1980 Constitution which was negotiated at the Lancaster House Conference. The 1980 Constitution had an effect on the development of the right to freedom of association for private sector employees in Zimbabwe as shall be demonstrated later.

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277 See the Second Schedule to the constitution of Rhodesia, 1969.

278 See section 9 (2) of the Second Schedule to the constitution of Rhodesia, 1969.

279 Section 81 of the Constitution of Rhodesia, 1969 provided that: "no court shall inquire into or pronounce upon the validity of any law on the ground that it is inconsistent with the Declaration of Rights".

280 Cheater 1991 *Zambezia* 1-14.

Soon after independence, the new government hated strong trade unions and the autonomy of trade unions was extremely limited.[281] There were six trade union centres at independence in Zimbabwe but they were later merged to form the ZCTU.[282] Trade unions were weak at independence and their rights were merely a result of political freedom unlike in South Africa where the ANC and COSATU alliance led to a pro-union Labour Relations Act.[283] The early pieces of legislation which are relevant for the purposes of this study were the Minimum Wages Act and the Employment Act. They were followed by the Labour Relations Act, 1985, which was the first comprehensive piece of legislation on the right to freedom of association for private sector employees in Zimbabwe. Although it has been amended on several occasions, it represents today's Labour Act. Thus, this part discusses the changes that have been made to labour laws in Zimbabwe after independence which have had an impact on the right to freedom of association for private sector employees. Apart from analysing the legislative provisions and other relevant sources of law, it also looks at what has been happening in practice as far as the right to freedom of association is concerned.

2.4.1 The 1980 Constitution of Zimbabwe

Zimbabwe became a constitutional democracy after independence and the 1980 Constitution became the supreme law of the land with any other law inconsistent with it void to the extent of such inconsistency.[284] Roman-Dutch law, as modified by the English law, became the law of Zimbabwe.[285] Crucially, it provided for a justiciable Declaration of Rights which contained many civil and political rights.[286]

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281 Raffopoulos & Sachikonye *The labour movement* xvi.

282 www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020) The six trade union centres were the African Trade Union Congress (ACTU), the National African Congress of Trade Unions (NACTU), the Trade Union Congress of Zimbabwe (TUCZ), the United Trade Unions of Zimbabwe (UTUZ) the Zimbabwe Federation of Labour (ZFL) and the Zimbabwe Trade Union Congress (ZTUC).

283 Madhuku "Trade unions and the law" 108.

284 Section 3 of the 1980 Constitution.

285 Section 89 of the 1980 Constitution.

286 The rights included the following; the right to personal liberty, the right to protection from slavery, the right to freedom of expression, the right to life, the right to protection from arbitrary search or entry, the right to secure the protection of law, the right to protection of

The Declaration of Rights did not contain socio-economic rights. This could be explained by the fact that the 1980 Constitution was a transitional document and the negotiators at the Lancaster House conference were more concerned with securing political independence. The courts of the independent Zimbabwe adopted a purposive interpretation of the Declaration of Rights which made sure that its objectives were fulfilled.[287] Labour law was indirectly affected by the Declaration of Rights as any provision that was not consistent with the Declaration of Rights was null and void.[288]

More significant was the recognition of the right to freedom of association in the 1980 Constitution which had a direct impact on labour law.[289] The right to freedom of association was expressly backed by the right not to associate in section 21 of the 1980 Constitution. In addition, such a right extended to the right of employees to form and belong to trade unions of their choice. In the *Bemba Farm (Pvt) Ltd* case, the employer made an application to interdict trade unions from communicating with its employees because they were disrupting production. The trade unions and the employees were both cited as respondents. The application

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freedom of conscience, the right to protection from inhuman and degrading treatment, the right to protection from forced labour, the right to freedom of assembly and association, the right to freedom of movement and the right to protection from discrimination.

287 *Hewlett v Minister of Finance* 1981 ZLR 571 (hereinafter the *Hewlett* case); *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* SC-128-02 (hereinafter the *Capital Radio (Pvt) Ltd* case); *In re Munhumeso & Others* 1995 (1) SA 551 (Z) (hereinafter the *In re Munhumeso* case); *Smyth v Ushewekunze & Anor* 1997 (2) ZLR 544 (S) (hereinafter the *Ushewekunze* case); *Rattigan & Others v Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S) (hereinafter the *Rattigan* case).

288 *Law Society of Zimbabwe & Others v Minister of Finance (AG Intervening)* 1999 (2) ZLR 231 (hereinafter the *Law Society of Zimbabwe* case); *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S) (hereinafter the *Nyambirai* case).

289 Section 21 of the 1980 Constitution. It provided as follows, "(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that it to say, his right to assemble freely and associate with other persons and in particular to form and belong to political parties or trade unions or other associations for the protection of his interests. (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to a trade union". See also the following cases; the *Netone Cellular (Pvt) Ltd* case; *Zimbabwe Banking and Allied Workers Union & Anor v Beverly Building Society & Others* HH-63-07 (hereinafter the *Zimbabwe Banking and Allied Workers Union* case); *Bemba Farm (Pvt) Ltd v Zimbabwe Horticulture Agroindustries and General Agriculture Workers Union & Others* HH-94-11 (hereinafter the *Bemba Farm (Pvt) Ltd* case); *Ngulube v Zimbabwe Electricity Supply Authority & Anor* SC-52-02 (hereinafter the *Ngulube* case).

followed wage disputes which emanated from the classification of the enterprise. The employees had engaged in an unlawful collective job action. The respondents challenged the application on the basis that it infringed their right to freedom of association as enshrined in section 21 of the 1980 Constitution. The court held that it could not lightly take away the respondents' right to freedom of association. The court further held that the Labour Act had clear provisions which dealt with unlawful collective job actions and the application by the employer was dismissed.

In a nutshell, the 1980 Constitution laid down a firm foundation for the development of the employees' right to freedom of association after independence in Zimbabwe. However, it failed to provide comprehensive aspects of the right to freedom of association which include the right to organise, the right to strike and the right to collective bargaining. The scope of the right to freedom of association for private sector employees in Zimbabwe was only expanded by the legislation.

2.4.2 The Minimum Wages Act

The Minimum Wages Act came as part of positive consequences of independence. Under the colonial rule, African employees were a rich source of cheap labour. They also suffered discrimination and subjugation at the hands of the colonialists. The new government of Zimbabwe sought to correct the past racial injustices through improving the remuneration of employees. The Minister was empowered to set minimum wages through a notice without any discrimination on the grounds of race, sex or age.[290] In addition, the Minister had the power to appoint a board which was required to investigate and make recommendations to him on the fixing of minimum wages.[291] An employer was prohibited from contravening a minimum wages notice and any published notice applied to contracts of employment already in force.[292] It was also a criminal offence for an employer to fail to comply with a minimum wages notice.[293] Lastly, it

290 Section 3 of the Minimum Wages Act.
291 Section 4 of the Minimum Wages Act.
292 Section 5 of the Minimum Wages Act.
293 Section 6 of the Minimum Wages Act.

was also a criminal offence for an employer to terminate a contract of employment on the sole ground that he should pay a minimum wage, so the only available option was for him to apply for exemption from paying the minimum wage.[294]

An example of a minimum wage notice was the Minimum Wages Notice, 1980[295] which applied to contract workers, independent contractors and special workers.[296] It prescribed minimum wages for various categories of employees.[297] Madhuku rightly argues that although the Minimum Wages Act did not directly deal with the employees' right to freedom of association, it gave trade unions a 'floor of rights' to defend, thereby making their work easier.[298]

2.4.3 The Employment Act

The Employment Act sought to regulate the minimum conditions of employment, control the recruitment of employees either to work inside or outside Zimbabwe and the registration of employment agencies.[299] It further repealed the repressive Master and Servants Ordinance among other statutes.[300] The rationale for its enactment was to improve the conditions of employees after many years of oppression under colonial rule. Similar developments were noticed in South Africa where it enacted the Basic Conditions of Employment Act[301] which also sought to regulate basic conditions of employment at the workplace, thereby complying with its ILO obligations.[302] Just like Zimbabwe, South Africa was in a period of transition from colonial rule when it enacted the Basic Conditions of Employment Act.

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294 Section 7 of the Minimum Wages Act.
295 It came into force on 1 July 1980.
296 See section 2 of the Minimum Wages (Specification of Minimum Wages) Notice, 1980.
297 Examples included persons who were employed by welfare organisations as domestic employees who got Z$30 as minimum wages, mining employees got Z$43 as minimum wages, sugar production and sawmilling employees got Z$70 as minimum wages and agricultural employees got Z$30.00 as minimum wages.
298 Madhuku "Trade unions and the law" 110.
299 See the preamble to the Employment Act.
300 Madhuku "Trade unions and the law" 110.
301 No. 75 of 1997 (hereinafter referred to as the Basic Conditions of Employment Act).
302 See the preamble to the Basic Conditions of Employment Act.

The Employment Act gave full powers to the Minister to regulate everything to do with the contract of employment including deductions from remuneration, leave, special conditions for women employees, juvenile employees and insurance.[303] The Minister was given the power to regulate all aspects of employment as a temporary measure pending the enactment of a detailed labour legislation.[304] In addition, the Employment Act prohibited summary dismissals except for limited situations of misconduct.[305] Just like the Minimum Wages Act, Madhuku correctly points out that the provision of minimum conditions of employment made the work of trade unions easier as they got a 'floor of rights' to defend.[306]

2.4.4 The expression of freedom of association by trade unions and employees (1980 - 1985)

In the first five years of independence, the labour movements in Zimbabwe were weak and subjected to State control.[307] The ZCTU was formed by the government and it was effectively a wing of the ruling party in early 1980s.[308] One of the reasons to explain the weaknesses of the trade unions in the early 1980s is that they had not played a significant part in the armed struggle which was waged in the rural areas.[309] The situation in Zimbabwe was different from South Africa where trade unions had played an important role during the period of transition to democracy because of their strong ties with political parties.[310] The government of Zimbabwe moved slowly to implement far-reaching reforms in recognising the right to freedom of association. The result was that the agitated employees resorted to a number of strikes during the period 1980 - 1981.[311]

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303 See section 3 of the Employment Act.
304 Madhuku *Labour law in Zimbabwe* 18.
305 See section 8 of the Employment Act.
306 Madhuku "Trade union and the law" 110.
307 Sibanda *Industrial relations in Zimbabwe today* 2.
308 Raftopoulos *The labour movement and the emergence of opposition politics in Zimbabwe* 3.
309 Sibanda *Industrial relations in Zimbabwe today* 2.
310 Raftopoulos *The labour movement and the emergence of opposition politics in Zimbabwe* 4.
311 Sibanda *Industrial relations in Zimbabwe today* 2. The author notes that about 200 strikes were recorded during the period 1980-81.

To further buttress the view that the trade union leadership was compromised resulting in weak trade unionism, Albert Mugabe, who was a brother to the then Prime Minister of Zimbabwe, Robert Mugabe was quoted as saying:

> Strikes do more harm than good. We do not need to retard economic progress by arranging strikes. There are some bad eggs in the union movement. There are some people in the union movement who go out looking for difficulties and try to be difficult. We will watch them closely and discourage striking as much as we can.[312]

These words by Albert Mugabe clearly highlight how trade union leaders became accomplices in denying employees the right to freedom of association. It is submitted that the existence of such weak trade unions explains why the right to freedom of association did not significantly develop from its colonial past during the first five years of independence in Zimbabwe. The colonial ICA, 1959 continued to regulate the right to freedom of association in Zimbabwe. Any reforms during this period were either based on the benevolence of the state or they naturally flowed from independence.

2.4.5 The Labour Relations Act, 1985

The year 1985 was significant in the development of the right to freedom of association for private sector employees in Zimbabwe because the Labour Relations Act, 1985 was passed. It was the first comprehensive piece of labour law after independence. It sought to address the ills of colonialism by introducing new rights for employees which they have not enjoyed before. Although it has been amended on several occasions, it represents today's Labour Act.[313] A detailed discussion of the Labour Relations Act, 1985 and its amendments is undertaken in Chapter 5 of this research. This part only seeks to highlight the major changes of the law at that stage of development.

Some of the major reasons behind the passing of the Labour Relations Act, 1985 was to align labour law to the 1980 Constitution and to fulfil Zimbabwe's ILO

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312 Sibanda *Industrial relations in Zimbabwe today* 5.

313 The amendments to the Labour Relations Act since 1985 include Labour Relations (Amendment) Act 12 of 1992, Labour Relations (Amendment) Act 17 of 2002, Labour (Amendment) Act 7 of 2005 and Labour (Amendment) Act 5 of 2015.

obligations.[314] It repealed the ICA, 1959, the Minimum Wages Act and the Employment Act. To begin with, it removed public service employees from its application, thereby entrenching a two-tier labour relations system.[315] Secondly, it guaranteed employees' right to freedom of association through the protection of their entitlement to workers committees and trade unions membership and their right to democracy at the workplace.[316] Workers committees had the power to negotiate collective bargaining agreements at shop floor level[317] and trade unions had the power to negotiate collective bargaining agreements at industry-wide level.[318] Sibanda argues that the introduction of workers committees was meant to dilute the influence of trade unions at shop floor level as there was no link between trade unions and workers committees.[319] It is submitted that these fears were catered for by the Labour Relations Act which subordinated workplace agreements to industry-wide agreements which were negotiated by trade unions, thereby making trade unions stronger and superior.[320]

The right to strike was severely curtailed and the Minister was given wide powers to deal with industrial disputes.[321] The state had the power to control the collection of union dues which subjected trade unions to continuous interference by the Minister.[322] Crucially, it maintained the principle of 'one industry one union'.[323] Madhuku argues that the concept of 'one industry one union' gave trade unions monopoly in their respective industries and there was no competition or divisions

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314 Machingambi *A guide to labour law in Zimbabwe* 17.

315 Section 3 thereof provided that, "The Act shall apply to all employers and all employees except those whose conditions of employment are otherwise provided for by and under the constitution" It is the public service employees whose conditions of employment were provided for under the constitution.

316 See Part II of the Labour Relations Act, 1985.

317 Section 24 of the Labour Relations Act, 1985.

318 Section 74 of the Labour Relations Act, 1985.

319 Sibanda *Industrial relations in Zimbabwe today* 6.

320 See section 24 of the Labour Relations Act, 1985.

321 Madhuku *Labour law in Zimbabwe* 19.

322 Gwisai *Labour and employment law in Zimbabwe* 25.

323 Section 45 of the Labour Relations Act, 1985 provided that the Registrar "shall be bound by the general rule that there should be no more than one certified trade union and employer's organisation for each undertaking or industry".

which strengthened existing trade unions.[324] On the other hand, Gwisai opines that the principle was meant to ensure state control and management of a reduced number of trade unions.[325] It is submitted that there was no justification for maintaining the principle of 'one industry one union' as it was a negation of the employees' right to freedom of association. To make matters worse, it was a colonial concept with no justification in a democratic country. Despite the inherent shortcomings, the Labour Relations Act, 1985 was a pro-employees piece of legislation which compelled employers to condemn it.[326]

2.4.5.1 Trade union activities following the enactment of the Labour Relations Act, 1985

Having been enacted through the influence of politicians than through trade union strength and lobbying, the Labour Relations Act, 1985 meant that trade unions did not contribute towards the protection of employees' right to freedom of association.[327] In contrast, the South African Labour Relations Act was a product of close ties between trade unions and political parties.[328] Madhuku rightly opines that it is difficult to divorce labour law from political, economic and social factors.[329] The same applies to the employees' right to freedom of association. In 1985, the ZCTU elected a new leadership that was widely viewed as independent.[330] Trade unionism was weak in the second half of the 1980s due to a number of factors which included state intervention, repressive labour laws, arbitration of industrial disputes and politically instigated divisions between the ZCTU and its affiliates.[331]

The new ZCTU leadership campaigned for wider tripartite negotiations on reforming the Labour Relations Act, 1985 in order for trade unions to have more

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324 Madhuku "Trade unions and the law" 111.
325 Gwisai *Labour and employment law in Zimbabwe* 25.
326 Madhuku *Labour law in Zimbabwe* 20.
327 See Madhuku in "Trade unions and the law" at 108 on the role of politics in the enactment of the Labour Relations Act, 1985.
328 Budeli 2012 *CILSA* 475; Wood & Harcourt 1998 *Labour studies journal* 85.
329 Madhuku "Trade unions and the law" 106.
330 www.zctu.co.zw.aboutzctu (Date of use: 22 August 2020).
331 Sibanda *Industrial relations in Zimbabwe today* 10.

freedom of association.[332] In 1990, the ZCTU campaigned against an attempt by the governing party to impose a one party state, corruption and the state of emergency which was a colonial strategy to stifle the right to freedom of association.[333] In the same year, Zimbabwe introduced the Economic Structural Adjustment Programme (ESAP) which was a free market policy prescribed by the IMF, the World Bank, Western donors and multi-national corporations.[334] The ZCTU's attitude towards ESAP was summarised in its own words as follows:

> The government's strategy of staking the people's hopes on the World Bank structural adjustment policies, on foreign investments, on privatisation and on trade liberalisation ignore the evidence of devastating effects of these policies on the working people across the globe and dooms a vast section of the society to permanent joblessness, hopelessness and economic insecurity. It further mortgages the economy to foreigners and leaves the nation economically powerless and with no economic control over its future.[335]

True to the ZCTU's words, ESAP had devastating economic effects. The ZCTU's stance clearly shows that trade unions went beyond the workplace issues to fight for political, economic and social issues they did not agree with.[336]

ESAP led to de-industrialisation and job losses.[337] ESAP was figuratively referred to by employees as the "Eternal Suffering of African People".[338] It shows that the employees abhorred it as it brought suffering to them. In response to their suffering, private sector employees organised many strikes as a sign of displeasure against the government's economic policies. It is a clear testimony of how employees took the struggle for better living and working conditions out of the workplace. It further buttresses the view that the development of the right to

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332 Raftopoulos *The labour movement and the emergency of opposition politics in Zimbabwe* 7.

333 Raftopoulos *The labour movement and the emergency of opposition politics in Zimbabwe* 7.

334 Gwisai *Labour and employment law in Zimbabwe* 26.

335 Raftopoulos *The labour movement and the emergence of opposition politics in Zimbabwe* 8.

336 Raftopoulos *The labour movement and the emergence of opposition politics in Zimbabwe* 8.

337 Bond in *Radical rhetoric and the working class during Zimbabwean nationalism's dying days* at 31 notes that the manufacturing sector fell from 32% share of GDP in 1992 to 17% 6 years later. Sibanda in *Industrial relations in Zimbabwe today* at 11 posits that 100 000 jobs in the formal sector were lost due to ESAP.

338 Gwisai *Labour and employment law in Zimbabwe* 26.

freedom of association has not been confined to the workplace only but it has gone beyond the workplace to either influence or be influenced by the political, economic and social factors.

2.4.5.2 The Labour Relations (Amendment) Act, 1992

Zimbabwe abandoned the state corporatist policies and adopted the free market policies in 1990 through ESAP. Therefore, it was necessary to amend the labour law to reflect the new reality. The first major change that was brought by the Labour Relations (Amendment) Act[339] was the abolition of the principle of 'one industry one union'.[340] Apart from de-regulating the labour market, the principle of 'one industry one union' was against the constitutional right to freedom of association and the ILO conventions.[341] The amended section 45 of the Labour Relations Act, 1985 allowed the registration of more than one trade union in any given industry. However, the Registrar retained the discretion to deny registration to a trade union which was not 'sufficiently representative' of the employees concerned.[342] The Registrar was no longer required to take into account 'whether a substantial number of employees in the undertaking or industry that will be represented by the trade union are in favour of joining the trade union'.[343] A new provision was introduced to replace the old provision and it required the Registrar to consider objections raised by any interested person to the effect that the trade union to be registered will not substantially represent the employees concerned.

The major challenge with the Registrar's discretion was that the term 'sufficiently representative' of the employees was not defined. It meant the Registrar had wide and unguided powers to stifle the registration of new trade unions on the basis of lack of sufficient representation. Resultantly, it had the potential to negatively

339 No.12 of 1992 (hereinafter referred to as the Labour Relations (Amendment), 1992.
340 Section 45 of the Labour Relations Act, 1985 as amended by the Labour Relations Act, 1992.
341 See section 21 of the 1980 Constitution and Conventions 87 and 98.
342 See section 45 (1) (a) (iii) and (iv) of the Labour Relations (Amendment) Act, 1992.
343 See section 45 (1) (a) (vi) of the Labour Relations Act, 1985 as repealed by the Labour Relations (Amendment) Act, 1992.

interfere with the employees' right to freedom of association. The discretion of the Registrar was the subject of litigation in the case of *Agriculture Labour Bureau & Anor v Zimbabwe Agro-Industry Workers Union*.[344] In this case, the employer and a registered trade union (GAPWUZ) opposed the registration of a new trade union (ZAWU). These objections were turned down by the Registrar. The Supreme Court set aside the registration of the trade union and referred the matter back to the Registrar for reconsideration. The basis of the Supreme Court decision was that the Registrar had failed to properly exercise his discretion through failure to adequately take into account section 45 of the Labour Relations Act, 1985. The Supreme Court was of the view that the Registrar had failed to fully address the argument that it was impractical and unworkable to have two trade unions in the same industry so that individual farmers may have to deal with many trade unions as some employees may belong to ZAWU. This case is a clear testimony of an indirect perpetuation of the 'one industry one union' through the Registrar's discretionary powers.

The Labour Relations Act, 1985 had given the Minister of Labour the power to direct a trade union to amend its procedures and conditions for obtaining membership which the Minister considered cumbersome or unduly restrictive.[345] This provision was removed through the Labour Relations (Amendment) Act, 1992. The removal of such powers from the Minister was positive for the development of the employees' right to freedom of association as trade unions could freely determine their membership. In addition, the Minister had the power to direct a trade union to represent even employees who were not its members[346] and to approve any trade union levies before they were affected.[347] All these retrogressive provisions were repealed by the Labour Relations (Amendment) Act, 1992.

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344 1998 (2) ZLR 190 (S) hereinafter the *Agriculture Labour Bureau* case).
345 See section 54 of the Labour Relations Act, 1985.
346 Section 56 of the Labour Relations Act, 1985.
347 Section 57 of the Labour Relations Act, 1985.

Another important provision which was introduced by the Labour Relations (Amendment) Act, 1992 relates to managerial employees. It defined a managerial employee as an employee "whose contract of employment requires or permits him to hire, transfer, promote, suspend, lay off, dismiss, reward, discipline or adjudge the grievances of other employees or to make recommendations on those matters to the employer".[348] Madhuku argues that the phrase "to make recommendations to the employer" was too wide to include other employees who were not managers and it disqualified many employees from becoming trade union members thereby weakening the existing trade unions.[349] In addition, the Labour Relations (Amendment) Act, 1992 prohibited managerial employees from joining non-managerial workers' committees.[350] Thus, the exclusion of managerial employees from trade union activities coupled with the wide definition of managerial employees had the effect of taking away the right to freedom of association from many employees.

There were other developments which are relevant to the employees' right to freedom of association which followed ESAP and the Labour Relations (Amendment) Act, 1992. To begin with, employees remained restless as they continued to clash with government over a number of polices. In 1997, the ZCTU organised 231 strikes culminating in the most successful general strike against challenges caused by ESAP, desertion by donors due to bad relations between Zimbabwe and western countries, the unbudgeted compensation of war veterans who were earmarked to get a gratuity of Z$ 50 000 and a monthly payment of Z$ 2000 from January 1998.[351] In 1998, the ZCTU organised successful stay aways as they protested the government's decision to send troops to fight in the DRC war which had a huge toll on the economy.[352] It was a clear reflection of the role of trade unions in Zimbabwe's political, economic and social affairs. However, the

348 Section 2 of the Labour Relations (Amendment) Act, 1992.
349 Madhuku "Trade unions and the law" 115.
350 Section 23 of the Labour Relations Act, 1985 as amended by the Labour Relations (Amendment) Act, 1992.
351 www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020).
352 www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020).

government proceeded to invoke the Presidential Powers (Temporary Measures) Act[353] which expanded the list of essential services with the effect of making many strikes in the private sector illegal.[354] The Presidential Powers (Temporary Measures) Act was invoked again in 1998 to ban further stay aways and any action which was intended to put pressure on government to change its policies. Heavy fines and imprisonment were imposed for engaging in strikes and stay aways. [355]

The ZCTU also pushed for a new constitution through the National Constitutional Assembly (NCA) which consisted of the ZCTU, churches, human rights groups, NGOs, lawyers and interested organisations.[356] When the state continued to block all attempts to challenge it, the ZCTU came to the opinion that the problems facing Zimbabwe were emanating from governance issues. At the 'Working People's Convention' in February 1999, employees agreed to form a broad-based movement to fight for political change.[357] It culminated in the formation of the MDC which was a clear product of employees' right to freedom of association at the workplace and consequently elevated itself into a political force to fight for labour rights and general governance. The MDC party has contested elections since 2000 and its late leader, Morgan Tsvangirai, became the Prime Minster of Zimbabwe during the GNU period (2009-2013).

2.4.5.3 The Labour Relations (Amendment) Act, 2002

By early 2000, it had become clear that ESAP had failed. The threat of the new MDC party was real to the extent that it presented the strongest challenge to ZANU (PF) rule since independence.[358] The State had to move away from disastrous free market policies. The first major change that was brought by the

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353 [Chapter 10:20] (hereinafter referred to as the Presidential Powers (Temporary Measures) Act).

354 Sibanda *Industrial relations in Zimbabwe today* 15.

355 Sibanda *Industrial relations in Zimbabwe today* 16.

356 Raftopoulos *The labour movement and the emergence of opposition politics in Zimbabwe* 15.

357 www.zctu.co.zw>aboutzctu (Date of use: 22 August 2020).

358 Raftopoulos & Sachikonye *The labour movement* xviii.

Labour Relations (Amendment) Act[359] was to rename the Labour Relations Act, 1985 to the Labour Act. Secondly, it abolished the dual labour relations system by bringing the public service employees under the Labour Act.[360] Uniting employees was in the interests of promoting their right to freedom of association as they could speak with one voice and it was conducive for the emergence of stronger trade unions. Thirdly, it defined the purpose of the Labour Act which is to advance social justice and democracy at the workplace through, among other things, the promotion of collective bargaining and the promotion of participation by employees in decision-making processes which had effects on their interests at the workplace.[361] The provision was enacted in the spirit of promoting the employees right to freedom of association from the workplace level to the industrial level.

Fourthly, it provided that where a trade union was registered to represent not less than fifty percent of the employees at a workplace where a workers committee was to be established, every member of that workers committee automatically became a member of that trade union.[362] This provision had the effect of violating the freedom of members of the workers committee not to associate with the trade union with the majority of members at the workplace. It appears it was designed to ensure that no employee remains unrepresented and to curb the proliferation of trade unions at any given workplace. In addition, it ensured that trade unions had control over the activities of workers' committees.

Fifthly, the Labour Relations (Amendment) Act, 2002 removed the rights of unregistered trade unions to form or be represented in any employment council, to recommend a collective job action, right of access and right to collect union dues.[363] The net effect of this provision was that unregistered trade unions could not fully enjoy the right to freedom of association. It was undesirable for employees

359 No.17 of 2002 (hereinafter referred to as the Labour Relations (Amendment) Act, 2002).
360 Madhuku *Labour law in Zimbabwe* 22.
361 See section 2A of the Labour Act.
362 See section 23 (1) (a) and (b) of the Labour Act.
363 See section 30 of the Labour Act.

to join unregistered trade unions as they suffered from legal handicaps to fully represent their constituencies.

Lastly, it introduced the trade union leave which was alien to Zimbabwe's labour law system. The employer had an obligation to grant special leave on full pay not exceeding twelve days in a calendar year to an employee who was supposed to attend any meeting of a registered trade union which represented the relevant employees as a delegate or official.[364] In addition, an official or officer-bearer of a registered trade union or federation was entitled to paid or unpaid leave during working hours in order to enable him/her to perform the functions of his/her office.[365] The parties were to negotiate the terms of such leave in a collective bargaining agreement and they had the right to refer the matter to compulsory arbitration if they failed to agree on the extent of paid or unpaid leave.[366] The introduction of trade union leave was done as a recognition of the employees' right to freedom of association. They could not fully enjoy this right without getting the time to advance the interests of their trade unions.

2.4.5.4 The Labour (Amendment) Act, 2005

The Labour (Amendment) Act[367] was significant in the development of the right to freedom of association for private sector employees in Zimbabwe in many ways. Firstly, it re-introduced the two-tier labour law system which had been abolished through the Labour Relations (Amendment) Act, 2002.[368] Public service employees were separated from private sector employees. It is submitted that this had the effect of dividing employees generally. Public service employees can not enjoy the right to freedom of association that is provided for in the Labour Act together with private sector employees. Secondly, it made a provision that in the event of a dispute arising from the appointment or election of a worker's committee, either party to the dispute had the right to refer the matter to the labour

364 See section 14 B of the Labour Act.
365 See section 29 (4) (a) of the Labour Act.
366 See section 29 (4) (a) of the Labour Act.
367 No. 7 of 2005 (hereinafter referred to as the Labour (Amendment) Act, 2005).
368 See section 3 of the Labour Act.

officer to determine the mater and the decision of the labour officer was final unless parties agreed to refer it to voluntary arbitration.[369] This was significant as it entitled any part whose right to freedom of association was under threat to seek redress before a third party who was supposed to give an impartial decision. In addition, the Labour (Amendment) Act brought a new provision to the effect that any person who was aggrieved by the decision of the Minister regarding the amendment of a workplace collective bargaining agreement had a right to appeal to the Labour Court.[370] Thus, the powers of the Minister to amend a freely negotiated collective bargaining agreement were subjected to judicial scrutiny if parties were not satisfied. It can be argued that it was a positive development in protecting employees' right to freedom of association.

Thirdly, it amended section 29 (4a) of the Labour Act on trade union leave for officials or office-bearers of registered trade unions. Before this amendment, the Labour Act provided that any disagreement on the extent of paid or unpaid trade union leave during collective bargaining agreement entitled any party to the negotiations to refer the matter to compulsory arbitration.[371] The requirement to refer the matter to compulsory arbitration was replaced by the requirement to refer the matter to a labour officer.[372] The labour officer was required to deal with the matter in terms of section 93 of the Labour Act which required him to attempt to settle the dispute failure of which he could make a binding decision since it was a dispute of right.[373] It is submitted that the amendment ensured that disputes relating to the extent of trade union leave were resolved quickly by subjecting parties to a settlement procedure before a binding ruling is given. Above all, if the labour officer managed to assist the parties to settle before a binding ruling is given, the relations of the parties at the workplace were maintained.

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369 See section 13 of Labour (Amendment) Act, 2005.

370 See section 14 of the Labour (Amendment) Act, 2005.

371 See the repealed section 29 (4a) of the Labour Act as introduced by the Labour Relations (Amendment) Act, 2002.

372 See section 29 (4a) of the Labour Act as substituted by the Labour (Amendment) Act, 2005.

373 See section 93 of the Labour At as amended by the Labour (Amendment) Act 5 of 2015.

Fourthly, the Labour (Amendment) Act, 2005 introduced the right of an aggrieved person to make an appeal to the Labour Court against the decision of the Minister on the supervision of internal elections of trade unions.[374] The Minister had several powers in the conduct of internal elections by trade unions which included the power to set aside an improperly conducted election, postponement, change of venue or procedure for an election, control the campaigns and to make regulations for controlling and regulating elections including the qualifications for office-bearers of registered trade unions.[375] This empowered the Minister to interfere with the internal affairs of a trade union. They were against the dictates of the right to freedom of association although it can be argued that they were designed to ensure that there was internal democracy within trade unions. Therefore, it was necessary to subject their exercise to judicial scrutiny. In that light, it can be argued that the amendment was useful in the promotion of the right to freedom of association for private sector employees in Zimbabwe.

Finally, it added further issues for collective bargaining. Although the Labour Act empowered trade unions, employers and employers' organisations to negotiate collective bargaining agreements on any conditions of employment which were of mutual interest to them, it further provided a list of issues which could be the subject of collective bargaining.[376] To that list, the Labour (Amendment) Act, 2005 added the issue of housing and transport facilities or an allowance for the same in their absence. The other issue related to measures to combat workplace violence and its management.[377]

The additions were significant because they expanded the scope of collective bargaining which is a vital component of the right to freedom of association. In addition, the added issues ensures an improvement in the conditions of service for private sector employees and peaceful resolution of disputes at the workplaces

374 See section 51 of the Labour Act.
375 Section 51(2) of the Labour Act.
376 See section 74 (2) and (3) of the Labour Act.
377 See section 74 (3) (f) and (g) of the Labour Act.

without resorting to violence. Once those outcomes are achieved, collective bargaining becomes more effective.

2.4.5.5 The Zimbabwean Constitution

The Zimbabwean Constitution was a product of the Global Political Agreement (GPA) which was entered into by ZANU PF, MDC-T and MDC-M political parties in 2008. It followed disputed elections in that year and the then South African President Thabo Mbeki brokered the talks among these political parties leading to its signing. The GPA had a provision on a constitution-making process which was to be led by the parliament and it led to the birth of the current Zimbabwean Constitution. A detailed study of the impact of the Zimbabwean Constitution is undertaken in chapter four. It suffices to highlight the key provisions of the Zimbabwean Constitution as part of the development of the right to freedom of association in Zimbabwe. The Zimbabwean Constitution repealed the 1980 Constitution.[378] It became the supreme law of Zimbabwe and it invalidated any law, custom, conduct or practice that was inconsistent with it to the extent of that inconsistency.[379] This includes the Labour Act which must comply with the dictates of the Zimbabwean Constitution.

A new development was the elevation of the right to freedom of association and all its components into constitutional provisions.[380] Section 65 of the Zimbabwean Constitution in particular provides for employees right to organise, bargain collectively and strike. Crucially, these provisions are part of the Declaration of Rights which has its own legal implications. The Declaration of Rights obliges everyone including the State to promote and protect its provisions.[381] It further obliges courts and other bodies to give full effect to it including the right of employees to freedom of association when interpreting its provisions.[382] Another significant development is that it obliges courts to consider international law which

378 Section 3 of the Zimbabwean Constitution.
379 Section 2 of the Zimbabwean Constitution.
380 Section 58 and 65 of the Zimbabwean Constitution.
381 Section 44 of the Zimbabwean Constitution.
382 Section 46 of the Zimbabwean Constitution.

includes conventions and treaties which were adopted by Zimbabwe when interpreting and applying the Declaration of Rights.[383] Thus, one has to refer to international law in understanding Zimbabwe's law on the right of private sector employees to freedom of association in Zimbabwe. Lastly, it exhorts courts and other relevant bodies to refer to foreign law when interpreting it.[384] It provides a strong basis for a comparative analysis of Zimbabwe's labour law on the right of private sector employees to freedom of association against foreign jurisdictions.

2.4.5.6 The Labour (Amendment) Act, 2015

The Labour (Amendment) Act [385] was the first amendment to the Labour Act after the advent of the Zimbabwean Constitution. It was triggered by the Supreme Court decision in the *Nyamande v Zuva Petroleum* case where the court held that the employer had a common law right to unilaterally terminate a contract of employment on notice.[386] The first major highlight of the amendment was the prohibition of employers from terminating contracts of employment on notice unless such termination was in terms of a code or it was due to mutual agreement in writing.[387] It further provided that such termination was only proper if it related to fixed term contracts, contracts for the performance of a specific service or pursuant to retrenchment.[388] It is submitted that the provision had a positive impact on trade unions since they had lost a number of members through unmitigated termination on notice.

Secondly, the amendment made provision for a retrenchment package of a minimum of one month's salary or wages for every two years that the employee worked for that particular employer (or the equivalent amount of salaries or wages if the period of employment was less than two years).[389] The minimum

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383 Section 46 (1) (c) of the Zimbabwean Constitution.
384 Section 46 (1) (e) of the Zimbabwean Constitution.
385 No.5 of 2015 (hereinafter referred to as the Labour (Amendment) Act, 2015).
386 The decision led to widespread termination of contracts of employment in the private sector leading to the intervention of the government.
387 See the amended section 12 of the Labour Act.
388 See the amended section 12 of the Labour Act.
389 Section 12C of the amended Labour Act.

retrenchment package was payable to an employee who had lost his employment regardless of the reason for the loss of such employment including dismissal.[390] It can be argued that this was significant to the development of the right to freedom of association for private sector employees in Zimbabwe as it guaranteed the rights of employees on termination of employment which could be defended by trade unions.

Thirdly, the Labour (Amendment) Act, 2015 repealed provisions of the Labour Act relating to the regulation of union dues by the Minister. To start with, it removed the power of the Minister to make regulations on union dues which provided for limitations on salaries and allowances which might be payable to employees of trade unions.[391] It further removed similar powers of the Minister to limit the number of staff that might be employed by the trade union and the property it might acquire.[392] These were progressive amendments as they sought to reduce the powers of the Minister to interfere with the internal affairs of trade unions. Such interference had the effect of limiting the right of employees to freedom of association as they could not freely decide on how many employees to take, their levels of remuneration and assets they could acquire. However, the Minister retained the power to order trade unions to pay a percentage of their dues to a trade union association or congress which the Minister recognised as representative of all or most of trade unions which are registered in Zimbabwe.[393] The provision has the effect of forcing trade unions to affiliate to a trade union congress against its will. Thus, it is inimical to the employees' right to freedom of association.

Fourthly, the amendment made provision for the life of employment councils. It was significant because this is the platform where industrial collective bargaining agreements are negotiated. The old section 59 did not provide for the duration of a

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390 See section 12C as read with section 12 (4a) of the amended Labour Act.

391 See the new section 55 of the Labour Act as amended by the Labour (Amendment) Act, 2015.

392 See the new section 55 of the Labour Act as amended by the Labour (Amendment) Act, 2015.

393 Section 55 (d) of the Labour Act.

certificate of registration of an employment council. The Labour Act now provides that a certificate of registration for an employment council should not be limited in terms of its duration.[394] It can only be cancelled if the employment council fails to comply with the submission of audited accounts.[395] The preservation of this institution of collective bargaining ensures that this vital component of the right to freedom of association is protected.

Lastly, it expanded the number of issues which can be the subject of collective bargaining. This was achieved through the insertion of a provision that requires parties to collective bargaining to consider measures to enhance the viability of undertakings and to ensure high levels of employment.[396] These measures include the promotion of high levels of productivity, the promotion of economic development, the promotion of economic and environmental sustainability and the mitigation of the cost of living.[397] Collective bargaining was expanded to deal with issues which go beyond the workplace such as economic development and environmental sustainability. The provision buttresses the view that the employees' right to freedom of association has an effect which goes beyond the workplace. It affects or it is affected by the political, economic and social factors.

2.5 Conclusion

In this chapter, the historical development of the right to freedom of association in Zimbabwe was discussed. The chapter began by discussing the colonial occupation of Zimbabwe.[398] It is apparent that the colonial occupation of Zimbabwe which was led by Ceil John Rhodes was a treacherous process. Lobengula was misled into signing the Moffat Treaty and the Rudd Concession.[399] These treaties formed the basis of the colonial occupation of Zimbabwe. It was further discussed that the colonialists wanted business opportunities in Zimbabwe

394 See section 59 (3) of the Labour Act.
395 See section 59 (4) of the Labour Act.
396 See section 74 of the Labour Act.
397 See section 74 (3) (n) (i-iv) of the Labour Act.
398 See [2.2] hereof above.
399 Mukanya *Dynamics of history* 93.

and this was to inform the nature of the laws and practices they had to impose on Zimbabwe. Thus, there was no right to freedom of association for employees because of the intentions of the colonial system. Another significant early development was the Proclamation of 10 June 1891 which introduced Roman-Dutch law with some English Law influence. This has stood the test of time as it has remained the common law of Zimbabwe until this day. However, the common law did not provide for the right of employees to freedom of association.

It was also noted that the colonialists adopted other measures to ensure a cheap source of labour such as the hut tax[400] and the Natives Employment Ordinance, 1899.[401] These developments were capped by the enactment of the Master and Servants Ordinance, 1901, but all these laws had nothing to do with the right of employees to freedom of association. They were, instead, meant to stifle the same rights by ensuring that African employees remained a source of cheap labour. Despite the denial of the right to freedom of association, employees continued to exercise the right outside the law with the clearest example being the formation of the ICU in 1927.[402] The ICA, 1934 did not help matters as it introduced a racially determined labour law system.[403] The right to freedom of association was only recognised with respect to white employees and not African employees who were the majority.

The racially determined labour law system was partially abolished through the ICA, 1959.[404] However, the ICA, 1959 preserved existing white dominated trade unions and maintained trade unions based on trade or class of work and excluded 85% of African employees who were employed in mines, farms and households.[405] The net effect was the denial of the right to freedom of association to the majority of African employees despite the law which purported to grant it. The position of

400 See [2.3.2] hereof above.
401 See [2.3.4] hereof above.
402 See [2.3.5.1] hereof above.
403 See [2.3.7] hereof above.
404 See [2.3.9] hereof above.
405 Madhuku "Trade unions and the law" 109 and Malaba 1980 *Review of African political economy* 23.

employees was worsened by the fact that there were no significant constitutional developments which sought to protect the right of employees to freedom of association.

It was only after independence that employees' right to freedom of association was seriously considered. The 1980 Constitution had a justiciable Bill of Rights which provided for both the right to associate and not to associate.[406] This was a significant development as courts resorted to this constitutional right to protect employees against its infringement. The right to freedom of association was comprehensively covered by the Labour Relations Act, 1985. Together with its amendments, it forms the present-day Labour Act. Each amendment has attempted to broaden the scope for the exercise of the right to freedom of association by private sector employees in Zimbabwe. Just like the period before independence, the post-independence period witnessed trade unions activities which went beyond the workplace to demand political, economic and social reforms. In addition, the political, economic and social environment has influenced the way employees exercise their right to freedom of association at the workplace. This continues to be the case in Zimbabwe as the country navigates into the future. The Zimbabwe Constitution has added an impetus in the development of the right of private sector employees to freedom of association. It constitutionalises this right and its components.

406 Section 21 of the 1980 Constitution.

CHAPTER THREE

INTERNATIONAL STANDARDS ON FREEDOM OF ASSOCIATION APPLICABLE IN ZIMBABWE

3.1 Introduction

This chapter discusses the right of private sector employees to freedom of association in terms of international law. International law is a body of legal rules, standards and norms that apply between sovereign states and other entities that are recognised by law as international actors.[407] The chapter focuses on international human rights law and labour law that is applicable in Zimbabwe as is demonstrated later. International human rights law consists of treaties, agreements, conventions and declarations.[408] These human rights instruments oblige States to promote, protect and fulfil them and they can take either a universal or regional character.[409] With international labour law, the focus shall principally be on the work of the ILO in the development and nurturing of the jurisprudence on freedom of association.[410] The chapter further analyses the enforcement of international rules, norms and standards on freedom of association. The effectiveness of such enforcement mechanisms is crucial in gauging the impact of international law on States insofar as the right to freedom of association is concerned. A study of international law is justified in this research because Zimbabwe is a member of the international community and has ratified all the important human rights instruments which affect the right to freedom of association for private sector employees. To this end, the Zimbabwean Constitution obliges courts, forums, tribunals and other bodies to take into account international law including all treaties and conventions to which Zimbabwe is a

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407 www.brittanica.com (Date of use: 23 November 2020).

408 Examples of such instruments include the UDHR, the ICESCR, the ICCPR and the Banjul Charter.

409 See Budeli 2009 *De jure* 140.

410 Examples include Conventions 87 and 98, Workers Representative Convention, the 1998 Declaration on Fundamental Principles and Rights at Work. It also includes the work of the Committee of Experts and the Committee on Freedom of Association in promoting the observation of the international obligations on freedom of association by States.

party when interpreting the Declaration of Rights which has provisions on the right to freedom of association.[411] In addition, members of the Zimbabwean judiciary are obliged by the Constitution to enhance their professional skills and competencies which include keeping their pace with developments in international law.[412] It means developments in international law affect the interpretation and application of Zimbabwe's domestic laws on freedom of association. Zimbabwean courts and tribunals are further obliged to interpret legislative provisions in line with customary international law as far as it is possible and consistent with the Zimbabwean Constitution and Acts of Parliament.[413] There is a similar provision with regard to international treaties, conventions and agreements which are binding on Zimbabwe.[414] The Labour Act is also clear that one of its purposes is to advance social justice and democracy at the workplace by giving effect to Zimbabwe's international obligations as a member of the ILO and other international organisations which govern conditions of employment.[415] Such conditions of employment include the right of private sector employees to freedom of association.

3.2 The concept of human rights

According to Donnelly, human rights are rights that an individual has simply because he/she is a human being.[416] For Ghosal, human rights are those inalienable rights that a person should enjoy regardless of his/her nationality, colour, creed, income, sex or any other socio-economic reasons.[417] In Leib's view, human rights are conceptualised as entitlements which apply to all men at all times.[418] Thus, there are features which emanate from the concept of human rights which help in understanding the context in which the employees' right to

411 See section 46 (1) (c) of the Zimbabwean Constitution.
412 See section 165 (7) of the Zimbabwean Constitution.
413 See section 326 of the Zimbabwean Constitution.
414 See section 327 of the Zimbabwean Constitution.
415 Section 2A of the Labour Act.
416 Donnelly 2007 *Human rights quarterly* 282. See also Sudjatmiko *et al* 2020 *Journal of law, politics and globa*lization 3.
417 Ghosal 2010 *Indian journal of political science* 1104.
418 Leib *Human rights and the environment* 47.

freedom of association should be applied. To begin with, human rights (which include the right to freedom of association) are inalienable, meaning they should not be denied because it is a fact of nature that they exist for human beings.[419] Secondly, human rights are said to be individual rights in the sense that collective rights (which include trade union rights) are not meant to protect the group but individuals who constitute that group.[420] The third feature is that human rights are universal and it means every human being is justified to claim those rights at all times and places.[421] It is submitted that the concept of universality does not take into account whether the rights are applied at regional level or international level as it relates to the way they should be understood and applied without considering their location.

Lastly, human rights are indivisible. It means the enjoyment of civil and political rights on one hand and economic, social and cultural rights on the other hand is indispensable.[422] In the process of drafting Convention 87, the drafters noted the following with regards to employees' right to freedom of association:

> Freedom of industrial association is but one aspect of freedom of association in general, which must itself form part of the whole range of fundamental liberties of man, all dependent and complementary of one another, including freedom of assembly, freedom of speech and opinion, freedom of expression and of the press and so forth.[423]

The interdependence of human rights is clearly captured in both international and regional human rights instruments.[424] It follows that the right of private sector employees to freedom of association in Zimbabwe should be understood as part of a family of rights which must be generally enjoyed by human beings. The

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419 Donnelly 2007 *Human rights quarterly* 282.

420 Leib *Human rights and the environment* 57.

421 Beitz 2003 *Daedulus* 43; Hernandez-Truyol 1996/97 *University of Miami inter-American law review* 237. The preambles to most international human rights instruments including the UDHR, ICCPR and ICESCR clearly captures the universality of human rights which are contained within them which include the right to freedom of association.

422 Leib *Human rights and the environment* 50; Hernandez-Truyol 1996/97 *University of Miami Inter-American law review* 224.

423 Pouyat 1982 *International labour review* 297.

424 For example, the UDHR contains all categories of human rights, the preambles to the ICCPR and ICESCR recognise the indivisibility of civil and political rights as well as economic, social and cultural rights.

succeeding paragraph discusses the right to freedom of association in terms of the UDHR.

3.3 The employees right to freedom of association under general and universal human rights standards.

This part discusses the right to freedom of association in terms of the UDHR, the ICCPR and the ICESCR. These instruments are widely referred to as the international bill of rights.[425]

3.3.1 Universal Declaration of Human Rights

The UDHR came as a result of the two world wars, the emergence of totalitarian regimes and the cruelty of the Nazi regime in Germany among other reasons which made it more important to respect human rights.[426] It recognised "the inherent dignity and the equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace of the world".[427] The UDHR is regarded as a measure of achievement for all nations and it imposes an obligation upon nations and individuals to promote respect for the rights which are provided under it.[428]

The UDHR recognises the right of everyone to freedom of peaceful assembly as well as freedom of association.[429] It further provides that no person may be forced to belong to an association.[430] It is clear that the UDHR contains both the positive and the negative rights to freedom of association. Another glaring feature is that it combines the right to freedom of association and the right to peaceful assembly which confirms the indivisibility of such rights. The aspect of indivisibility of human rights is further confirmed by the fact that the UDHR contains both civil and

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425 For a further discussion of this, see Leib *Human rights and the environment* 46; Olivier 2002 *CILSA* 298.
426 Kunz 1949 *The American journal of international law* 317.
427 See the preamble to the UDHR.
428 See the proclamation clause to the UDHR.
429 Article 20 (1) of the UDHR.
430 Article 20 (2) of the UDHR.

political rights on one hand and economic, social and political rights on the other hand.

Article 23 of the UDHR further confirms that the right to freedom of association is interconnected with other rights like the right to work, free choice of employment, just and favourable working conditions and favourable remuneration.[431] Above all, the UDHR expressly recognises the right of everyone to form and join trade unions for the protection of his interests.[432] The recognition of trade union rights in such an important document means these rights lie at the heart of the employees' right to freedom of association. All these rights can only be limited through the law which is solely meant to recognise and respect the rights and freedoms of others including the preservation of "morality, public order and general welfare in a democratic society".[433] The intention of the UDHR is to promote the rights which are stated in it as a general rule and these rights can only be limited where it is extremely necessary to do so and on the grounds which are contained in its limitation clause.

The UDHR ushered in a three-staged process which resulted in the creation of an international bill of rights and the stages included a declaration which defined rights which must be respected, binding covenants which followed it and their enforcement machinery.[434] The UDHR is particularly important and relevant to Zimbabwe because the country became a member of the UN on 25 August 1980.[435] Thus, it becomes justified to discuss how the provisions of the UDHR impacts on the right to freedom of association in Zimbabwe. In addition, the UDHR provides a similar point of comparison among different countries of the world making it easier to compare Zimbabwe's standards on freedom of association with standards from other countries like South Africa.[436]

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431 Leib *Human rights and the environment* 50.
432 Article 23 (4) of the UHDR.
433 Article 29 of the UDHR.
434 Olivier 2002 *CILSA* 298.
435 www.sahistory.org.za (Date of use: 24 November 2020).
436 See Brown *The universal declaration of human rights in the 21st century* 33.

3.3.1.1 The legal status of the UDHR

The UDHR is not legally binding and it was adopted as soft law.[437] Olivier defines soft law as instruments which do not fit within the traditional criteria for establishing rules of international law.[438] Thus, the UDHR occupies an important position in international law as it has the status of customary international law.[439] The status of the UDHR as part of customary international law is significant for Zimbabwe because the Zimbabwean Constitution obliges courts to adopt legislative interpretations which are consistent with customary international law applicable in Zimbabwe.[440] South African courts have also held that customary international law is part of South African law unless it is inconsistent with their constitution.[441] It follows that the right to freedom of association in the UDHR can be enforced as part of customary international law which makes the provisions binding on member states of the UN including Zimbabwe.

In a nutshell, the UDHR is important because it represents the founding document in the promotion and protection of human rights including the right to freedom of association. It has resulted in the development of a body of human rights law supported by enforcement mechanisms which were not there in the 1920s and 1930s.[442] Despite criticisms that it is not legally binding, it has become part of customary international law and led to the formation of an international bill of rights.[443] Baets describes the UDHR as the "most important statement of ethics and its force is unparalleled".[444] In Donnelly's view, the UDHR's authority is

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437 See Brown *The universal declaration of human rights in the 21st century* 34.

438 Olivier 2002 *CILSA* 294.

439 Baets 2009 *History & theory* 20; Hinds 1985 *Crime & social justice* 6.

440 Section 326 of the Zimbabwean Constitution. See also *Minister of Foreign Affairs v Jenrich & Others* HH-232-15 where the court held that customary international law is part of Zimbabwean law in terms of section 326 (1) of the Zimbabwean Constitution unless it is inconsistent with it.

441 See section 232 of the South African Constitution; *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, Tladi 2016 *African human rights law journal* 321.

442 Brown *The universal declaration of human rights in the 21st century* 90.

443 Kunz 1949 *The American journal of international law* 322.

444 Baets 2009 *History and theory* 20.

accepted by virtually all countries in the world.[445] In Leib's words, the UDHR is a success that has been rarely achieved in the history of international law.[446] Therefore, the UDHR laid the foundation for the development of employees' rights to freedom of association in Zimbabwe.

3.3.2 International Covenant on Civil and Political Rights

Zimbabwe ratified the ICCPR on 31 August 1991.[447] It becomes justified to discuss the obligations which are created by the covenant as it is directly applicable to Zimbabwe. The ICCPR recognises the indivisibility of human rights by providing that "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil and political rights, as well as his economic, social and cultural rights".[448] Thus, the ICCPR recognises that the right to freedom of association is interconnected with other human rights which enable the preservation of the "inherent dignity of the human person".[449] It further imposes an obligation on individuals (who include employers) to promote and observe the rights which are recognised in the covenant.[450] If one is to put the covenant in the context of the present research, it becomes clear that it imposes an obligation on individual employers to promote and observe the private sector employees' right to freedom of association.

The ICCPR provides for the right of everyone to freedom of association including the right to establish and to become a member of a trade union in order to protect one's interests.[451] Unlike the UDHR, the ICCPR does not directly provide for the right not to associate with others. Budeli further notes that the rights of peaceful assembly and association which are combined in the UDHR were separated in the

445 Donnelly 2007 *Human rights quarterly* 288.
446 Leib *Human rights and the environment* 46.
447 www.hrw.org>reports (Date of use: 24 November 2020).
448 See the preamble to the ICCPR.
449 See the preamble to the ICCPR.
450 See the preamble to the ICCPR.
451 Article 22 (1) of the ICCPR.

ICCPR although they are related.[452] However, the indivisibility of such rights is clearly recognised in ICCPR's preamble.

The ICCPR includes the right to form and join trade unions as part of the right to freedom of association. This is significant as it puts the right of private sector employees in Zimbabwe to freedom of association within its ambit. Both the UDHR and the ICCPR do not explicitly provide for the right to strike.[453] It becomes the antithesis of these two human rights instruments given the importance of the right to strike as a component of the right to freedom of association.

3.3.2.1 Limitations of rights under the ICCPR

Article 22(2) of the ICCPR provides as follows:

> No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

It is clear from the wording of Article 22(2) of the ICCPR that it prohibits the imposition of restrictions on the exercise of the right to freedom of association unless they fall within the circumstances which are specified in that provision. The phrase "necessary in a democratic society" does not mean it should be absolutely necessary to impose a restriction but there must be a pressing social need for interference and the restrictions should remain within the confines of what is acceptable in a democratic society.[454] Sudjatmiko *et al* share a similar position when they assert that any restriction on the right to freedom of association should be guided by the principle of proportionality which provides that the restriction should be based on clear and legitimate purposes, should have a minimum impact

452 Budeli 2009 *De jure* 143.
453 Budeli 2009 *De jure* 143.
454 www.ohchr.org/documents/HRBodies/ HRCouncil (Date of use: 24 November 2020).

on human rights and should not have the effect of scaring away employees from exercising their right to freedom of association.[455]

Additionally, any restriction should be authorised by a domestic law that complies with international human rights law.[456] Where the issue of national security is involved, the State should be in a position to show that the threat to national security is real and not hypothetical.[457] Further, the imposition of "lawful restrictions" on members of the armed forces means such restrictions cannot be unlawful. The provision does not completely take away the right of members of the armed forces and the police to freedom of association but it merely permits its restrictions which must be clearly determined by domestic laws.

3.2.2.2 The ICCPR's implementation and enforcement mechanisms

It is imperative to analyse the provisions of the ICCPR which deal with its enforcement as this has a direct bearing on the extent to which member States are obliged to comply with its provisions. The ICCPR establishes an eighteen-member Human Rights Committee (HRC) which plays a key role in the enforcement of its provisions.[458] The ICCPR provides two principal mechanisms for its enforcement that is, the reporting procedure and the interstate complaints procedure. In terms of the reporting procedure, each member State is required to submit to the HRC a report on the "measures they have adopted which give effect to the rights recognised in the covenant and on the progress made in the enjoyment of those rights".[459] The HRC examines the submitted reports and provide general comments to State parties.[460] With the interstate complaints procedure, one State party can complain to the HRC against another State party that the other State

455 Sudjatmiko *et al* 2020 *Journal of law, politics and globalization* 4.
456 Boravin 2020 *Journal of Southeast Asian human rights* 211.
457 Boravin 2020 *Journal of Southeast Asian human rights* 211.
458 See Article 28 of the ICCPR.
459 Article 40 of the ICCPR.
460 Article 40 (4) of the ICCPR.

party is failing to fulfil its obligations under the ICCPR provided that both States recognise the HRC's jurisdiction to entertain the matter.[461]

Apart from the interstate complaints procedure, the ICCPR's Optional Protocol which was adopted in 1976 provides for an individual complaints' procedure.[462] Keith notes two inherent defects of the ICCPR's reporting procedures. Firstly, the reports are compiled by the State's own officials and they are likely to be biased and secondly, a number of States submit their reports very late or they do not submit at all.[463] Similar weaknesses can be seen in the complaints' procedure. With both individual and interstate complaints, they require the cooperation of States which may not happen. It follows that the enforcement mechanisms under the ICCPR are weak and they depend on the commitment of individual States to observe human rights including the right to freedom of association.

3.3.3 International Covenant on Economic, Social and Cultural Rights

This is another important source of international human rights law. It is particularly relevant to Zimbabwe because it ratified the ICESCR on 13 May 1991.[464] Just like the ICCPR, the ICESCR is legally binding on member States.[465] Thus, the ICCPR and the ICESCR sought to transform the provisions of the UDHR into binding treaties. Both the ICCPR and the ICESCR recognise that the rights contained therein "derive from the inherent dignity" of humans.[466] These rights include the right to freedom of association. In addition, both covenants recognise the indivisibility of civil and political rights as well as economic, social and political rights.[467] Individuals are also required to promote and observe the rights which are

461 See Article 41 of the ICCPR.
462 Keith 1999 Journal of peace research 98.
463 Keith 1999 *Journal of peace research* 98. The author further indicates that he 1996 HRC's report noted that about two-thirds of State parties at the time had failed to submit their reports and some of the reports were 12 years overdue.
464 www.jswhr.com (Date of use: 24 November 2020).
465 Brown *The universal declaration of human rights in the 21st century* 34.
466 See the preambles to the ICCPR & ICESCR.
467 See the preambles to the ICCPR & ICESCR.

contained in the ICESCR which include aspects of the right to freedom of association.[468]

Article 8 provides for the right of "everyone" to form and join trade unions of his/her choice subject only to the rules of the relevant organisation with the aim of promoting and protecting his/her economic and social interests.[469] In addition, such trade unions have a right to form national federations and confederations with the latter having a right to form and join international trade union organisations.[470] The ICESCR represents a marked departure from the UDHR and ICCPR in that it clearly provides for the right to strike.[471] However, the right to strike should be exercised in accordance with the laws of the country concerned. It is clear that the ICESCR focuses on trade union rights which form a strong foundation for the enjoyment of the employee's right to freedom of association. It closely resembles Convention 87.[472] Saul, Kinley & Mowbray rightly point out that when the ICESCR was drafted, states were quite aware that the right to form and join trade unions was simply an aspect of freedom of association that had been granted in the ICCPR.[473]

In their joint statement, the HRC and the CESCR noted that Article 8 of the ICESCR and Article 22 of the ICCPR are identical and they reflect that the individual's right to freedom of association, including the right to establish and to become a member of a trade union, is at the intersection between economic, social and cultural rights on one hand and civil and political rights on the other hand.[474] They further opined that the right to establish and to become a trade union member means that trade unions must be protected from harassment, discrimination, reprisals and intimidation.[475] However, Article 8 of the ICESCR

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468 See the preamble to the ICESCR.
469 Article 8 (1) (a) of the ICESCR.
470 Article 8 (1) (b) of the ICESCR.
471 Article 8 (1) (d) of the ICESCR. See Also Budeli 2009 *De jure* 144.
472 www.ituc-csi.org (Date of use: 24 November 2020).
473 Saul, Kinley & Mowbray *The international covenant on economic, social and cultural rights* 487.
474 www.ohchr.org/Documents /HRBodies (Date of use: 24 November 2020).
475 www.ohchr.org/Documents/HRBodies (Date of use: 24 November 2020).

apparently does not contain a negative right not to join a trade union. It can be argued that such a right exists because forming and joining a trade union should be a voluntary act. The problem only comes when a domestic law requires one to join a trade union against his or her will.

3.3.3.1 Limitations of rights under the ICESCR

Article 4 of the ICESCR provides for a general limitation clause which applies to all rights including trade union rights. It provides that a State "may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". Alston and Quinn describe this limitation clause as both a shield and a sword.[476] It is a "sword" because it authorises states to limit the enjoyment of rights which are provided in the ICESCR. It is a "shield" because it limits the purposes for which the limitations may be imposed and also the way in which it may be done in a legitimate manner. The limitation should only be determined by law and it must only serve the purpose of "promoting the general welfare in a democratic society'. Therefore, the grounds for limiting the rights which are provided for in the ICESCR are very narrow in terms of Article 4 of that covenant.

In addition, Article 8 of the ICESCR contains limitations which are specific to trade union rights. It is the only provision of the ICESCR which provides for a detailed limitation clause.[477] Firstly, it provides that no restrictions may be placed on the right of everyone to establish and to become a member of a trade union of his/her choice other than "those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the right and freedoms of others".[478] The phrase "prescribed by law" means there must be a law of general application that is consistent with the ICESCR and the limitation must not be unreasonable, arbitrary and

476 Alston & Quinn 1987 *Human rights quarterly* 193.
477 For a further discussion of this, see Alston & Quinn 1987 *Human rights quarterly* 210.
478 See Article 8 (1) (a) of the ICESCR.

discriminatory.[479] Another limitation relates to the right of trade unions to function freely. This right can only be limited by law and must be "necessary in a democratic society in the interests of national security or public order or for the protection of rights and freedoms of others".[480] Thus, the grounds for limiting the right to join and form trade unions are similar to those for limiting the right of trade unions to function freely.

There is a further limitation which relates to members of the armed forces, those responsible for the administration of the State and the police. Just like the ICCPR, the ICESCR allows for the imposition of "lawful restrictions" on the exercise of trade union rights on members of the armed forces, the police and those responsible for the administration of the State.[481] It is submitted that the restrictions on members of the referred categories of employees should be understood within the context of the main provisions of the article which grants everyone the right to form and join trade unions of his/her choice. In that vein, the restriction does not completely take away the right of these employees. It explains why such restrictions should only be lawful.[482] Unlawful restrictions are not permissible.

3.3.3.2 The ICESCR's implementation and enforcement mechanisms

Measuring compliance with the provisions of the ICESCR (which include trade union rights) is principally achieved through the reporting procedure. Member States should submit reports to the UN Secretary-General who in turn forwards copies to the Committee on Economic, Social and Cultural Rights (CESCR).[483] The report should contain measures which the State has "adopted and the progress made in achieving the observance of the rights recognised herein".[484] In

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479 Saul, Kinley & Mowbray *The international covenant on economic social and cultural rights* 507.

480 Article 8 (1) (c) of the ICESCR.

481 Article 8 (2) of the ICESCR.

482 For a further discussion of this, see Saul, Kinley & Mowbray *The international covenant on economic, social and cultural rights* 503.

483 Article 16 of the ICESCR.

484 See Article 16 (1) of the ICESCR.

addition, the report should also include the challenges which the concerned State is facing in implementing the provisions of the ICESCR (which include trade union rights).[485] The CESCR can share information with other specialised agencies like the HRC and the ILO on issues which are relevant to all these organisations like the right to freedom of association.[486] This ensures that there is coordination in the enforcement and supervision of human rights standards.

The antithesis of the reporting procedure is that the CESCR has no power to impose penalties against violations of the ICESCR. It suffers a similar fate like the HRC under the ICCPR. The CESCR can only submit reports to the General Assembly with recommendations of a general nature.[487] The General Assembly may not act upon such recommendations. It explains why human rights continue to be violated across the globe by states which have ratified relevant human rights treaties.[488] On the other hand, Hathaway argues that economic dependence and regional politics can exert pressure on states to observe human rights.[489]

The CESCR also plays an interpretative role through the publication of "General Comments" which provide authoritative interpretations of the ICESCR.[490] Among its achievements was the development of jurisprudence on the meaning of Article 8 of the ICESCR that is consistent with ILO jurisprudence.[491] Part of the jurisprudence include protection of trade unionists from intimidation, harassment, discrimination and reprisals.[492] It has also dealt with restrictions on the right to form trade unions like unduly narrow legal criteria for the formation of trade unions,

485 Article 17 of the ICESCR.
486 Article 18 of the ICESCR.
487 Article 21 of the ICESCR.
488 Brown *The universal declaration of human rights in the 21st century* 90.
489 Hathaway 2002 *The Yale law journal* 2020.
490 www.ituc-csi.org (Date of use: 24 November 2020).
491 www.ituc-csi.org (Date of use: 24 November 2020).
492 www.ohchr.org/Documents/HRBodies (Date of use: 24 November 2020).

delays in registration of trade unions and prior authorisation for a trade union to become registered.[493]

Despite the weaknesses in the implementation mechanisms at international level, there is enough scope for the promotion and protection of the rights which are protected in the ICESCR which include trade union rights. It is up to individual States to provide effective domestic remedies in order to fulfil the objectives of the ICESCR. States should implement these rights immediately although it is clear that the ICCPR and the ICESCR do not clearly provide for the right to bargain collectively.[494] However, the right to bargain collectively is provided for in terms of international labour law as various human rights instruments complement each other. Although the ICESCR does not refer to the right to strike, the CESCR and HRC jointly stated that it is corollary to the effective exercise of the general right to form and join trade unions.[495]

3.4 The employees' right to freedom of association in international labour law

The international labour law jurisprudence on the right of employees to freedom of association has been developed through the work of the ILO and its special committees. The ILO committees which deserve special mention at this stage are the Committee of Experts on the Application of Conventions and Recommendations[496] and the Committee on Freedom of Association (CFA). The ILO's founding principles are laid down in its constitution which incorporates the Declaration of Philadelphia.[497] It is these founding documents which authorised the ILO to develop important conventions on freedom of association such as Conventions 87, 98 and the Workers' Representative Convention. These conventions are supported by the 1998 Declaration of Fundamental Principles and Rights at Work. The gist of the succeeding discussion is to analyse the impact of

493 Saul, Kinley & Mowbray *The international covenant on economic, social and cultural rights* 508.
494 Budeli 2009 *De jure* 144.
495 www.ohchr.org/Documents/HRBodies (Date of use: 24 November 2020).
496 Hereinafter referred to as the Committee of Experts.
497 Budeli 2009 *De jure* 145.

these international labour law instruments on private sector employees' right to freedom of association in Zimbabwe. The work of the ILO committees and the implementation mechanisms of the instruments are also explored.

3.4.1 The International Labour Organisation Constitution

Zimbabwe became an ILO member on 6 June 1980.[498] It is therefore bound by the ILO constitution as a member State. It becomes justified to explore the provisions of the ILO constitution and analyse the extent to which they affect Zimbabwe as far as the right of private sector employees to freedom of association is concerned. The ILO is a specialised agency of the UN and its membership requires a formal acceptance of its constitution.[499] Its constitution was part of the Versailles Peace Treaty which brought World War One to an end and it was motivated by the need to maintain lasting peace based on social justice.[500] The ILO standards' place in the sphere of human rights generally were clearly stated by the Committee of Experts as follows:

> The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the UDHR. The ILO standards on human rights along with the instruments adopted in the UN and in other international organisations give practical application to the general expressions of human aspirations made in the UDHR and have translated into binding terms the principles of that noble document.[501]

Therefore, it is apparent that international labour law jurisprudence is built on international human rights law jurisprudence. The two branches of law are intertwined and related.

One of the aims of the ILO is to ensure that peace, harmony and improvements of the conditions of employees is maintained across the world through the recognition of the principle of freedom of association.[502] The significance of the incorporation of the right to freedom of association in the ILO constitution is that States which

498 www.ilo.org (Date of use: 25 November 2020).
499 Dunning 1998 *Int'l lab rev* 156.
500 Betten 1988 *Netherlands quarterly of human rights* 29.
501 Norman 2004 *Saskatchewan law review* 592.
502 See the preamble to the ILO constitution.

signify its formal acceptance are bound by the principle of freedom of association whether or not they have ratified conventions on freedom of association.[503]

In its 1944 session in Philadelphia, United States of America, the International Labour Conference had to adopt a declaration with the objective to redefine the ILO's purposes and aims including the principles that would shape member States' policies.[504] The Declaration of Philadelphia codified fundamental principles which included the de-classification of labour as a commodity, the recognition of freedom of expression and association as essential to sustained progress and that poverty in any part of the world poses a threat to prosperity in every part of the world.[505] The Declaration of Philadelphia further recognised the principle of collective bargaining and the collaboration of employers and employees in matters affecting the employment relationship.[506] The significance of the Declaration of Philadelphia is that it was incorporated into the ILO constitution in 1946 resulting in the adoption of a new preamble which recognised the role of freedom of association in the maintenance of social justice and lasting world peace.[507]

3.4.1.1 The structure of the ILO

A discussion of the structure of the ILO is essential because its organisation affects how it fulfils its mandate including promoting employees' right to freedom of association. It is generally based on the concept of tripartism which makes it a constitutional requirement that States, employers and employees are equally represented in its organs. The ILO consists of the International Labour Conference, the Governing Body and the International Labour Office.[508]

The International Labour Conference is the "Legislative body" of the ILO.[509] All ILO members are represented in the Conference by two government

503 Dunning 1998 *Int'l lab rev* 156.
504 Budeli 2009 *De jure* 145.
505 Betten 1988 *Netherlands quarterly of human rights* 30; Dunning 1998 *Int'l lab rev* 156.
506 Budeli 2009 *De jure* 145.
507 Budeli 2009 *De jure* 145.
508 Article 2 of the ILO constitution.
509 Simamba 1988 *CILSA* 411.

representatives, one employers' representative and one employees' representative.[510] Equal representation ensures that all the interests are represented in the conference. Each delegate to the International Labour Conference is allowed to be accompanied by two advisers and where issues to do with women are to be discussed, at least one of the advisers should be a woman.[511] This requirement ensures that representatives of parties, particularly employees are well guided in making decisions which affect them including those that are relevant to their right to freedom of association.

Delegates to the International Labour Conference who are government representatives and their advisers must be chosen with the consent of industrial organisations which "are most representative of employers or work people" in their respective countries.[512] The provision favours big trade unions which have a say on who should represent a particular country at the Conference. Critically, the International Labour Conference has the power to make international conventions and recommendations.[513] The adoption of a convention or recommendation requires a two thirds majority of votes cast by delegates.[514] Thus, the power of the International Labour Conference to make conventions is important to this discussion because it led to the adoption of Conventions 87 and 98 which lie at the heart of the employees' right to freedom of association.

The Governing Body has representatives from the government, the employers and employees.[515] It is the executive organ of the ILO.[516] All the ILO activities are coordinated through the Governing Body including the preparation of meetings, the agenda for meetings and the appointment of members of various committees.[517] The Governing Body's power to appoint committees is important because it led to

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510 Article 3 of the ILO constitution.
511 Article 3 (2) of the ILO constitution.
512 Article 3 (5) of the ILO constitution.
513 Article 19 of the ILO constitution. See also Betten 1988 *Netherlands quarterly of human rights* 31.
514 Article 19 (2) of the ILO constitution.
515 Article 7 of the ILO constitution.
516 Simamba 1988 *CILSA* 411.
517 Betten 1988 *Netherlands quarterly of human rights* 31.

the establishment of the Committee of Experts and the CFA which is discussed further in succeeding paragraphs. These committees have assisted in the development of international labour law jurisprudence on freedom of association for employees.

Lastly, there is the International Labour Office which is the Secretariat of the ILO and it is headed by the Director-General.[518] The Director-General and his/her staff are required to be impartial in the discharge of their duties.[519] This requirement ensures that they deal with issues concerning member States in an objective manner. The duties of the International Labour Office include the collection and distribution of information that is relevant to industrial life and labour, examination of the agenda of the Conference, conducting investigations which may be ordered by the Conference or the Governing Body, giving technical assistance to governments and issuing labour-related publications of international interest.[520] Hence, the International Labour Office plays an important role in discharging the assigned duties including the implementation of employees' right to freedom of association. Having explored the provisions of the ILO constitution and how the organisation works, it becomes necessary to discuss the relevant conventions on freedom of association.

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

Convention 87 imposes direct obligations on Zimbabwe because the country ratified it on 9 April 2003.[521] It, therefore, becomes important to discuss its provisions and effect on Zimbabwe. Convention 87 was the first major ILO instrument on freedom of association and it lays down general standards on the right to freedom of association and the right to organise.[522] It provides that employers and employees have an equal right to establish and subject only to the

518 See Articles 2 & 8 of the ILO constitution.
519 See Article 9 of the ILO constitution.
520 Article 10 of the ILO constitution.
521 www.ituc-csi-org (Date of use: 25 November 2020).
522 Budeli 2009 *De jure* 146.

rules of the organisation concerned, to join organisations of their choice without prior authorisation.[523] In addition, it further provides for the right of employers and employees' organisations to draw up their constitutions and rules, to freely elect their representatives and to generally run their internal affairs without interference from the State.[524] Just like the ICESCR, Convention 87 also affirms the right of employers and employees' organisations to establish and join federations and confederations which can affiliate to international organisations of employees or employers.[525] It clearly uses the word "shall" which highlight that member States are bound by these aspects of freedom of association and they should implement them in their respective countries including in Zimbabwe.

Furthermore, Convention 87 specifically recognises the right of employers and employees to organise by requiring members to "take all necessary and appropriate measures" to ensure that such a right is freely enjoyed.[526] Dunning rightly points out that freedom of association would be meaningless if there is no democracy at the work place or if there is external interference in the functioning of these organisations, particularly those which represent employees.[527] Although Convention 87 does not explicitly provide for the right not to associate with any organisation, such a right was inferred from the positive right to associate.[528]

3.4.3 Right to Organise and Collective Bargaining Convention, 1949 (No.98)

This convention is also significant in understanding the right of employees to freedom of association in Zimbabwe. The reason is that Zimbabwe ratified it on 27 August 1998 and is bound by its provisions.[529] It supplements Convention 87 and provides further safeguards on the right to organise.[530] In addition, it provides a framework for collective bargaining. It specifically provides protection for

523 Article 2 of Convention 87.
524 Article 3 of Convention 87.
525 Article 5 of Convention 87.
526 Article 11 of Convention 87.
527 Dunning 1998 *Int'l lab rev* 150.
528 Budeli 2009 *De jure* 148.
529 www.ituc-sci.org (Date of use: 25 November 2020).
530 Budeli 2009 *De jure* 149.

employees against acts of "anti-union discrimination in respect of their employment".[531] It goes on to provide specific acts of discrimination like subjecting the employment of a worker to the condition that he should either not join or relinquish trade union membership.[532] The second instance is where a worker is dismissed or suffers any form of prejudice by mere reason that he/she is a trade union member or his/her participation in trade union activities either outside working hours or within working hours with the consent of the employer.[533] Unlike other provisions of Convention 87 and Convention 98, the protection against discrimination based on trade unionism is only enjoyed by employees and not employers. This was an acknowledgement by the drafters of Convention 98 that it is the employees who are vulnerable to such forms of discrimination, hence the need for protection.

Moreover, Convention 98 provides for the independence of both employers and employees organisations.[534] It proceeds to specify acts which amount to interference with the independence of employees' organisations by the employers such as their domination by employers or their organisations and financial control with the intention of exerting total control of their activities.[535] Although Article 2 (1) appears to protect both employers and employees against interference with each other, Article 2(2) of Convention 98 seems to protect employees' organisations against interference by the employers. Thus, the provisions are skewed in favour of protecting the employees' rights to freedom of association.

With collective bargaining, States should take appropriate measures to "encourage and promote" the development and use of voluntary negotiation of collective agreements.[536] Hence, it promotes the idea of voluntarism in collective bargaining. Schregle summarises the main aspects of collective bargaining in Convention 98 as including governmental promotion of collective negotiations, a voluntary

531 Article 1 (1) of Convention 98.
532 Article 1 (2) (a) of Convention 98.
533 Article 1 (2) (b) of Convention 98.
534 Article 2(1) of Convention 98.
535 Article 2(2) of Convention 98.
536 Article 4 of Convention 98.

character of the bargaining procedure and the autonomy of the bargaining parties.[537] Just like Convention 87, Convention 98 does not directly provide for the right to strike. However, this right was implied by the Committee of Experts and the CFA and the work of the two committees is discussed later in this Chapter.

3.4.4 Workers Representative Convention, 1971 (No.135)

Convention 135 makes reference to Convention 98 and makes it clear that it supplements the latter's terms which relate to anti-union discrimination.[538] It was ratified by Zimbabwe on 27 August 1998.[539] Workers' representatives are protected against prejudicial acts, including dismissal, which are based on their work or status as workers' representatives, trade union members and their participation in trade union activities as long as they abide by the laws of their country.[540] The provision seeks to protect workers' representatives in their capacity as representatives and does not extend to acts committed against them in other capacities. In addition, they should comply with domestic laws before they are entitled to protection. It is submitted that the laws themselves must fully recognise the right of employees to freedom of association.

Moreover, workers representatives are entitled to appropriate facilities within the undertaking which enable them to discharge their duties "promptly and efficiently".[541] The granting of such facilities should take into account the industrial relations system of a country and the size, capabilities and needs of the undertaking concerned.[542] Another condition is that the granting of the facilities should not affect the "efficient operation of the undertaking concerned". It is not clear as to who should determine the effect on production of the granting of reasonable access to the employer's facilities. These provisions can be abused by employers who can allege that the granting of facilities is likely to affect production,

537 Schregle 1993 *Comparative labour law journal* 433.
538 See the preamble to Convention 135.
539 https://www.ilo.org.dyn.normlex (Date of use: 15 November 2021).
540 Article 1 of Convention 135.
541 Article 2 (1) of Convention 135.
542 Article 2 (2) of Convention 135.

thereby denying employees their right to freedom of association. However, Article 4 of Convention 135 may assist in resolving this problem as it empowers domestic laws, collective agreements, arbitration and courts to determine the facilities which must be provided by a given employer.

Finally, Convention 135 provides that where there are elected representatives and trade union representatives in the same undertaking, measures should be put in place to ensure that the existence of the elected representatives is not designed to dilute the work of trade unions and their representatives but to work together and complement each other.[543] The provision is important as it strengthens the position of trade unions which play a crucial role in the promotion of employees' right to freedom of association. Trade unions are involved in all important issues which affect employees and they participate in collective agreements aimed at improving employees' conditions of work.

3.4.5 ILO Declaration on Fundamental Principles and Rights at Work, 1998

The ILO Declaration is significant in this study because Zimbabwe committed itself to comply with it.[544] It is not a binding instrument but member States have an obligation to respect, promote and fulfil its principles in good faith and in terms of the ILO constitution.[545] There was realisation that economic growth alone was not sufficient to sustain social progress, equity and poverty eradication.[546] Thus, it sought as one of its aims to "maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and

543 Article 5 of Convention 135. A good example is the relationship between workers' committees and trade unions in Zimbabwe. Workers' committees are elected at shop floor level by employees without taking into account their trade union affiliation. However, members of the workers' committee automatically become members of the trade union with majority membership at the undertaking.

544 www.ituc-csi.org (Date of use: 24 November 2020).

545 Budeli 2009 *De jure* 152.

546 Preamble to the Declaration of Fundamental Principles.

on the basis of equality of opportunity their fair share of the wealth which they have helped to generate and to achieve fully their human potential."[547]

In order to "maintain the link between social progress and economic growth", all ILO members, including those that did not ratify the relevant conventions, have an obligation to promote, respect and realise, in good faith and in line with the ILO constitution, certain fundamental rights which include freedom of association as well as the recognition of the right to collective bargaining.[548] Hence, freedom of association and collective bargaining ensures that employees are able to obtain a share that is fair from the wealth they have a direct contribution in its creation through the improvement of their conditions of work. Although there is no mention of other components of freedom of association such as the right to organise and the right to strike, such rights can be inferred from the general right to freedom of association which is recognised in the ILO Declaration.

3.4.6 The UN Global Compact

The Global Compact is a UN initiative which is based on ten principles which cut across areas of human rights, labour rights, environmental rights and anti-corruption. It has been introduced at this stage because its principles on labour standards are similar to those in the ILO Declaration. It was motivated by the fact that international human rights and labour law instruments do not create direct obligations for individuals but they create obligations for states. Individuals are only bound if they are translated into domestic law and practice.[549] The Global Compact reiterates that businesses should uphold the principles of freedom of association including the protection of the right to collective bargaining.[550] Van Niekerk & Smit argue that it is an important initiative as it overlaps with the ILO conventions and it represents an agreement on fundamental labour rights between

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547 See the preamble to the Declaration of Fundamental Principles.

548 Article 2 of the Declaration of Fundamental Principles. Some of the rights include the elimination of all forms of forced or compulsory labour; the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

549 Van Niekerk & Smit *Law@work* 32.

550 Principle 3 of the Global Compact.

public and private entities.[551] However, the Global Compact is not binding and does not have any supervision and enforcement mechanisms. It relies on the commitment of different partners to uphold and promote its principles.

3.5 Enforcement and supervision of ILO's labour standards on freedom of association

The supervision and enforcement of ILO's standards on freedom of association is significant to this research as it helps to understand the role and effectiveness of such measures in ensuring that Zimbabwe is compliant with its international obligations on freedom of association. The ILO adopted different supervisory procedures, namely, the reporting procedure, the complaint procedure (which takes different forms), the representation procedure and the system of direct contacts.[552] These procedures are discussed in detail separately. Before considering the supervision procedures in detail, it is instructive to analyse how the ILO committees have interpreted key ILO conventions and standards on freedom of association. Understanding the interpretation of key provisions by the ILO helps countries in their implementation.

3.5.1 ILO's interpretation of conventions and standards on freedom of association

The Committee of Experts and the CFA have played a crucial role in interpreting and closing the gaps that were left by international rules and standards on freedom of association. This part does not seek to exhaust all the works of these committees but it highlights some of the key interpretations of the conventions and labour standards on freedom of association. To begin with, Convention 87 does not clearly provide for the right to strike which is an essential component of the right to freedom of association. However, the Committee of Experts and the CFA inferred such a right from Articles 3, 8, 10 of Convention 87.[553] The Committee of

551 Van Niekerk & Smit *Law@work* 33.

552 Betten 1988 *Netherlands quarterly of human rights* 32.

553 Norman 2004 *Saskatchewan law review* 594; Hornung-Draus 2018 *Comparative labour law and policy journal* 533; Gernigon, Odero & Guido 1998 *Int'l lab rev* 442. Article 3 of Convention 87 empowers workers or employers' organisations to organise their activities

Experts and the CFA have established a body of principles and minimum rules relating to the right to strike. Firstly, a general right to strike exists for private sector employees except employees in the essential services in the strict sense (those services that endanger the life, safety or health of the whole or part of the population if they are interrupted) or in situations of acute national interests.[554] There is a narrow definition of essential services to the extent that the majority of private sector employees are entitled to exercise the right to strike.

The Committee of Experts and the CFA declared that certain conditions may be imposed by the law on the right to strike like the obligation to give prior notice, the obligation to resort to conciliation before a strike, recourse to voluntary arbitration and the secret ballot.[555] However, these conditions should not make a strike difficult or impossible. The conditions serve certain purposes which may be in the interest of resolving the dispute amicably or ensuring that the strike action has the support of the majority employees within the workplace or industry concerned. For example, the obligation to give the employer prior notice enables the employer to take corrective action before the day of reckoning. Another principle is that replacement of employees on strike is only acceptable in situations of national crisis or where it involves essential services.[556] This is significant because the purpose of a strike is to disrupt production in order to force the employer to accede to certain demands. If the employer has an opportunity to hire temporary labour, strike action would be meaningless.

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and to formulate their programmes in full freedom and Article 8 of Convention 87 provides, among other things, that domestic laws should not impair the guarantees provided for in that convention. Importantly, Article 10 of Convention 87 provides that, "In this Convention, the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers". Furthering and defending the interests of workers has been held by the Committee of Experts and the CFA to include the right to strike.

554 Gernigon, Odero & Guido 1998 *Int'l lab rev* 476; Pouyat 1982 *Int'l lab rev* 297.

555 Gernigon, Odero & Guido 1998 *Int'l lab rev* 477; Pouyat 1982 *Int'l lab rev* 297.

556 Gernigon, Odero & Guido 1998 *Int'l lab rev* 477.

On Convention 98, the Committee of Experts commented that:

> It would normally be contrary to the principle of Convention 98 to exclude from collective bargaining certain questions, particularly those concerning conditions of employment or to make a collective agreement subject to prior approval before it can enter into force or to provide for the possibility of it being declared void because it runs counter to the government's economic policy.[557]

The Committee of Experts was merely emphasising on the voluntary nature of collective bargaining and the fact that the parties should remain independent in determining conditions of work. This does not mean they can do things outside their own legal framework or make collective agreements which are contrary to both domestic and international law and practice. Zimbabwe, like many other member States of the ILO, should be informed by these standards. In other words, its laws should be measured against these set standards.

3.5.2 The reporting procedure

In terms of the ILO constitution each member State agrees to submit annual reports to the International Labour Office on the steps it has pursued in order to fulfil its obligations arising from the conventions it has ratified.[558] The Director-General of the ILO should communicate the reports to the employer and employee's organisations which represent their constituencies in the International Labour Conference.[559] This provision is fair to employees as they get a chance to comment and fully participate at the International Labour Conference. Before the reports are referred to the International Labour Conference, they are first examined by the Committee of Experts.[560] The Committee of Experts' observations are referred to the relevant countries which may be required to make certain clarifications before they are referred to the International Labour Conference.[561]

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557 General Survey by the Committee of Experts relating to freedom of association and collective bargaining as quoted by Schregle 1993 *Comparative labour law journal* at 434.
558 Article 22 of the ILO constitution.
559 Article 23 of the ILO constitution.
560 Betten 1988 *Netherlands quarterly of human rights* 33.
561 Waugh 1982 *Comparative labour law* 191.

Failure to ratify a convention does not absolve a State from the reporting obligation. The concerned State "shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to matters dealt with in the convention, showing the extent to which effect has been given to any of the provisions of the convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such convention."[562] Therefore, member States are bound by the ILO constitution which protects the right to freedom of association even if they have not ratified the relevant conventions.[563] The significance of the provision is that member States of the ILO cannot escape international scrutiny on their observance or failure to observe the employees' right to freedom of association by mere failure to ratify a convention.

3.5.3 The representation procedure

Employers and employees' organisations are entitled to submit representations to the International Labour Office on the ground that a member has failed to observe a convention to which it is a party.[564] The Governing Body then communicates the representation to the country concerned and invites that country to comment.[565] If the relevant country does not reply within a reasonable time or provides a reply that is not satisfactory, the Governing Body has a right to publish the representation and the affected country's reply.[566] The Governing Body also appoints a committee of three members which considers the representation, comments on it and then provides feedback to the Governing Body.[567]

The representation procedure is important as it affords employers and employees direct access to the ILO through their organisations. The threat of negative

562 Article 22 of the ILO constitution.
563 Dunning 1998 *Int'l labour rev* 157.
564 Article 24 of the ILO constitution.
565 Article 24 of the ILO constitution.
566 Article 25 of the ILO constitution.
567 Betten 1988 *Netherlands quarterly of human rights* 34.

publicity can force a country to comply with the request to reply to a representation. The ILO can then make the necessary recommendations which can bring the feud to an end. However, there has been limited use of the representation procedure by both employers and employees' organisations.[568] This means that this procedure has not made a significant contribution to the promotion and supervision of employees' right to freedom of association.

3.5.4 The general complaints procedure

The ILO constitution provides for a general complaints' procedure.[569] The Governing Body, any member State and a delegate to the International Labour Conference can lodge such complaint with the International Labour Conference.[570] The Governing Body can decide to communicate to the government in question so that it can react before referring the complaint to a Commission of Enquiry. Reference to the government allows the Governing Body to have a balanced view of the facts. A Commission of Enquiry is appointed if no satisfactory reply has been received by the Governing Body within a reasonable time.[571]

The affected government has a right to be represented in the procedures of the Governing Body when the matter is being considered.[572] This allows the government concerned an opportunity to defend itself when issues of violating employees' rights including the right to freedom of association are raised. Another important provision relates to the obligation of all members of the ILO to provide information required by the Commission of Enquiry whether they are concerned with the complaint or not.[573] It ensures that all members of the ILO have a collective obligation to ensure that the ILO standards are observed including the

568 Waugh 1982 *Comparative labour law* 191.
569 Article 26 of the ILO constitution.
570 Articles 26 (1) and 26 (4) of the ILO constitution.
571 Article 26 (3) of the ILO constitution.
572 Article 26 (5) of the ILO constitution.
573 Article 27 of the ILO constitution.

employees' right to freedom of association. The Commission of Enquiry prepares a report which embodies its conclusions and recommendations.[574]

The report of the Commission of Enquiry is communicated by the Director-General to the Governing Body and to all the governments mentioned in the complaint.[575] The report is further published.[576] The publication of the report is crucial as it ensures transparency in the complaint procedure. In addition, the act of publishing information about a State's violation of human rights may act as a deterrent factor against such violations. The government can either accept the recommendations of the Commission of Enquiry or decide to have the matter heard by the ICJ.[577] It is submitted that the ICJ acts as a court of appeal in this regard. This argument is fortified by the fact that the ICJ has the power to confirm, vary or reserve the decision of the Commission of Enquiry.[578] The major problem with the complaint procedure is that the matter is referred back to the International Labour Conference by the Governing Body if there is non-compliance and the International Labour Conference has to make a decision on how to ensure compliance.[579] This makes the procedure long and winding without a guarantee of eventual compliance by the concerned State.

3.5.5 Freedom of association complaints procedure

The ILO constitution does not provide for this procedure but it was born out of an agreement between the ILO and the United Nations Economic and Social Council in 1950.[580] The procedure revolves around the committee system. In 1950, the Fact Finding and Conciliation Commission (FFCC) was established and it was mandated to examine complaints relating to violations of trade union and employers' organizations' rights by the member states of the ILO which would

574 Article 28 of the ILO constitution.
575 Article 29 of the ILO constitution.
576 Article 29 of the ILO constitution.
577 Article 29 of the ILO constitution.
578 Article 32 of the ILO constitution.
579 See Article 33 of the ILO constitution.
580 Betten 1988 *Netherlands quarterly of human rights* 36; Budeli 2009 *De jure* 154.

have been referred to it.[581] However, the FFCC could only examine a case if the defendant government gave its consent and it created challenges leading to the formation of the CFA in 1951 to complement the work of the FFCC.[582]

Governments, employers' organisations and trade unions can file a complaint regarding an alleged violation of the right to freedom of association.[583] Complaints are made whether or not the concerned state has ratified freedom of association conventions.[584] In other words, non-ratification of a convention on freedom of association does not absolve a state from the obligation to respect employees' right to freedom of association. The CFA examines complaints relating to freedom of association which are received from any of the tripartite partners.[585] It studies documentary evidence that it receives and it invites the government to which the complaint relates to comment.[586] Further proceedings depends on whether the government concerned has replied.[587] Thus, the whole procedure depends on the cooperation of the defendant government which makes it weaker as a mechanism for enforcing compliance with States' obligations to observe the employees' rights to freedom of association.

The CFA makes recommendations relating to the complaint and some of its decisions regarding trade union rights are now part of customary international law.[588] The fact that some of the decisions of the CFA are regarded as being part of customary international law is particularly important to Zimbabwe as customary international law is part of Zimbabwe's domestic law unless it is inconsistent with the Zimbabwean Constitution or an Act of Parliament.[589] There is a similar provision in the South African Constitution which makes South Africa equally

581 Budeli 2009 *De jure* 154.
582 Budeli 2009 *De jure* 154.
583 Betten 1988 *Netherlands quarterly of human rights* 37.
584 Waugh 1982 *Comparative labour law* 191.
585 Betten 1988 *Netherlands quarterly of human rights* 37.
586 Dunning 1998 *Int'l lab rev* 165.
587 Simamba 1988 *CILSA* 413.
588 Simamba 1988 *CILSA* 414.
589 Section 326 of the Zimbabwean Constitution.

bound by the rules of customary international law.[590] The recommendations of the CFA are referred to the Governing Body and they are usually endorsed without further discussion.[591] The tripartite nature of the CFA makes its decisions objective and balanced.[592] If the matter is not resolved by the CFA, the Governing Body can refer it to the FFCC which is a Commission of Enquiry that requires the consent of the government to do its work.[593] The major weakness of seeking the defendant government's consent is that such consent has not been given in many cases leaving the FFCC with the power to publicise only.[594] On the other hand, Waugh opines that the FFCC and the CFA have achieved positive and tangible results through this procedure which include the repealing or amending of criticised legislation, discontinuing of practices which violated the right to freedom of association, reinstatement of dismissed trade union leaders and the release of imprisoned trade union leaders.[595] These results indicate the importance of the freedom of association complaints procedure in the promotion and observance of the right of private sector employees to freedom of association in Zimbabwe.

3.5.6 Direct contacts

These are direct contact missions made up of one or more individuals appointed by the Director-General of the ILO. They are sent to a country to engage the relevant parties on behalf of the Director-General.[596] The representatives are sent at the request or consent of the government concerned.[597] Thus, the procedure presents another inherent defect, that is, the requirement of governmental consent. In the absence of such consent, no progress can be made. Governmental consent should not be a requirement if the procedure is to be more effective.

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590 See section 232 of the South African Constitution.
591 Betten 1988 *Netherlands quarterly of human rights* 37.
592 For a discussion of the effect of tripartism on the ILO structure and its committees, see Waugh 1982 *Comparative labour law* at 186.
593 Betten 1988 *Netherlands quarterly of human rights* 37.
594 Betten 1988 *Netherlands quarterly of human rights* 37; Simamba 1988 *CILSA* 413.
595 Waugh 1982 *Comparative labour law* 193.
596 Betten 1988 *Netherlands quarterly of human rights* 38.
597 Waugh 1982 *Comparative labour law* 191.

3.6 Employees' right to freedom of association in terms of African human rights systems

Africa has its own regional human rights system. The African Charter of Human and People's Rights (The African Charter) protects human rights including the right to freedom of association at continental level. In addition, there is the Charter of Fundamental Social Rights in SADC (SADC Charter) which also protects human rights within SADC member States. This part discusses the nature and import of these two regional instruments as far as the right to freedom of association for private sector employees in Zimbabwe is concerned.

3.6.1 Employees' right to freedom of association under the African Charter on Human and People's Rights

Zimbabwe ratified the African Charter on 30 May 1986 and its provisions have a direct impact on Zimbabwe's human rights standards including the employees' right to freedom of association.[598] The African Charter (also referred to as the Banjul Charter) was adopted in June 1981 but it only came into force in October 1986.[599] The African Charter is similar to the UDHR in that it contains civil and political rights as well as economic, social and cultural rights.[600] Just like the ICCPR and the ICESCR, the African Charter clearly provides for the indivisibility of human rights.[601] This is a common feature in these human rights instruments which clearly indicate that human rights, including the employees' right to freedom of association, can only be fully enjoyed when they are equally observed. The concept of human rights in Africa proceeds from the position that an individual is a member of a larger community and is not isolated from it.[602] This conception is

598 Viljoen 1991 *Journal of African law* 1.
599 Kiwanuka 1988 *The American journal of international law* 80; Budeli 2009 *De jure* 161.
600 Lindholt 1989 *Mennesker og Rettigheter* 63.
601 The preamble to the African Charter provides that, "Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".
602 Kiwanuka 1988 *The American journal of international law* 80.

also relevant to the employees' right to freedom of association as it is collectively enjoyed by employees.

The AU member states have an obligation to recognise the rights, freedoms and duties in the African Charter and they should "undertake to adopt legislative or other measures to give effect to them".[603] For Dlamini, the obligation to recognise, rather than to implement the provisions of the African Charter, means that these rights were meant to be promoted rather than protected.[604] However, an undertaking to adopt legislative or other measures which give effect to the rights in the African Charter means member States (including Zimbabwe) have an obligation to implement measures which protect such rights, including the right of employees to freedom of association.[605]

Article 10 of the African Charter provides as follows:

> (1) Every individual shall have the right to free association provided that he abides by the law.
>
> (2) Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

It is thus, clear that the African Charter provides for a general right to freedom of association but it does not provide for the right to freedom of association that is specific to trade unions only.[606] Article 10 of the African Charter is also clear that the right to freedom of association should be exercised within the confines of the law. It is submitted that, the effect of this provision is that, the right cannot be fully enjoyed if the laws of a specific country like Zimbabwe are too restrictive. However, member States including Zimbabwe made an undertaking to put in place relevant legislation and measures that give effect to the African Charter which include the right to freedom of association.[607] In addition, the obligations of States

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603 See Article 1 of the African Charter.
604 Dlamini, 1991 *CILSA* 194.
605 See Akinyemi, 1985 *The Indian journal of political science* at 210, on the obligatory nature of the provisions of the African Charter.
606 Budeli 2009 *De jure* 161.
607 The undertaking is directly imposed by Article 1 of the African Charter.

emanate from other international human rights instruments such as the UDHR, the ICCPR and the ICESCR which were clearly endorsed by the African Charter.[608]

3.6.1.1 Limitations of the right to freedom of association under the African Charter

While Article 10 of the African Charter contains the negative right not to associate, it is subject to limitations under Article 29 of the same Charter. An individual has the following obligations in terms of the African Charter: to preserve strong family bonds who live and work as a unity and to respect his/her parents including maintaining them, to serve his or her community, not to compromise state security, to preserve and strengthen social and national unity and to preserve and strengthen territorial integrity and independence of his own country among other things.[609]

Thus, the African Charter does not contain derogation clauses which only apply in cases of emergencies, but it has a clawback clause which applies in everyday situations.[610] Derogation clauses have the effect of suspending rights which have been previously granted while clawback clauses have the effect of restricting rights from the start.[611] Therefore, the right to freedom of association can be limited by the State through domestic law.[612] This is a major weakness of the African Charter as it allows for the taking away of the right to freedom of association in a number of situations. However, the limitations which are relevant to the employees' right to freedom of association such as the need to preserve national security or the rights of others are not different from other international human rights instruments.[613]

608 See the preamble to the African Charter.
609 Article 29 of the African Charter.
610 D'sa 1985 *Journal of African law* 76.
611 Dlamini 1991 *CILSA* 196.
612 D'sa 1985 *Journal of African law* 76.
613 See, for example, Article 22 of the ICCPR and Article 8 of the ICESCR.

3.6.1.2 The African Charter's implementation and enforcement mechanisms

The African Charter establishes the African Commission on Human and People's Rights (The African Commission) with the mandate to promote and protect human rights including the right to freedom of association.[614] The promotional mandate is achieved through undertaking research and studies on African problems affecting human rights, organising seminars, conferences and symposia, information dissemination, encouraging local observation of human rights and making recommendations to governments.[615] The protective mandate is achieved through the consideration of cases and communications which are brought by States and private entities.[616] In addition, the African Commission can also interpret the provisions of the Charter at the request of a member State or other recognised institutions.[617] The mandate of the African Commission ensures that it plays a central role in the promotion and protection of human rights including the right to freedom of association at continental level.

The African Charter provides for a complaints procedure (also referred to as the Communications procedure) for member States against each other when there is an alleged violation of human rights by the offending State.[618] The complaining State serves a written communication on the offending State which must be copied to the Secretary General of the AU and the Chairman of the African Commission.[619] The offending State should provide a written explanation to the complaining State within three months after receiving the complaint.[620] The provision is significant as it allows the State that has received the complaint to explain itself. State parties should try to resolve the complaint through bilateral negotiations or other peaceful procedures, failure of which, the complaint is

614 Articles 30 & 45 of the African Charter.
615 See Article 45 1(a) of the African Charter and Odinkalu 2001 *Human rights quarterly* 352.
616 Lindholt 1989 *Mennesker og Rettigheter* 66; Akinyemi 1985 *The Indian journal of political science* 236; Odinkalu 2001 *Human rights quarterly* 352.
617 Article 45 (3) of the African Charter.
618 Article 47 of the African Charter.
619 Article 47 of the African Charter.
620 Article 47 of the African Charter.

referred to the African Commission.[621] It is clear that the complaining State cannot impose its will on the offending State. The success of the procedure depends on the cooperation of the offending State.

When a matter is submitted before the African Commission for resolution, it can ask the concerned States to provide all the information that is relevant in that matter.[622] In addition, the concerned States have a right to be represented and to submit written or oral evidence.[623] The African Commission does not only rely on the information that it gets from the concerned States but it can also use information "from other sources".[624] Thus, the African Commission is not restricted in gathering all the relevant information which makes it possible to arrive at an informed position when it deals with complaints including the violation of the right to freedom of association. The major weakness of this procedure is that the African Commission does not have the power to make a binding decision but it can only make recommendations to the Assembly of Heads of State and Government.[625] In practice, States do not usually condemn their counterparts.[626]

The African Commission can also deal with individual complaints.[627] Such complaints are only considered if they, among other things, identify their authors even if they ask to remain anonymous, are not written in a language that is insulting or disparaging to the State concerned or the AU, are not based on rumours and local remedies should have been pursued first.[628] In other words, an individual who is pursuing a complaint against the state should do so in good faith and the complaint should be based on evidence. This is significant as it ensures that when the African Commission deals with the violation of the right to freedom of association, it relies on correct and verifiable facts. Crucially, the complainant

621 Article 48 of the African Charter.
622 Article 51 of the African Charter.
623 Article 51 of the African Charter.
624 Article 52 of the African Charter.
625 Articles 52 & 53 of the African Charter.
626 Lindholt 1989 *Mennesker og Rettighetter* 66.
627 See Article 55 of the African Charter.
628 Article 56 of the African Charter.

does not need to be a victim and the African Commission cannot decline its jurisdiction once a complaint has been accepted.[629]

In the course of deliberating individual complaints, if it appears that there has been a "series of serious or massive violations of human and people's rights", the African Commission can draw the attention of the Assembly of Heads of State and Government to those cases.[630] The African Commission may then be requested by the Assembly of Heads of State and Government to undertake a detailed study of these serious cases and present a factual report together with its findings and recommendations.[631] Decisions are only made by the Assembly of Heads of State and Government.[632] This is an inherent defect of the individual complaints procedure as the African Commission has no power to make a binding decision. Just like the interstate complaints procedure, it is unlikely that the Assembly of Heads of State and Government can take a decisive action against the offending State.[633]

The African Charter is also instructive on the applicable principles in the discharge of duties by the African Commission. It provides that:

> The Commission shall draw inspiration from international law on human and people's rights, particularly from the provisions of various African instruments on human and people's rights, the Charter of the United Nations, the Charter of the Organisation of African Unity (now the AU), the Universal Declaration of Human Rights, other instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.[634]

The above provision is significant because it connects the work of the African Commission with the jurisprudence that has been developed in international human rights and labour law. Therefore, important conventions on the right to

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629 For a further discussion of this point, see Akinyemi 1985 *The Indian journal of political science* at 236.
630 Article 58 of the African Charter.
631 Article 58 of the African Charter.
632 Article 59 of the African Charter.
633 See Lindholt 1989 *Mennesker og Rettigheter* 66.
634 Article 60 of the African Charter.

freedom of association such as Conventions 87 and 98 are also considered by the African Commission in the discharge of its duties.

Lastly, the African Charter provides for a reporting procedure. In terms of that procedure, every member State should submit a report every two years on the "legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter".[635] The obligation to report ensures that the African Commission is updated on the domestic laws, practices and challenges and it can help to formulate policies which ensure compliance with the provisions of the Charter (which include the right to freedom of association).[636] With regard to trade union rights, States are also obliged to provide information on all the sources of law that are aimed at promoting and protecting trade union rights including their right to collective bargaining and their right to strike.[637] The detailed guidelines on trade union rights were provided by the African Commission in its Guidelines for the Submission of State Reports.[638] It becomes clear that the right of private sector employees to freedom of association in Zimbabwe is within the ambit of the African Commission's mandate.

3.6.2 Employees' right to freedom of association under the Charter of Fundamental Social Rights in SADC

Zimbabwe is a signatory of the Charter of Fundamental Social Rights in SADC (the SADC Charter).[639] To this end, it committed itself to implement its provisions. It becomes justifiable to discuss the provisions of the SADC Charter and how it affects the right of private sector employees to freedom of association in Zimbabwe. Fundamentally, the Charter embodies the recognition by governments, employers and employees of the universality and indivisibility of basic human rights in international instruments such as the UDHR, the African Charter, the ILO

635 Article 62 of the African Charter.
636 Viljoen 1999 *Journal of African law* 355.
637 Okene & Eddie- Adadi 2011 *Nigerian law journal* 54.
638 Okene & Eddie-Adadi 2011 *Nigerian law journal* 54.
639 See the preamble to the SADC Charter.

constitution and all the relevant treaties and conventions.[640] Therefore, the right of private sector employees to freedom of association in Zimbabwe is equally recognised by the SADC Charter as it is recognised by many international human rights instruments discussed above. Member States, including Zimbabwe and South Africa, undertook to observe the basic rights which are referred to in the SADC Charter.[641]

The SADC Charter extensively deals with the employers and employees' right to freedom of association and its components. To begin with, member States have an obligation to create a conducive environment that is consistent with the ILO conventions on freedom of association.[642] In that vein, employers and employees have the right to form, join or not to join employers' associations or trade unions of their choice for the promotion of their interests and without any form of prejudice.[643] This right is consistent with the provisions of other international human rights and labour law instruments such as the ICESCR and Convention 87. In addition, the SADC Charter recognises the right of employers' associations and trade unions to bargain collectively in accordance with domestic laws and practices.[644] Thus, the SADC Charter clearly provides for the right of employees to collective bargaining which is also consistent with Convention 98 which laid down the standards for collective bargaining.

Another important development is that the SADC Charter clearly provides for the right of employees to strike if a dispute remains unresolved.[645] This is a marked departure from other international conventions on freedom of association which do not provide for the right to strike.[646] It goes further to provide for organisational rights to representative unions such as the right of access, the right to trade union dues, the right to elect trade union representatives, the right of trade union

640 Article 3 of the SADC Charter.
641 Article 3 of the SADC Charter.
642 Article 4 of the SADC Charter.
643 Articles 4(a) & 4(b) of the SADC Charter.
644 Article 4(c) of the SADC Charter.
645 Article 4 (e) of the SADC Charter.
646 Conventions 87 & 98 do not expressly provide for such a right although it was implied by the Committee of Experts and the CFA.

representatives to education as well as training and the right of trade unions to disclosure of information.[647] Such organisational rights constitute an important component of the right to freedom of association.

Furthermore, there are specific provisions on essential services in the SADC Charter which deserve mention. Firstly, it provides that the parameters of essential services should mutually be defined and agreed upon by governments, employers' associations and trade unions.[648] In other words, the government should not impose the parameters of essential services but it must seek an agreement with employers and employees. This requirement ensures that the government does not unduly take away the right of employees to freedom of association through unmitigated declaration of essential services.

In order to safeguard employees in essential services, the State as well as employers and employees must ensure that there is an easily accessible machinery for expeditious resolution of disputes.[649] An effective dispute resolution machinery ensures that those employees with limited rights to freedom of association are equally protected.

3.6.2.1 The SADC Charter's enforcement and implementation mechanisms

The responsibility of implementing the SADC Charter lies with national tripartite institutions and regional structures.[650] These structures should promote the implementation of the SADC Charter through legislation and equitable growth within SADC.[651] In addition, there must be regional mechanisms to assist SADC members to comply with the ILOs reporting system.[652] Thus, the SADC systems are designed to ensure compliance with the ILO system which protects the employees' right to freedom of association at international level. All member States

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647 Article 4 (f) of the SADC Charter.
648 Article 4 (g) of the SADC Charter.
649 Article 4 (h) of the SADC Charter.
650 Article 16 (1) of the SADC Charter.
651 Article 16 (2) of the SADC Charter.
652 Article 5 (c) of the SADC Charter.

are also requested to submit regular progress reports to the SADC Secretariat and the reports should have the input of employers and employees.[653] The reporting system is consistent with other international human rights instruments such as the ICCPR, the ICESCR and the ILO constitution. The SADC Secretariat is kept updated on developments and challenges which member States are facing in implementing the SADC Charter's provisions including the right of employees to freedom of association.

3.7 Conclusion

This chapter has discussed relevant international and regional human rights instruments as well as labour law instruments on freedom of association. To begin with, the chapter discussed the concept of human rights.[654] It was noted that human rights are rights which accrue to human beings by virtue of their status as human beings. It was further discussed that these human rights have certain attributes which include the fact that they are inalienable, indivisible and universal. The chapter proceeded to discuss the employees' right to freedom of association in terms of universal and general human rights standards. First to be considered under the universal and general human rights standards was the UDHR.[655] The UDHR contains both the positive right to associate and the negative right not to associate. The UDHR further provides for trade union rights which are a vital component of the employees' right to freedom of association. It became clear that the UDHR laid a firm foundation for the development of other binding international human rights instruments like the ICCPR and the ICESCR although it was not legally binding. However, some of its provisions have assumed the status of customary international law.

The ICCPR was also discussed.[656] It also recognises the right of everyone to freedom of association including the right to establish and to become a member of

653 Article 16 (3) & (4) of the SADC Charter.
654 See [3.3] hereof above.
655 See [3.3.1] hereof above.
656 See [3.3.2] hereof above.

trade unions for the protection of one's own interests. However, the ICCPR does not provide for the right not to associate with others. It was highlighted that both the UDHR and the ICCPR did not expressly provide for the right to strike. It was further noted that the circumstances justifying the limitations of rights under the ICCPR were meant to protect the right to freedom of association rather than taking it away. The ICCPR also provides for reporting and complaint procedures but their major weaknesses are that they depend on the commitment of states to abide by them.[657] The ICESCR provides for the right of everyone to form and join trade unions.[658] However, it became apparent that it expressly provides for the right to strike unlike the UDHR and the ICCPR. States are also obliged to report on the progress made in implementing the provisions of the ICESCR and the system has similar deficiencies as those suffered by the reporting system under the ICCPR.

The chapter further discussed the employees' right to freedom of association in terms of international labour law. International labour law jurisprudence revolves around the ILO and its tripartite institutions. The ILO constitution recognises the principle of freedom of association.[659] The right of employees to freedom of association was strengthened by the Declaration of Philadelphia which was incorporated into the ILO constitution. The work of the ILO resulted in the adoption of important conventions on freedom of association. It was further discussed that Convention 87 was the first major ILO instrument on freedom of association. Among other things, it guaranteed the right of employees to form and join trade unions and it also protected the rights of trade unions themselves such as the preservation of their independence.[660] Convention 87 was followed by Convention 98 which provided further safeguards on the right to organise and it ushered in a framework for collective bargaining.[661] It further dealt with anti-union discrimination such as subjecting the employment of a worker to the condition that he should either join or relinquish trade union membership. It also dealt with the

657 See [3.3.2.2] hereof above.
658 See [3.3.3] hereof above.
659 See [3.4.1] hereof above.
660 See [3.4.2] hereof above.
661 See [3.4.3] hereof above.

independence of trade unions as well as providing for the obligations of States (including Zimbabwe) to provide a framework for collective bargaining.

The chapter also discussed Convention 135 which sought to protect the workers' representatives against acts of discrimination.[662] It further provides a framework for workers' representatives to properly discharge their duties. The ILO Declaration on Fundamental Principles and Rights at Work together with the Global Compact are not binding instruments but they complement other international instruments on the right to freedom of association.[663] It was further highlighted that the Committee of Experts and the CFA play an important role in the interpretation and application of the international instruments on freedom of association.[664] In addition, implementation mechanisms of the ILO instruments were discussed which include the reporting and complaints procedures.[665] These procedures are crucial in the implementation and enforcement of States' obligations under international labour law. However, they depend on the commitment and cooperation of member States.

At regional level, the chapter dealt with the right to freedom of association in terms of the African Charter and the SADC Charter.[666] The African Charter provides for a general right to freedom of association.[667] However, this is subject to limitations provided for under Article 29 of the African Charter which was criticised for completely taking away the right to freedom of association under certain circumstances.[668] It was also noted that the African Charter provides for reporting and complaints procedures which are designed to ensure adherence to the set obligations including the respect of employees' right to freedom of association. However, these procedures also depend on the cooperation and commitment of state parties. Lastly, the chapter addressed the right to freedom of association

662 See [3.4.4] hereof above.
663 See [3.4.5] & [3.4.6] hereof above.
664 See [3.5.1] hereof above.
665 See [3.5.2 - 3.5.6] hereof above.
666 See [3.6] hereof above.
667 See [3.6.1] hereof above.
668 See [3.6.1.1] hereof above.

under the SADC Charter which clearly covers all aspects of this right including the right to organise, to bargain collectively and to strike.[669] It was further highlighted that the SADC Charter has a reporting procedure just like other international instruments. The nature, import and scope of these international obligations will guide the discussions in the succeeding chapters.

669 See [3.6.2] hereof above.

CHAPTER FOUR

THE CONSTITUTIONAL FRAMEWORK IN ZIMBABWE

4.1 Introduction

In this chapter, the constitutional framework on the right to freedom of association and its components in Zimbabwe is discussed. In chapter 2, it was highlighted that the 1980 Constitution laid down a firm foundation for the development of the employees' right to freedom of association after independence in Zimbabwe.[670] This was achieved through section 21 of the 1980 Constitution which provided for both the positive and negative rights to associate. It stated that no one was prevented from exercising his/her right to freedom of assembly and association, that is, to freely assemble and associate with others, and in particular, to form or belong to political parties, trade unions or other associations for the protection of his/her interests unless he/she gave his/her consent or was subjected to parental discipline. In addition, it provided that no one was compelled to belong to an association. Thus, the constitutional jurisprudence on the employees' right to freedom of association was developed around section 21 of the 1980 Constitution.[671] However, the 1980 Constitution did not expressly provide for the other components of the employees' right to freedom of association, that is, the employees' rights to organise, to bargain collectively and to strike. These components were constitutionally entrenched in Zimbabwe through section 65 of the Zimbabwean Constitution when it was enacted in 2013.[672] The Zimbabwean Constitution is the supreme law of the land and any law, practice, custom or conduct that is inconsistent with it becomes invalid to the extent of the inconsistency.[673] Because the Zimbabwean Constitution is the supreme law of the

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670 See [2.4.1].

671 See for example the following cases: The *Zimbabwe Banking and Allied Workers' Union* case; The *Netone Cellular (Pvt) Ltd* case; The *Bemba Farm (Pvt) Ltd* case; The *Ngulube* case.

672 Tsabora & Kasuso 2017 *ILJ* 44.

673 Section 2 of the Zimbabwean Constitution.

land that deals with the employees' right to freedom of association and its components, it becomes justified to devote a discussion of its impact on this right.

Another notable feature is that section 65 of the Zimbabwean Constitution is almost similar to section 23 of the South African Constitution. To that end, these similarities have been described as an act of 'constitutional borrowing' as Zimbabwe replicated most of the South African constitutional provisions when it was introduced in 2013.[674] As a matter of fact, the constitutional entrenchment of the employees' right to freedom of association and all its components was done in South Africa in 1996 when the South African constitution was enacted. In sharp contrast to that development, the entrenchment of the employees' right to freedom of association and its components only took place in Zimbabwe in 2013 when the Zimbabwean Constitution was introduced. In that vein, South Africa has a more developed constitutional labour law jurisprudence as compared to Zimbabwe as far as the employees' right to freedom of association and its components is concerned. Therefore, it becomes justified to adopt a comparative analysis between Zimbabwean and South African constitutional developments on the employees' right to freedom of association and its components. It is also important to note that the South African Constitution is the supreme law of the republic and any law or conduct that is inconsistent with it is invalid.[675] Hence, the Zimbabwean and South African constitutions form the legal foundations for the protection of the employees' right to freedom of association in these two countries.

Finally, this chapter discusses the background to the enactment of the Zimbabwean Constitution, the impact of including the right to freedom of association and its components in the Declaration of Rights and the way South Africa has dealt with similar provisions since the advent of her own democracy in 1996.

674 Kondo 2017 *African human rights law journal* 175.
675 Section 2 of the South African Constitution.

4.2 Background to the Zimbabwean Constitution

This part discusses the brief background leading to the Zimbabwean Constitution in 2013. It helps to understand the theoretical foundation for the introduction of the employees' right to freedom of association and its components in the Zimbabwean Constitution. A direct comparison is made with the South African background to the development of its constitution. It provides a launch pad for further analysis of the constitutional right of employees to freedom of association.

In February 2009, a Government of National Unity (GNU) was formed in Zimbabwe following the disputed 2008 general elections. SADC brokered successful talks through the then South African president, Thabo Mbeki. The GNU was a product of ZANU (PF), the MDC -T and the MDC-N which were the three major political parties with representation in parliament.[676] The three parties signed a Global Political Agreement (GPA) on 15 September 2008.[677] One of the main objectives for the formation of a GNU was the drawing up of a people-driven constitution.[678] This development was motivated by the fact that the 1980 Constitution was a product of political compromise which only sought to transfer power from the colonisers to majority rule.[679] Thus, it was not people driven.

There were several attempts to come up with a new constitution in Zimbabwe between 1980 and 2013. Firstly, there was the 1999 Constitutional Commission Draft Constitution. It was a product of the work of the Constitutional Commission that had been appointed by the President in terms of the Commission of Inquiry Act.[680] The Commission's mandate was to extract views from the public which led to the compilation of a draft constitution before it was put to a referendum in 2000.[681] Unfortunately, the Constitutional Commission Draft Constitution was

676 The GNU was legally ushered in by the Constitution of Zimbabwe (Amendment) Act No.19 of 2008.

677 http://ir.buse.ac.zw (Date of use: 14 august 2021).

678 See Article 6 of the GPA; *Kersting Constitution in transition* 7.

679 See again Article 6 of the GPA.

680 [Chapter 10:07] (hereinafter referred to as the Commission of Inquiry Act). The Commission was legally constituted in terms of SI 138 of 1999.

681 https//www.eisa.org (Date of use: 14 August 2021).

rejected by the people in the referendum that ensued. Of particular significance to this research is that the rejected constitutional draft did nothing to expand on the employees' right to freedom of association as provided for in the 1980 Constitution.[682] After the rejection of the Constitutional Commission Draft Constitution, the National Constitution Assembly (NCA), a civic organisation which campaigned for a new constitution, began to draft a new constitution for Zimbabwe. In 2001, the NCA came up with a draft constitution.[683] Crucially, the NCA Draft Constitution had a justiciable bill of rights which contained the employees' right to freedom of association and its components.[684] Although the NCA Draft Constitution was never adopted by the government of Zimbabwe, it marked the beginning of constitutionalisation of the right to freedom of association and all its components in Zimbabwe.

In 2007, there was another abortive attempt to write a new constitution for Zimbabwe. Again, this was facilitated by the then South African president, Thabo Mbeki on behalf of SADC and the process was meant to ensure free and fair elections in 2008.[685] The constitution was negotiated in Kariba by the three main political parties, that is, ZANU (PF), MDC-T and MDC-M.[686] It explains why it became known as the Kariba Draft Constitution. It was bound to fail as it was a politically negotiated document without the involvement of the people. It was never passed into law. The Kariba Draft Constitution had non-justiciable national objectives which included work and labour relations. In terms of section 25 of the Kariba Draft Constitution, the State had an obligation to adopt reasonable policies and measures, within its capacity, in order to ensure that there were equal

682 https://www.uz.ac.zw (Date of use: 14 August 2021).

683 https://media.africaportal.org (Date of use: 14 August 2021).

684 See section 28 which provided for the right of workers to fair and safe standards and labour practices; the right of employees to form and join trade unions; the right to strike and collective bargaining.

685 https://brill.com>book>edcoll (Date of use: 14 August 2021).

686 https://www.refworld.org>docid (Date of use: 14 August 2021). The Kariba Draft Constitution was written by ZANU (PF)'s Patrick Chinamasa and Nicholas Goche, Tendai Biti from the MDC-T and Welshman Ncube of the MDC-M.

opportunities to work for all.[687] It went further to provide that the State should make all necessary efforts to ensure that both employers and employees enjoyed their rights to collective bargaining and to strike.[688] Thus, it recognised the important components of the right to freedom of association in its national objectives, that is, the rights to bargain collectively and to strike. In addition, the general right to freedom of assembly and association was also recognised in the Kariba Draft Constitution's Bill of Rights.[689] The Kariba Draft Constitution was significant because it was acknowledged and recognised in the GPA.[690]

4.2.1 The Zimbabwean Constitution making process

The constitution-making process which led to the birth of the Zimbabwean constitution was led by parliament.[691] In line with the GPA, a Constitution Parliamentary Select Committee (COPAC) was set up in April 2009 and it constituted of representatives from ZANU (PF), MDC-T and MDC-N.[692] The First All Stakeholders Conference was held in July 2009 and it came up with 17 thematic committees with labour forming one of the thematic areas.[693] The thematic committee on labour was given a task to determine specific labour rights that were to be included in the constitution. After the beginning of consultations in 2010, a total of 4943 meetings were conducted across Zimbabwe.[694] The meetings were overally attended by 1.2 million people.[695] In addition, there were 51 written submissions and 2397 electronic submissions.[696] However, the number

687 Section 25 (1) of the Kariba Draft Constitution.
688 Section 25 (2) of the Kariba Draft Constitution.
689 Section 47 of the Kariba Draft Constitution.
690 See Article 6 and the preamble to the GPA.
691 See Article 6 of the GPA.
692 Article 6.1 (a) of the GPA. COPAC was given the special mandate which would lead to the writing of a new constitution which included the setting up of sub-committees consisting of civil society and members of parliament to assist in discharging its duties, to conduct public consultations; to consult relevant stakeholders through an All Stakeholders Conference, to come up with a draft constitution that would be tabled at the Second All Stakeholders Conference, to report its findings to Parliament and then to put the draft constitution to a referendum.
693 http://www.veritaszim.net (Date of use: 15 August 2021).
694 http://www.veritaszim.net (Date of use: 15 August 2021).
695 https://www.zw.undp.org (Date of use: 15 August 2021).
696 https://www.zw.undp.org (Date of use: 15 August 2021).

of people who attended the outreach meetings was very low given that in 2013, Zimbabwe had a total population of 13,430,000.[697] The gathered data was compiled leading to the production of a first draft constitution that was presented to the Second All Stakeholders Conference which was held in October 2012.[698] The final draft was presented in parliament in 2013 before it was subjected to a referendum and the people voted for its adoption.[699]

It is clear that the Zimbabwean constitution-making process was a pure product of politics. It had also been highlighted that the outreach programmes were not consultative enough to capture the views of the majority of Zimbabwe's population. It can be argued that despite these shortcomings, the issue of labour relations was seriously considered which led to the enactment of sections 58 and 65 of the Zimbabwean Constitution which recognise and protect the rights of private sector employees to freedom of association.

Important lessons can be learnt from the South African constitution-making process. Heyns & Brand describe the South African Constitution as "arguably the most sophisticated and comprehensive system for the protection of socio-economic rights of all the constitutions in the world today."[700] The observation by the two authors is particularly important to this research as international human rights jurisprudence recognise the employees' right to freedom of association as both a civil right and an economic right.[701] Both South Africa and Zimbabwe share a similar history of colonisation. In South Africa, there was a systematic and racial violation of fundamental rights including the right of employees to freedom of association through the system of apartheid. Hence, the writing of the new constitutions in both Zimbabwe and South Africa was one way of correcting those past injustices.[702] Thus, the employees' right to freedom of association in the two

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697 https://countryeconomy.com>zimbabwe (Date of use: 15 August 2021).

698 http://archive .kubatana.net (Date of use: 15 August 2021).

699 Manyatera *The Constitution of the Republic of Zimbabwe* 10.

700 Heyns & Brand 1998 *Law, democracy and development* 153.

701 See generally Chapter 2 of the research for a discussion on this point.

702 The historical injustices are well captured in the two countries preambles to their constitutions. The preamble to the South African Constitution provides:

constitutions should be understood within the context of the fulfilment of the objectives of attaining independence.

The writing of the South African Constitution was also led by political parties notably the ANC and the National Party. It all began with the passing of the Interim Constitution of South Africa in 1993.[703] The Interim Constitution contained a schedule with 34 principles which the final constitution was supposed to comply with. In addition, a Constitutional Court was set up to determine compliance of the draft final constitution with those 34 principles.[704] Just like in Zimbabwe, the process of writing the South African Constitution was parliamentary driven with the parliament that was elected after the 1994 elections serving a dual role of Legislature and Constitutional Assembly.[705] Thus, the Constitutional Assembly worked on the draft constitution between 1994 and 1996 and its work was summarised by Malherbe in the following words:

> The process was firstly characterised by its comprehensiveness and intensity. In terms of the number of people occupied for so many months, the mass of inputs and information processed, the volume of paperwork produced, the extent of public involvement generated and the many hours, day and night of intensive and exhaustive negotiations, the making of the 1996 constitution will be difficult to surpass.[706]

The above quotation clearly shows that much time and resources were dedicated to the writing of the South African Constitution. People were also heavily consulted. After the drafting of the new constitution, it was referred to the Constitutional Court for certification in accordance with the Interim Constitution. At first, the Constitutional Court was unable to certify the draft constitution as

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"We, the people of South Africa , recognise the injustices of our past; honour those who suffered for justice and freedom in our land; …"
On the other hand, the preamble to the Zimbabwean Constitution provides that:
"We the people of Zimbabwe, united in our diversity by our common desire for freedom, justice and equality , and our heroic resistance to colonialism, racism and all forms of domination and oppression, extolling the brave men and women who sacrificed their lives during the Chimurenga/ Umvukela liberation struggles".

703 It was passed as the Constitution of the Republic of South Africa, Act No. 200 of 1993.

704 Dugard 1997 *European journal of international law* 78.

705 See again Dugard 1997 *European journal of international law* 78.

706 Malherbe 2000 *Netherlands quarterly of human rights* 47.

compliant with the 34 principles in the Interim Constitution.[707] The Constitutional Assembly then approved the required amendments before referring back the draft constitution to the Constitutional Court which certified the amended text on 4 December 1996.[708] Finally, the draft constitution was signed by the President on 10 December 1996 and came into force on 4 February 1997.[709]

It is apparent that the constitution-making process in South Africa was more consultative and took a much longer time to be concluded as compared to the Zimbabwean process. Another glaring feature is that the South African Constitution was subjected to scrutiny by the Constitutional Court before it was passed into law. Despite the differences in approach to constitution-making process between Zimbabwe and South Africa, it will be shown that Zimbabwe benefited immensely from a thorough constitution-making process in South Africa as the provisions in the two constitutions on the employees right to freedom of association are almost similar as demonstrated hereunder.

4.3 The right of employees to freedom of association under the Zimbabwean Constitution

In chapter 1, it was highlighted that section 58 of the Zimbabwean Constitution provides for the general right to freedom of association. This provision was there in the 1980 Constitution. What is striking in the Zimbabwean Constitution is that its section 65 now provides for labour rights which are now specific to employees. It is instructive to quote the said section which provides under "Labour rights" as follows:

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707 *In re: Certification of the Constitution of the Republic of South Africa*, 1996, BCLR, 1996, 1253 (CC) (hereinafter the *In re Certification of the Constitution of the Republic of South Africa* case). For a further discussion of the certification process, see Malherbe 2000 *Netherlands quarterly of human rights* 47; Cockrell 1997 *Modern law review* 528; Dugard 1997 *European journal of international law* 78.

708 *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996, 1 BCLR, 1997, 1 (CC) (hereinafter the *In re: Certification of the Amended Text for the Constitution of the Republic of South Africa* case).

709 See Proclamation R6 of 1997.

(1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.
(2) Except for members of the security services, every person has the right to form and join trade unions and employee or employers' organisations of their choice, and to participate in the lawful activities of those unions and organisations.
(3) Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.
(4) Every employee is entitled to just, equitable and satisfactory conditions of work.
5) Except for members of the security services, every employee, employer, trade union, and employee or employer's organisation has the right to -
(a) engage in collective bargaining;
(b) organise; and
(c) form and join federations of such unions and organisations.
(6) Women and men have a right to fully paid maternity leave for a period of at least three months.

It is clear that the Zimbabwean Constitution provides for the general right to freedom of association, the right to strike, the right to collective bargaining and the right to organise. These rights are available to private sector employees as well as public sector employees although the focus is on the former category. Sections 58 and 65 of the Zimbabwean Constitution are part of the entrenched Declaration of Rights in the constitution. The effect of including such rights in the Declaration of Rights is discussed later. At this stage, it is important to highlight that sections 58 and 65 of the Zimbabwean Constitution borrow heavily from the provisions of the South African Constitution. Firstly, section 58 of the Zimbabwean Constitution is equivalent to section 18 of the South African constitution which provides for the general right to freedom of association.[710] The only difference between the two sections is that section 18 of the South African Constitution does not expressly provide for the right not to associate, something that is expressly provided for by section 58 of the Zimbabwean Constitution.

Section 65 of the Zimbabwean Constitution closely resembles section 23 of the South African Constitution which also provides for a broader set of labour rights including the right to organise, bargain collectively and strike.[711] It also gives the

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710 Section 18 of the South African Constitution provides that: "Everyone has the right to freedom of association".

711 Section 23 of the South African Constitution provides as follows under 'Labour Relations':
(1) Everyone has the right to fair labour practices.

right to form and join trade unions to everyone but it excludes security services members. The position is different from section 23 of the South African Constitution which gives those rights only to 'workers'. In addition, the right to strike in Zimbabwe is available to an "employee" and it is not available to either a trade union or any other person who is not an employee.[712] This is similar to the South African Constitution which provides for the right to strike to the individual worker.[713] Therefore, it means that the constitutional right to strike is an individual right although it can be exercised by employees acting collectively.

Furthermore, section 65 of the Zimbabwean Constitution recognises the rights of employees, employers, trade unions, employer's organisations and other employees' organisations to organise, to bargain collectively and to form and join federations of their choice. In contrast, the right to join federations is only constitutionally given to a trade union and an employers' organisation in South Africa.[714] It means individual employers or employees cannot claim a constitutionally protected right to join federations of their choice in South Africa. They can only do so through their trade unions or employers' organisations. Another sharp contrast is that in Zimbabwe, employers, employees, trade unions, employee organisations and employers' organisations have a right to engage in collective bargaining.[715] Conversely, in South Africa, its only trade unions, employers organisations and employers who have the right to engage in collective

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(2) Every worker has the right- a) to form and join a trade union; b) to participate in the activities and programmes of a trade union; and (c) to strike.
(3) Every employer has the right to- (a) to form and join an employers' organisation; (b) to participate in the activities and programmes of an employers' organisation.
(4) Every trade union and every employers' organisation has the right - (a) to determine its own administration, programmes and activities; (b) to organise and (c) to form and join a federation.
(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with Section 36(1)."

712 Section 65(3) of the South African Constitution.
713 Section 23(2) of the South African Constitution.
714 Section 23(4) of the South African Constitution.
715 Section 65(5) of the Zimbabwean Constitution.

bargaining.[716] Only employees are excluded from the South Africa's constitutional right to collective bargaining. They can only do so through their trade unions. It can be argued that since the South African workers have a right to form and join trade unions, they can still fully enjoy the right to collective bargaining through such trade unions.

It is apparent that, the Zimbabwean and South African constitutional provisions on the right of employees to freedom of association are closely related. It justifies why it is important to take a comparative analysis of these provisions. Thus, the Zimbabwean and South African constitutions identify the beneficiaries of the right to freedom of association as 'every person', employees (workers), employers, trade unions and employers' organisations. It is necessary to understand the meaning, content and scope of those specific beneficiaries of the constitutional rights which raise legal issues such as 'every person', employer and employee.

4.3.1 The effect of the words 'every person'

It has already been indicated that the constitutional right to form and join trade unions and employees or employers' organisations of his/her choice and to be involved in the lawful activities of the relevant unions and organisations is given to 'every person'.[717] The scope of the words 'every person' is not defined in the Zimbabwean Constitution, thereby warranting a further analysis of their meaning and effect. According to Madhuku, the effect of 'every person' under section 65 of the Zimbabwean Constitution is to extend the enjoyment of the right to form and join trade unions to non-employees.[718] However, this view is not consistent with the jurisprudence that has been developed around the meaning of 'every person' as it applies to unfair labour practices either in Zimbabwe or South Africa. In Zimbabwe, the right to fair and safe labour practices and standards including the

716 Section 23(5) of the South African Constitution.
717 Section 65(2) of the Zimbabwean Constitution.
718 Madhuku *Labour law in Zimbabwe* 282.

constitutional right to be paid a fair and reasonable wage is given to 'every person'.[719]

The effect of the words 'every person' in relation to unfair labour practices under section 65(1) of the Zimbabwean Constitution was considered by the Zimbabwean Constitutional Court in the case of *Greatermans Store (1979) (Pvt) Ltd t/a TM Hospitality (Pvt) Ltd v The Minister of Public Service, Labour and Social Welfare and Anor.*[720] In this case, the court held that in order for one to be able to prove that there has been an unfair labour practice, he/she must be able to prove that an employer had done or refrained to do something during the subsistence of the employment relationship.[721] Therefore, the Zimbabwean Constitutional Court restricted the meaning of 'every person' to an employment relationship. It can be argued that the same interpretation should be given to section 65(2) of the Zimbabwean Constitution. The argument is fortified by the fact that section 65(2) talks of the right of 'every person' to form and join trade unions. A trade union is defined as "any association or organisation formed to represent or advance the interests of any employees or class thereof in respect of their employment."[722] Thus, the link between 'every person' and trade unions which represent the interests of employees means the former should be understood within the context of an employment relationship.

The contextualisation of the words 'every person' in section 65 of the Zimbabwean Constitution finds support from scholars who have made efforts to interpret similar provisions in the South African Constitution. Although the South African Constitution identifies beneficiaries of labour rights under it, the right to fair labour practices is given to 'everyone'.[723] Commenting on the meaning of 'everyone', Cheadle asserts that the term should be read together with the words 'labour

719 Section 65(1) of the Zimbabwean Constitution.
720 CCZ-2-18 (hereinafter the *Greatermans Stores (1979) (Pvt) Ltd* case).
721 *Greatermans Stores (1979) (Pvt) Ltd* case at 38-39.
722 See section 2 of the Labour Act.
723 Section 23(1) of the South African Constitution.

practices' such that the former can only apply to employment relationships.[724] Mubangizi also shares a similar view by concluding that the term 'everyone' should be restricted to labour practices and refers to workers and employers.[725] In that manner, the jurisprudence that has been developed in South Africa on the scope of 'everyone' supports the view that section 65(2) of the Zimbabwean Constitution should be understood to mean that the right to form and join trade unions only applies to an employment relationship.

4.3.2 The meaning of 'employee'

Section 65 of the Zimbabwean Constitution accords the rights to organise, strike and collective bargaining to employees. However, it does not define the term 'employee'. Consequently, it is necessary to explore the meaning of 'employee' in order to understand the beneficiaries of these rights. The definition of the term 'employee' has to be sought from the Labour Act which gives effect to the labour rights which are enshrined in the Zimbabwean Constitution. According to the Labour Act, an 'employee' means;

> Any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person- (a) in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides substantial investment in or assumes the substantial risk of the undertaking; or (b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services.[726]

It is clear that the Labour Act provides a wide definition of the term 'employee' to include those situations which closely resemble an employer and employee relationship. The antithesis of the Labour Act is that it restricts the term 'employee' to private sector and quasi-state institutions such as parastatals, local authorities and state universities only. This is achieved through the exclusion of public service employees, members of the disciplined force of the State (including a foreign State

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724 Cheadle *Labour relations* 18-3. See also Grogan *Labour relations* 475.

725 Mubangizi *The protection of human rights in South Africa* 123. See also Van Niekerk & Smit *Law@work* 39-40; Cooper *Labour relations* 53-11.

726 Section 2 of the Labour Act.

where there is an agreement between Zimbabwe and that foreign State) and any other employees of the State as designated by the President through a statutory instrument.[727] The division of employees into various categories means all workers cannot collectively assert their constitutional rights to organise, bargain collectively and strike. This is despite the fact that the Zimbabwean Constitution itself does not distinguish between different categories or employees except members of the security services who are expressly excluded from enjoying the rights to organise, bargain collectively and strike.[728]

Since the Labour Act excludes an independent contractor from the definition of 'employee' it means they cannot enjoy the constitutional rights to organise, bargain collectively and strike.[729] In other words, there is no employment relationship between an independent contractor and the other contractual partner. A similar approach is followed in South Africa.[730]

A notable feature in the South African Constitution is that it uses the word 'worker' instead of 'employee'.[731] Van Niekerk & Smit posit that the term 'worker' is broader than the term 'employee'.[732] This position is endorsed by Du Toit *et al* who highlight that the use of the word 'worker' as opposed to 'employee' is a clear testimony that the rights in section 23(2) of the South African Constitution should not be restricted to common-law employees.[733] In that manner, the word 'worker' covers broad situations as compared to the word 'employee' that is used in the Zimbabwean Constitution. The *SANDU (1999)* case is considered in the succeeding paragraph in order to illustrate the significance of the term 'worker' in the South African Constitution.

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727 Section 3 of the Labour Act.
728 See section 65 of the Zimbabwean Constitution.
729 See Tsabora & Kasuso 2017 *ILJ* 54.
730 See, for example, the *SANDU (1999)* case where it was held that the rights in section 23 of the South African Constitution (the equivalent of section 65 of the Zimbabwean Constitution) do not apply to people who own or work in their own businesses such as independent contractors.
731 See section 23 of the South African Constitution.
732 Van Niekerk & Smit *Law@work* 40.
733 Du Toit *et al Labour relations* 220. See also *SANDU (1999)* case.

The *SANDU (1999)* case had to determine whether it was constitutional to bar members of the South African armed forces from joining trade unions and participating in public protest. Section 126B of the Defence Act[734] prohibited members of the South African National Defence Force from joining trade unions.[735] The applicant argued that this legal position that prohibited members of the armed forces from becoming trade union members breached section 23(2) of the South African Constitution. It argued that members of the South African armed forces should be recognised as 'workers' and fell within the ambit of section 23(2) of the South African Constitution. It was further argued that section 126B (1) of the Defence Act constituted a limitation of their right to join a trade union. On the other hand, the respondents submitted that members of the Permanent Force were not 'workers' as contemplated by section 23 of the South African Constitution. They further argued that if indeed they were 'workers', the limitation of their right to join trade unions was justified in terms of section 36(1) of the South African Constitution.[736]

The Court considered the jurisprudence that has been developed by the ILO on the definition of 'worker' and made the following useful observations:

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734 No.44 of 1957 (hereinafter referred to as the Defence Act).

735 Section 126B provided as follows: "(1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956): Provided that this provision shall not preclude any member of such force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister. (2) Without derogating from the provisions of section 4 (h) and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2) serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike or to perform such an act or to participate in a strike or such an act. (3) A member of the South African Defence Force who contravenes subsection (1) or (2) shall be guilty of an offence.

736 *SANDU (1999)* case [19].

> Clearly, members of armed forces render service for which they receive a range of benefits. On the other hand, their enrolment in the permanent force, imposes upon them an obligation to comply with the rules of the Military Disciplinary Code. A breach of that obligation of compliance constitutes a criminal offence. In many respects, therefore, the relationship between members of the permanent force and the defence force is akin to an employment relationship. In relation to punishment for misconduct, at least however, it is not…..If the approach of the ILO is adopted, it would seem to follow that when section 23(2) speaks of 'worker', it should be interpreted to include members of the armed forces, even though the relationship they have with the defence force is unusual and not identical to an ordinary employment relationship. The peculiar character of the defence force may well mean that some of the rights conferred upon 'workers' and 'employers' as well as 'trade unions' and 'employers' organisations' by section 23 may be justifiably limited. It is not necessary to consider that question now.[737]

To this extent, the Court held that section 126B (1) of the Defence Act infringed upon members of the armed forces' right to form and join trade unions. The *SANDU (1999)* case raises two issues which are particularly important to Zimbabwe. Firstly, the use of the word 'worker' in section 23 of the South African Constitution makes it easier for courts to extend it to relationships which are akin to employment. This is different from the Zimbabwean Constitution which uses the narrower word 'employee'. Secondly, the South African Constitution gives room for members of the armed forces to form and join trade unions unlike its Zimbabwean counterpart which expressly prohibits them from doing so.[738] In Zimbabwe, members of security services can only form or join a trade union if there is a statute that allows them to do so. However, they do not enjoy a constitutionally protected right to form or join trade unions.[739] Above all, there is a general agreement in both Zimbabwean and South African jurisprudence that members of the armed forces cannot enjoy certain rights such as the right to strike. This is consistent with international law that was discussed in chapter 3 of this research.

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737 *SANDU (1999)* case [24-27].

738 See section 23 of the South African Constitution and section 65 of the Zimbabwean Constitution.

739 See Madhuku *Labour law in Zimbabwe* 283.

4.3.3 The meaning of 'employer'

Section 65 of the Zimbabwean Constitution does not define the term 'employer' just like the absence of the definition of 'employee' from it. For private sector employees in Zimbabwe, one should resort to the definition that is provided by the Labour Act. An understanding of the meaning and scope of the term 'employer' helps to understand the persons against whom employees or trade unions can exercise their right to freedom of association. An employer is defined by section 2 of the Labour Act as:

> any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes- (a) the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed; and
>
> the judicial manager of such person appointed in terms of the Companies Act [Chapter 24:03];
>
> the liquidator or trustee of the insolvent estate of such person, if authorised to carry on the business of such person by-
>
> the creditors; or
>
> in the absence of any instructions given by the creditors, the Master of the High Court;
>
> the executor of deceased estate of such person, if authorised to carry on the business of such person by the Master of the High Court;
>
> the curator of such person who is a patient as defined in the Mental Health Act [Chapter 15:12] (No. 15 of 1996); if authorised to carry on the business of such person in terms of section 88 of that Act.

It is clear from the definition of employer that there are reciprocal obligations between the employer and the employee. The employee works for the employer and the latter should remunerate the former. The term employer under section 65 of the Zimbabwean Constitution includes both natural and juristic persons.[740] Problems have arisen in some situations where it has become difficult to identify the employer. One such example is found in triangular relationships where the

740 This is the South African position which was aptly captured in the case of *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC) (hereinafter the *NEHAWU* case). Since the Labour Act is silent on this point it is submitted that the position of the law is similar with the position in South Africa.

employer's duties are delegated to a third party.[741] Zimbabwe does not have express legislative provisions to deal with triangular relationships. However, in South Africa, the Labour Relations Act, among other statutes, had dealt with the problem of the employer identity in labour broking by providing for "temporary employment services".[742] The only way out for Zimbabwe in such situations would be to resort to the common-law concept of 'piercing the corporate veil'.[743] With this concept, the court can dig down and identify the real employer.

Another important aspect relates to managerial employees. Managers are part of the employer despite the fact that they may have their own employment contracts.[744] Consequently, the Labour Act prohibits managers from joining employees' trade unions.[745] What is clear is that managerial employees can only be part of the employer with a right to join an employers' organisation. In that regard, managerial employees fall under the employer when interpreting and applying the constitutional provisions on the right of employees to freedom of association. In the case of *Katsande & Anor v IDBZ*,[746] the Constitutional Court considered the status of a managerial employee in Zimbabwean law. In that case, the first applicant was employed by the respondent as a Loans Officer from June 2010. In the same month of employment, he was elected Vice President of the second applicant (Zimbabwe Banks and Allied Workers Union). On 27 October 2011, the first applicant was promoted to the position of Senior Loans Officer. In May 2012, he was appointed interim president of the second applicant. The respondent strongly objected to the first applicant's trade union activities on the

741 Benjamin 2010 *ILJ* 845; Theron 2008 *ILJ* 2.

742 See section 198 of the Labour Relations Act.

743 See *Barnsley v Harambe Holdings (Pvt) Ltd & Anor* HH-84-2021 (hereinafter the *Barnsley* case).

744 See section 2 of the Labour Act.

745 Section 45 of the Labour Act provides that: "1) In any determination for registration of a trade union or employer's organisation or of the variation, suspension or rescission thereof, the Registrar shall - a) ….
b) ensure compliance with the following requirements:
i) a trade union shall not represent employers.
ii) an employers' organisation shall not represent employees other than managerial employees.
iii) ……"

746 CCZ-9-17 (hereinafter the *Katsande* case).

basis that he had become a managerial employee and could no longer represent the interests of non-managerial employees by virtue of section 45 of the Labour Act. The second applicant repeatedly wrote to the respondent seeking the release of the first applicant to attend its meetings and functions within and outside Zimbabwe but all these requests were turned down.

The applicant challenged the attitude of the respondent on the basis that it constituted an infringement of the first applicant's right to form and join trade unions as provided for under section 65(2) of the Zimbabwean Constitution. The court observed that the first applicant was a managerial employee who could only join an employer's organisation in terms of section 45 of the Labour Act. Therefore, the applicant could not rely on section 65(2) of the Zimbabwean Constitution without challenging the constitutionality of section 45 of the Labour Act. The effect of this decision is that managerial employees cannot seek constitutional protection of the right to freedom of association as employees. They can only do so as employers.

Despite the provisions of the law on managerial employees, there is recognition by courts that they are still employees but they cannot form or join a trade union with non-managerial employees. In the *Bankers Association of Zimbabwe* case, the court held that the right to form and join trade unions enshrined in section 65(2) of the Zimbabwean Constitution means managerial employees had a right to form a trade union representing the interests of managerial employees only. It is submitted that the approach of the court in the *Bankers Association of Zimbabwe* case does not cause any confusion because managerial employees remain as employers when they deal with non-managerial employees but they are employees when they deal with their employers. It is a difficult situation to maintain a balance but it is possible as long as the exercise of one's right does not compromise the rights of others.

4.4 The application of constitutional provisions on employees' right to freedom of association

The employees' constitutional right to freedom of association and its components are part of the entrenched Declaration of Rights in the Zimbabwean Constitution.[747] Consequently, it is necessary to discuss the scope of its application because the application clause deals with two issues. Firstly, it identifies holders of rights under the Declaration of Rights and, secondly, the bearers of duties under the same.[748] It is at the application stage when a court or tribunal should decide whether a litigant is entitled to claim the right in question and whether the other party is constitutionally bound by the right which has allegedly been violated.[749] The Declaration of Rights answers the twin questions of who holds rights and who bears obligations as follows under the heading "Application of Chapter 4":

> (1) This Chapter binds the State and All executive, legislative and judicial institutions and agencies of government at every level.
>
> (2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
>
> (3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them.[750]

In view of the foregoing, it is apparent that section 45(1) of the Zimbabwean Constitution entrenches the vertical application of the Declaration of Rights since it governs the relationship between state institutions and the individual.[751] In addition, section 44 of the Zimbabwean Constitution provides for the scope of human rights obligations of constitutional duty bearers. It provides that the State has an obligation to ensure that the rights and freedoms that are provided for in

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747 See generally Chapter 4 of the Zimbabwean Constitution.

748 Moyo "Zimbabwe's constitutional values, national objectives and the declaration of rights" 46.

749 Currie & De Waal *The bill of rights handbook* 24-29.

750 Section 45 of the Zimbabwean Constitution.

751 Chitimira 2017 *Stell LR* 359; Tsabora & Kasuso 2017 *ILJ* 45; Moyo "Zimbabwe's constitutional values, national objectives and the declaration of rights" 46.

the Declaration of Rights are fully realised. Such rights and freedoms include the right of employees to freedom of association and its components.[752] The State's constitutional duty to promote and protect human rights has foundation in international and regional human rights instruments.[753] Thus, the Zimbabwean Constitution mirrors the development of the employees' right to freedom of association under international law.

Section 45(2) of the Zimbabwean Constitution marks a glaring departure from the 1980 Constitution as it extended the application of the Declaration of Rights to horizontal relationships. The 1980 Constitution only provided for the vertical application of the Bill of Rights.[754] Thus, sections 58 and 65 of the Zimbabwean Constitution which provide for the right of employees to freedom of association have a direct impact on the exercise of an employer's private power against its employees.[755] However, the obligations which are imposed by section 45(2) only bind natural and juristic persons to the extent that they apply to them after considering the nature of the relevant right or freedom and any duty imposed by it. In contrast, the State has an obligation to respect, protect, promote and fulfil the rights and freedoms set out in the Declaration of Rights.[756] Commenting on the effect of these provisions, Moyo correctly points out that they emphasise the idea that natural and juristic persons are not always bound to the same extent as public authorities.[757] Actually, the idea that the Declaration of Rights also governs horizontal relationships is glaring and even forms part of the provisions governing the supremacy of the Zimbabwean Constitution.[758]

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752 See sections 58 and 65 of the Zimbabwean Constitution.

753 See, for example, Article 45 of the African Charter. For a discussion of the promotion and protection of human rights by States in terms of the African Charter, see Odinkalu 2001 *Human rights quarterly* 352.

754 Gwisai *Labour and employment law in Zimbabwe* 39.

755 Tsabora & Kasuso 2017 *ILJ* 45.

756 Section 44 of the Zimbabwean Constitution.

757 Moyo "Zimbabwe's constitutional values, national objectives and the declaration of rights" 59.

758 Section 2(2) of the Zimbabwean Constitution provides that: "The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level."

The South African Constitution also provides for the vertical and horizontal application of the Bill of Rights.[759] Unlike section 45(1) of the Zimbabwean Constitution, section 8(1) of the South African Constitution provides that the Bill of Rights "applies to all law". The word 'law' means positive law and it includes statutory law, common law and customary law.[760] However, one could argue that the inclusion of the word 'law' under section 8(1) of the South African Constitution is an unnecessary repetition since the provision on the supremacy of the constitution already covers all law.[761] Just like the Zimbabwean Constitution, the South African Constitution imposes on the State the obligations to respect, protect, promote and fulfil the rights in the Bill of Rights.[762] In Heyns & Brand's own words, the obligation to respect imposes on the State a negative duty not to interfere with the existing enjoyment of these rights.[763] They further highlight that the obligation to protect places a positive duty on the State to protect the right holders from unwarranted interference by others including the provision of effective remedies. On the duty to promote, they submit that the State has a positive duty to ensure that people are aware of their rights and, finally, that the obligation to fulfil imposes on the State a positive obligation to ensure that the rights in the Bill of Rights are fully realised. It is clear that the rights contemplated by the application clause in both the Zimbabwean and South African constitutions include the right of employees to freedom of association.

The provision on the horizontal application of the South African Constitution's Bill of Rights is similarly worded as the Zimbabwean Constitution's provision.[764] Therefore, the Bill of Rights in South African Constitution applies to private

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759 Section 8 of the South African Constitution.

760 Robinson 2003 *PELJ* 3.

761 Section 2 of the South African Constitution. See also section 2 of the Zimbabwean Constitution. It explains why the Zimbabwean Constitution does not repeat the word 'law' under section 45(1).

762 See section 44 of the Zimbabwean Constitution and section 7 of the South African Constitution.

763 Heyns & Brand 1998 *Law, democracy and development* 157.

764 See section 8(2) of the South African Constitution and section 45(2) of the Zimbabwean Constitution.

relationships such as the relationship between the employer and the employee.[765] However, in the South African Constitution, there is a further provision on juristic persons that distinguishes them from natural persons.[766] To this extent, the South African constitutional position is that, the nature of the rights and the nature of the juristic person, must be considered in order to determine if it is entitled to the rights in the Bill of Rights. It means different principles can be taken into account when dealing with different types of juristic persons such as clubs, religious organisations, political organisations or educational organisations to mention a few.[767] Hence, the consideration of the 'nature' of the juristic person allows South African courts to develop different principles which are applicable to various juristic persons when applying the employees constitutional right to freedom of association.

4.4.1 The direct and indirect application of the declaration of rights

It is necessary to discuss the circumstances in which one can rely on the constitutional provisions on the right of employees to freedom of association. It helps to understand when and how can one seek constitutional protection against the violation of one's rights. To begin with, the Declaration of Rights applies directly or indirectly. When it applies indirectly, the purpose is to establish whether the ordinary rules of law or customary law (which include legislation, the common law or customary law) are consistent with it.[768] With direct application, the Declaration of Rights generates its own set of special remedies such as declaratory orders, interdicts, damages and meaningful engagement.[769]

Closely related to the indirect application of the Declaration of Rights is the principle of subsidiarity which provides that litigants who aver that a constitutionally protected right has been violated must rely on legislation enacted to protect that

765 Malherbe 2000 *Netherlands quarterly of human rights* 52; Van Niekerk & Smit *Law@work* 38.
766 Section 8(4) of the South African Constitution.
767 https://www.ajol.info (Date of use: 27 August 2021).
768 Chitimira 2017 *Stell LR* 359; Moyo "Zimbabwe's constitutional values, national objectives and declaration of rights" 47.
769 De Vos *et al South African constitutional law: in context* 323.

right and may not directly rely on the underlying constitutional provision when bringing an action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation itself.[770] In the case of *Maguruse & 63 Others v Cargo Carriers International Hauliers (Pvt) Ltd (SABOT)*[771], the applicants were cross border truck drivers. They accused the respondent of unfair labour practices by forcing them to drive for long hours a day from 4 am to 9 pm. They were not allowed to leave vehicles unattended or complain about the tracking system as they drove the vehicles. They also complained that they worked overtime without pay. They further alleged that those who tried to protest were subjected to disciplinary action and most of them were found guilty of inciting unlawful collective job action. Those found guilty were dismissed from employment. Some of the applicants had pending disciplinary cases on a similar charge. The applicants accepted that the legality of the conduct of the respondent could be determined in terms of a collective bargaining agreement published under Statutory Instrument No. 67 of 2012.They approached the court alleging that the respondent had infringed section 65(1) of the Zimbabwean Constitution. However, they did not challenge the constitutionality of the provisions of the collective bargaining agreement or the Labour Act which gave rise to the respondent's actions. The Court held that the applicants were bound by the principle of subsidiarity and could not rely on section 65(1) of the Zimbabwe Constitution without challenging the relevant provisions of the collective bargaining agreement or the Labour Act.

Zimbabwe has followed South Africa on the application of the doctrine of subsidiarity. A good example from South Africa is the case of *NUPSAW v National*

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770 *Majome v ZBC & Others* CCZ-14-16 (hereinafter the *Majome* case); the *Katsande & Anor* case; *Moyo v Sgt Chacha & Others* CCZ-19-17 (hereinafter the *Moyo* case); *Chani v Mwayera J & Others* CCZ-02-20 (hereinafter the *Chani* case); *Makanda v Magistrate Sande NO & 3 Others* CCZ-15-20 (hereinafter the *Makanda* case). On the South African position regarding the principle of subsidiarity, see *MEC for Education, KwaZulu-Natal* v *Pillay* 2008 (1) SA 474 (CC) (hereinafter the *MEC for Education; KwaZulu-Natal* case); *SANDU v Minister of Defence & Others/Minister of Defence & Others v SANDU* (2007) 28 ILJ 1909 (CC) (hereinafter the *SANDU (2007)* case); *SAMWU v Kopanong Local Municipality* (2014) 35 ILJ 1378 (LC) (hereinafter the *SAMWU (2014)* case); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) (hereinafter the *Minister of Health* case).

771 CCZ-15-16 (hereinafter the *Maguruse* case).

Lotteries Board[772] where the employer who was the respondent dismissed employees on the ground that their demand and threat constituted insubordination. The employees had demanded the dismissal of their CEO with a threat to stop work if the demand was not met. The applicants further associated themselves with a letter about the poor performance of their CEO which had been leaked by their trade union to the press during a conciliation process in terms of the Labour Act.[773] The letter which was written by the trade union listed a number of complaints against the CEO. The employees wrote their own letter (petition) to the employer demanding the dismissal of the CEO and stating that if it was not done by a certain date they would refuse to work under the same roof with him. Separately, the trade union did not succeed in conciliation proceedings where it sought to challenge the employer's refusal to disclose the CEO's conditions of service.[774]

The applicants argued that the dismissals were unfair in terms of sections 187 and 188 of the Labour Relations Act as the employees' conduct amounted to participation in the lawful activities of the trade union.[775] The court noted that although the Labour Relations Act did not directly provide for the rights of petition and free expression, its prohibition against unfair dismissal included unjustified dismissals which were caused by the employees' as they exercised the constitutional right of petition.[776] Thus, the applicants could not seek the dismissal of the CEO outside the parameters of the Labour Relations Act which regulated the dispute resolution mechanisms. The court observed that it was not lawful under the Labour Relations Act to demand the dismissal of fellow employee without a hearing.[777]

The *NUPSAW* case clearly supports the view that where legislation has been enacted to give effect to constitutional provisions, one should not rely directly on

772 2014 (6) BCCR 663 (CC) (hereinafter the *NUPSAW* case).
773 The *NUPSAW* case [1-2].
774 The *NUPSAW* case [4].
775 The *NUPSAW* case [3].
776 The *NUPSAW* case [35].
777 The *NUPSAW* case [86].

the constitution either to bypass its application or undermine its effectiveness. In the Zimbabwean context, it means one cannot bypass the provisions of the Labour Act or any other law, practice or conduct on the right of employees to freedom of association and rely on the constitutional provisions without challenging the validity of the Labour Act or such other law, practice or conduct.

4.5 The interpretation of constitutional provisions on employees' right to freedom of association.

The interpretation of the constitutional provisions on the employees' right to freedom of association is important as it enhances the degree of protection bestowed by the right. The enjoyment of the right to freedom of association can either be fully enjoyed or restricted by the approach of courts or relevant tribunals in interpreting it. Thus, it is justified to have a discussion of the constitutional interpretative guide for courts and other tribunals when they interpret the Declaration of Rights which includes the employees' right to freedom of association.[778] The South African Constitution also provides for a similar provision.[779] It is instructive to discuss each of these interpretative guides while drawing important lessons from South Africa which has dealt with similar provisions for a long time.

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778 Under the heading "Interpretation of Chapter 4", section 46 of the Zimbabwean Constitution provides as follows:
"(1) When interpreting this Chapter, a court, tribunal, forum or body -
a) must give full effect to the rights and freedoms enshrined in this Chapter;
b) must promote the values and principles that underlie a democratic society based on openness, justice , human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
e) may consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.
(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter."

779 See 39 of the South African Constitution.

4.5.1 Giving full effect to the rights and freedoms enshrined in the Declaration of Rights

Section 46(1) (a) requires a court, tribunal, forum or body to give full effect to the rights and freedoms enshrined in the Declaration of Rights in their interpretative role. These rights and freedoms include the employees' right to freedom of association and its components. Borrowing from the constitutional jurisprudence that has been developed under the 1980 Constitution, courts in Zimbabwe have always adopted a purposive, teleological approach in interpreting constitutional rights.[780] Thus, courts have a constitutional duty to prefer a wider interpretation so as to give full effect to the employees' right to freedom of association as opposed to a narrower interpretation.[781] In the *Rattigan* case, the court made the following observations:

> The court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interests of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom from, as far as the language permits, should be narrowly or strictly construed.[782]

To that end, the court or tribunal should seek to promote the rights enshrined in the Zimbabwean Constitution when interpreting it. Such an approach ensures that the employees in the private sector in Zimbabwe fully enjoy their right to freedom of association. The South African constitutional jurisprudence has also been developed around the purposive interpretation of the rights and freedoms in the constitution.[783] One clear example of that approach is the broad interpretation that was given to the word 'worker' under section 23 of the South African Constitution

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780 Tsabora & Kasuso 2017 *ILJ* 47. See also the *Hewlett* case; The *Capital Radio (Pvt) Ltd* case; The *In re Munhumeso* case; The *Rattigan* case.

781 Mavedzenge & Coltart *A constitutional law guide* 20.

782 The *Rattigan* case [57 F-H]. See also *Madzimbamuto v Registrar General & Others* CCZ - 5-14 (hereinafter the *Madzimbamuto* case).

783 Du Plessis & Corder *Understanding South Africa's transitional bill of rights* 60; Malherbe 2000 *Netherlands quarterly of human rights* 15.

to include members of the military.[784] In *Makate v Vodacom (Pty) Ltd*[785], the Constitutional Court of South Africa made the following useful observations:

> The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If a provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the later meaning.[786]

Thus, South African courts have followed a purposive interpretation of the Bill of Rights just like the Zimbabwean courts. That approach is consistent with upholding the fundamental rights in the constitution which includes the right of employees to freedom of association.

4.5.2 Promotion of values and principles that underlie a democratic society

When interpreting the Declaration of Rights, a court, tribunal, forum or body must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3 of the Zimbabwean Constitution.[787] Because of the similarity between the Zimbabwean and South African constitutional provisions, the interpretative approach by South African courts and tribunals is useful in the development of Zimbabwe's constitutional jurisprudence. The constitutional values and principles include the respect for supremacy of the constitution, respect for the rule of law, respect for fundamental rights and freedoms and equitable sharing of national resources among others.[788] The respect of these different sets of values have a positive impact on the promotion of the right of employees to freedom of association. Thus, courts and other tribunals

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784 See the *SANDU (1999)* case.

785 2016 (4) SA 121 (CC) (hereinafter the *Makate* case). See also *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others* 2019 *(*1) SA 73 (CC) (hereinafter the *POPCRU* case); The *Bader Bop* case.

786 The *Makate* case [89].

787 Section 46(1) (b) of the Zimbabwean Constitution. This is similar to section 39 (1) (a) of the South African Constitution.

788 Section 3 of the Zimbabwean Constitution.

have a constitutional obligation, in their adjudicative function, to promote the values underpinning the society.[789]

Founding values are normative ideals upon which the nation is found while constitutional principles expand on and give flesh to constitutional values.[790] Thus, Zimbabwe is found on the respect for fundamental rights and freedoms of association. The High Court of Zimbabwe had an opportunity to consider the status of constitutional values in the case of *Zibani v JSC & Others*[791] wherein it made the following observations:

> Our constitution has values. These values are not laid out or promulgated in procedural laws or practice manuals of government and its agencies. They however find expression in the will of the people through the tenets expressed in the words used in the preamble to the constitution, as well as the specific ideals set out in the founding values and principles. Where a State actor, such as the first respondent, fails to adhere to the same [i.e founding values] no act of wrongdoing can ever be ascribed to such failure because such failure is not visited by the sanction of law. The constitution instils these values and ideals in which egalitarian equality is enjoyed by all. Viewed this way, it will be clear that the values and principles provide a moral exhortation to higher ideals for which this nation yearns for the enjoyment and realisation of our developmental endeavour.[792]

Thus, the *Zibani* case is authority for the proposition that values and principles are not legally binding but they are only morally persuasive. It can be argued that such an approach is doubtful given that courts are compelled to take them into account by section 46(1) (b) of the Zimbabwean Constitution when interpreting the Declaration of Rights. The South African case of *Sidumo v Rusternburg Platinum Mines Ltd*[793] is in sharp contrast with the decision in the *Zibani* case and the South African Constitutional Court held as follows:

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789 Moyo "Socio-economic rights under the 2013 Zimbabwean constitution" 167.

790 Moyo "Zimbabwe's constitutional values, national objectives and the declaration of rights" 33.

791 HH-797-16 (hereinafter the *Zibani* case).

792 The *Zibani* case at 11.

793 2008 (2) SA 24 (CC) (hereinafter the *Sidumo* case).

> The values of the constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and spirit of the constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this and that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the constitution.[794]

It is submitted that Zimbabwean courts should follow the reasoning in the *Sidumo* case to the effect that the rights in the Declaration of Rights should be read together with the constitutional values and principles. The status of values and principles should not be limited to the interpretation of the constitution but it should be observed whenever the protection of fundamental rights and freedoms including the right of employees to freedom of association is at stake. Values which are relevant for purposes of this discussion in the South African Constitution include the adoption of the constitution as a supreme law in order to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[795] Such fundamental rights include the employees' right to freedom of association which was denied to most Africans before the advent of majority rule in South Africa. The same values are part of the Zimbabwean constitution and the development of the employee's right to freedom of association in Zimbabwe should be understood within their context.

4.5.3 Consideration of international law, treaties and conventions to which Zimbabwe is a party

It is peremptory for a court, tribunal, forum or body to take into account international law, treaties and conventions to which Zimbabwe is a party when interpreting the Declaration of Rights.[796] Zimbabwe is a party to important international and regional human rights and labour law treaties and conventions on

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794 The *Sidumo* case [149].

795 See the preamble to the South African Constitution. See also Robinson 2003 *PELJ* 1; Du Plessis & Corder *Understanding South African's transitional bill of rights* 60.

796 Section 46(1) (c) of the Zimbabwean Constitution.

the right of employees to freedom of association.[797] The recognition of international law in the interpretation of the Declaration of Rights puts it at the pinnacle of the present and future development of the constitutional jurisprudence on the employees' right to freedom of association. In addition, every court and tribunal must adopt any reasonable interpretation that is consistent with customary international law that applies to Zimbabwe ahead of an alternative interpretation that is inconsistent with that law when interpreting legislation.[798] This provision is significant in interpreting some provisions of international law which have the status of customary international law such as the UDHR.[799]

Furthermore, every court and tribunal must, when interpreting legislation, adopt any reasonable interpretation that is in line with any international convention, treaty or agreement which binds Zimbabwe ahead of an alternative interpretation that is inconsistent with that convention, treaty or agreement.[800] Thus, it is clear that when interpreting the legislative provisions on the employees' right to freedom of association, courts and tribunals should be guided by international human rights and labour standards.

The South African Constitution only requires a court, tribunal or forum to consider international law when interpreting the provisions of the Bill of Rights.[801] It is a marked departure from the Zimbabwean Constitution that requires the consideration of only international law, treaties and conventions to which Zimbabwe is a party.[802] The net effect of the South African constitutional position is that courts and tribunals have a greater latitude to even consider sources of international law to which South Africa is not a party unlike in Zimbabwe.[803] Hence, South African courts have a broader scope to develop their constitutional

797 See generally Chapter 3 of this research.
798 Section 326 (2) of the Zimbabwean Constitution.
799 See Baets 2009 *History and theory* 20; Hinds 1985 *Crime & social justice* 6.
800 Section 327(6) of the Zimbabwean Constitution. See also *Makoni v Prisons Commissioner & Anor* CCZ-8-16 (hereinafter the *Makoni* case).
801 Section 39(1) (b) of the South African Constitution.
802 See again section 46(1) (c) of the Zimbabwean Constitution.
803 See Cockrell 1997 *Modern law review* 531; Barrie *International human rights conventions* [1B39]; Viljoen *The law of criminal procedure and the bill of rights* [5B3].

jurisprudence on the right of employees to freedom of association based on international law. Moreover, when interpreting any legislation, every South African court must adopt any reasonable interpretation that is consistent with international law.[804] Unlike in Zimbabwe where preference should only be on treaties and conventions which are binding on it when adopting any reasonable interpretation, in South African courts may rely on any source of international law including those not binding on the country.

A good example in South Africa, where international law played an important role in the interpretation of section 23(5) of the South African Constitution, is the case of *SANDU & Others v Minister of Defence & Others*.[805] In that case, the question was whether section 23 (5) of the South African Constitution which gave every trade union, employers' organisation and employer the right to engage in collective bargaining also imposes a duty on the employer to engage in collective bargaining. The court noted that the 'the right to engage in collective bargaining' in section 23(5) of the South African Constitution can be subjected to many interpretations. It may mean that legislation should provide for an employer or a union called upon to bargain to comply with a demand to bargain. On the other hand, it may mean that legislation should only provide the framework for collective bargaining or it may only mean that no law or government policy can prohibit collective bargaining.[806]

The Supreme Court relied on section 39(1) (b) and section 233 of the South African Constitution which required it to consider international law. It then relied on Conventions 87 and 98.[807] The court concluded that there was distinct preference to voluntarism which emerged from Conventions 87 and 98.[808] It observed that:

804 Section 233 of the South African Constitution.
805 [2006] SCA 90 (RSA) (hereinafter the *SANDU (2006)* case).
806 *SANDU (2006)* case [6].
807 *SANDU (2006)* case [7-10].
808 *SANDU (2006)* case [11].

> On this part of the case, my conclusion is that the Constitution, while recognising and protecting the central role of collective bargaining in our labour dispensation, does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that where the right to strike is removed or restricted, but is replaced by another adequate mechanism, a duty to bargain arises. [809]

Thus, international law was used to interpret the meaning, scope and effect of the constitutional right of employees to collective bargaining. Although there is no similar decision on Zimbabwe on whether the constitutional right of employees to bargain imposes a duty on the employer to bargain, it is likely that courts will hold that section 65 of the Zimbabwean Constitution does not impose an obligation on either party to bargain. This view is fortified by the fact that Zimbabwe is also a signatory to Conventions 87 and 98 which promote voluntarism in collective bargaining.[810]

4.5.4 Consideration of the provisions of the whole constitution

Courts and other adjudicative bodies are also required to pay due regard to all the provisions of the Zimbabwean Constitution including the principles and objectives set out in its Chapter 2 in interpreting the Declaration of Rights.[811] Regarding the nexus between the provisions of a constitution, courts have pronounced that they are interconnected. In the recent case of *Kika v Minister of Justice & Others, YLAZ v JSC & Others,*[812] the court pointed out that it is an established principle that sections of the constitution must not be read in isolation but must be read together and in the context of the whole text in order to give effect to the purpose and objectives of the constitution.[813]

Therefore, the right of employees to freedom of association in the Zimbabwean Constitution should be understood by reference to the whole constitution starting from the preamble. This includes the connection between the letter and spirit of the

809 *SANDU (2006)* case [25].
810 See [3.4.2 - 3.4.3] under Chapter 3 of the research.
811 Section 46(1) (d) of the Zimbabwean Constitution.
812 HH-264-21 (hereinafter the *Kika* case).
813 The *Kika* case at 21. See also *Tsvangirai v Mugabe & Others* 2017 (2) ZLR 1 (CC) (hereinafter the *Tsvangirai* case) and *Shumba & Others v Minister of Justice & Others* CC-4-18 (hereinafter the *Shumba* case).

constitution. One such example would be the preamble to the Zimbabwean Constitution which talks of the Zimbabwean people's "common desire for freedom, justice and equality" and the "heroic resistance to colonialism, racism and all forms of domination and oppression" which unites them. Hence, the right of employees to freedom of association should be understood within the spirit of the Zimbabwean Constitution as it seeks to address the inequalities of the past which led to armed resistance followed by independence in 1980.[814]

Moreover, Chapter 2 of the Zimbabwean Constitution sets out its objectives. There are many objectives which either directly or indirectly affect the employees' right to freedom of association. These objectives guide the State and all institutions and agencies of government at every level in formulating and implementing law and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy their lives.[815] They include good governance; national unity, peace and stability; fostering of fundamental rights and freedoms; foreign policy; national development; empowerment and employment creation; food security; culture and gender balance among others.[816] A glaring objective that has a direct bearing on the employees' right to freedom of association deals with 'work and labour relations'.[817]

Most importantly, the State should ensure that it adopts policies and measures that improve the standard of living of employees. It is submitted that such policies and

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814 See generally Chapter 2 of the research on the oppression of African employees by the colonialists including the denial of the right to freedom of association through the enactment of oppressive laws and practices.

815 Section 8 of the Zimbabwean Constitution.

816 The national objectives were taken from the abortive Kariba Draft Constitution.

817 Section 24 of the Zimbabwean Constitution. It provides that: "(1) The State and all institutions and agencies of government at every level must adopt reasonable policies and measures, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families. (2) The State and all institutions and agencies of government at every level must endeavour to secure-
(a) full employment;
(b) the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities; …"
(c)

measures include those which promote the employees' right to freedom of association. South African interpretative guidelines have a similar effect as courts and other adjudicative organs are required to promote the spirit, purport and objects of the Bill of Rights including the values that underlie a democratic society based on human dignity, equality and freedom.[818] It is submitted that such requirements can only be achieved if all the provisions of the South African Constitution are read together with those that confer on employees the right to freedom of association.

4.5.5 Consideration of foreign law

In terms of section 46(1) (e) of the Zimbabwean Constitution, courts and other adjudicative organs have a discretion to consider relevant foreign law when interpreting the provisions of the Declaration of Rights.[819] The provision is significant because it allows courts to refer to relevant constitutional developments on the employees' right to freedom of association in other jurisdictions. It is even more important to this research as it heavily relies on the South African law. As a matter of fact, Zimbabwean courts have relied on South African and other foreign constitutional principles in making important decisions. One such example is the case of *Zesa Technical Employees Association v Zesa Holdings (Pvt) Ltd*[820] where the court was faced with the question of the legal status of a deregistered trade union. The court relied on the South African case of *National Entitled Workers Union (NEWU) v CCMA & Others.*[821]

The *NEWU (2010)* case laid down the principle that a de-registered union loses the right to represent its members in all statutory dispute resolution bodies. However, the court further held that such de-registration did not dissolve that trade union as a voluntary association and it could continue to exist in its exercise of its

818 Section 39 of the South African Constitution.
819 This section is similar to section 39 (1) (c) of the South African Constitution.
820 SC-51-16 (hereinafter the *Zesa Technical Employees Ass.* case).
821 [2010] ZALC 155 (hereinafter the *NEWU (2010)* case).

right to freedom of association.[822] The Zimbabwean Supreme Court in the *Zesa Technical Employees Ass.* case followed a similar reasoning in the *NEWU (2010)* case and held that a de-registered trade union only lost the rights which a registered trade union enjoyed. These decisions are important in understanding the effect of de-registration of a trade union on the enjoyment of the right of employees to freedom of association in terms of the Zimbabwean Constitution. Thus, employees can continue to enjoy that right although the de-registered trade union will not effectively defend their interests because of legal handicaps.

Another advantage that is derived from considering foreign law lies in the fact that the Zimbabwean Constitution's provisions on the right to freedom of association are just like identical twins with the South African provisions. The South African courts have been interpreting and applying the same provisions since 1996 and Zimbabwe has a lot to learn from South African decisions.[823] Hence, section 46 (1) (e) is very important on the development of constitutional jurisprudence on the right of employees to freedom of association in Zimbabwe.

4.6 Limitations on constitutional provisions on the employees' right to freedom of association.

The constitutional right of employees to freedom of association is not absolute and it is subject to limitations. Individual rights may be limited by the rights of others and other compelling societal interests.[824] In situations where there are compelling and justifiable reasons for permitting infringements of human rights, these infringements may still pass the constitutional muster.[825] Section 65 of the Zimbabwean Constitution provides that a law may restrict the right to strike in

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822 The *NEWU (2010)* case [11].

823 See, for example, the *Greatermans Stores (1979) (Pvt) Ltd* case where the court adopted a restrictive interpretation of the word 'every person' under section 65 (1) of the Zimbabwean Constitution to mean persons who are in an employment relationship. Such a reasoning is consistent with the South African constitutional jurisprudence that has been developed around the word 'everyone' under section 23 of the South African Constitution. See Cheadle *Labour relations* 18-3 and Grogan *Labour relations* 475.

824 Moyo "Zimbabwe's constitutional values, national objectives and the declaration of rights" 49.

825 Meyerson *Rights limited* 36-43.

order to maintain essential services. To this end, the Minister of Labour is empowered to declare any service or occupation to be an essential service.[826] An essential service is defined as any service "the interruption of which endangers immediately the life, personal safety or health of the whole or any part of the public" and is declared as such in the government gazette by the Minister after appropriate consultations.[827] The definition of essential service in the Labour Act is consistent with that of CFA.[828] Thus, international labour law allows for the restriction or prohibition of strikes in essential services.[829]

Some of the essential services in Zimbabwe include services relating to fire brigade, distribution of water, veterinary services, revenue specialists involved in the performance of security and health checks at airports, certain areas in health and electricity services and a broadcaster during a declared state of disaster.[830] The antithesis of Labour (Declaration of Essential Services) Notice is that it allows for the declaration of a non-essential service as an essential service by the Minister if a strike in a sector, service or industry persists to the point that lives, personal safety or health of the whole or part of the population is endangered.[831] It is only the Minister who makes the decision to declare a non-essential service as essential. This has the potential to take away the right of many employees to strike in the private sector.

Apart from the specific limitation provisions under section 65 of the Zimbabwean Constitution which also excludes members of the security services from enjoying the right to freedom of association, its section 86 provides as follows under the heading 'limitations of rights and freedoms':

826 Section 102 of the Labour Act.
827 Section 102 of the Labour Act.
828 https://www.ilo.org>publication (Date of use: 02 September 2021).
829 See again https://www.ilo.org>publication (Date of use: 02 September 2021).
830 Section 2 of the Labour (Declaration of Essential Services) Notice SI 137 of 2003 (hereinafter referred to as Labour (Declaration of Essential Services) Notice.
831 Section 3 of the Labour (Declaration of Essential Services) Notice.

> (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including-
> a) the nature of the right and freedom concerned;
> b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> c) the nature and extent of the limitation;
> d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
> e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
> f) whether there are any less restrictive means of achieving the purpose of the limitation ….

Therefore, the employees' right to freedom of association may be limited provided that the criteria under section 86 of the Zimbabwean Constitution is met. Consequently, the exercise of the employees' right to freedom of association should be balanced with other interests. There is a similar provision in the South African Constitution which provides a fertile ground for comparative analysis.[832] However, the Zimbabwean Constitution provides for rights which have a direct impact on the right of employees to freedom of association and such rights cannot be limited. These rights include the right to human dignity and the right to a fair trial.[833] Thus, no law can limit the right of employees to be subjected to a fair trial when they allege violation of their right to freedom of association.

Another general limitation relates to situations of public emergency. A written law may limit the fundamental rights and freedoms to provide for measures to deal with situations arising during a period of public emergency.[834] However, there are safeguards surrounding the enactment of that written law which include its publication in the government gazette, the limitation must not be greater than what

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832 Section 36 of the South African Constitution.

833 Section 86 (3) of the Zimbabwean Constitution. See also section 37 of the South African Constitution which provides a list of non-derogable rights with a direct impact on the employees' right to freedom of association such as the right to equality and human dignity.

834 Section 87 of the Zimbabwean Constitution.

is strictly required by the emergency, the envisaged law cannot indemnify anyone for unlawful conduct and that it cannot limit non-derogable rights.[835] Unlike the Zimbabwean Constitution, the South African Constitution defines the circumstances which constitute a state of emergency to include where the life of a nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and such a declaration should be necessary to restore peace and order.[836] The constitutional limitations of situations where a state of emergency can be declared in South Africa is significant as it ensures that the provision is not abused to take away fundamental rights and freedoms including the employees' right to freedom of association.

There are similar safeguards on the declaration of public emergencies in both Zimbabwe and South Africa. These include the maximum periods for such declarations, parliamentary approvals and the involvement of courts to determine any contested issue around the declaration.[837] Thus, there are adequate checks and balances to ensure that State organs responsible for making the declaration of the state of emergency do not abuse that limitation of fundamental rights and freedoms.

4.6.1 Limitation in terms of a law of general application

It has been indicated that section 86(2) provides that only a law of general application can limit fundamental rights and freedoms.[838] In the *Majome* case, the Zimbabwean Constitutional court held that "to say that only 'law of general application' may justify the impairment of a fundamental right means that conduct - public or private that limits a fundamental right but which is not sourced in a law of general application cannot be justified."[839] Thus, the requirement of 'law of general

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835 Section 87(2)-(4) of the Zimbabwean Constitution.

836 Section 37(1) (a)-(b) of the South African Constitution.

837 Section 113 of the Zimbabwean Constitution and section 37 of the South African Constitution.

838 See also section 39(1) of the South African Constitution.

839 The *Majome* case at 7. On the South African position, see *August v Electoral Commission & Others* 1999 (3) SA 1 (CC) (hereinafter the *August* case); *Minister of Safety and Security & Anor v Xaba* 2003 (2) SA 103 (D) (hereinafter the *Xaba* case).

application' is the manifestation of rule of law which is a liberal political philosophy and constitutional law principle.[840]

The 'law' requirement refers to all forms of legislation, common law and customary law but excludes a mere policy or practice by government or its organs.[841] On the requirement of 'general application', it means that, in its form, the law must be sufficiently clear, accessible and precise to the extent that those who are affected by it can fully understand their rights and obligations.[842] In substance, the law must not be arbitrary in its application but it must provide parity of treatment in the sense that like cases must be treated alike.[843] In the context of the right to freedom of association, the law of general application in Zimbabwe and South Africa is mainly found in the Labour Act and the Labour Relations Act respectively. Therefore, it means such laws must not be arbitrary in their application but must ensure that the right of employees to freedom of association is preserved. In addition, any conduct by the State or employers which has the effect of limiting the employees' right to freedom of association should have legal foundation.

Another effect of the principle of a law of general application is that even a contract of employment or collective agreement cannot alter its effect except to the extent that the relevant agreement is in accordance with that law of general application.[844] Thus, the court remarked, in the case of *SA Post office Ltd v Mampeule*[845] as follows:

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840 *Sogolani v The Minister of Primary and Secondary Education and 3 Others* CCZ-20-20 (hereinafter the *Sogolani* case). See also *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC) (hereinafter the *Affordable Medicines Trust* case); *Chimanikire & Others v The Attorney General of Zimbabwe* 2013 (2) ZLR 466 (S).

841 Mavedzenge & Coltart *A constitutional law guide* 20.

842 Mavedzenge & Coltart *A constitutional law guide* 20; Van Nierkerk & Smit *Law@work* 50.

843 Mavedzenge & Coltart *A constitutional law guide* 20; Van Niekerk & Smit *Law@work* 50; The *Makwanyane* case; *President of the Republic of South Africa v Hugo* 1997 (4) SA I CC (hereinafter the *President of South Africa* case).

844 Van Niekerk & Smit *Law@work* 84.

845 [2010] 10 BLLR 1052 LAC (hereinafter the *Mampeule* case).

> Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, they are incapable of consensual validation between parties to a contract by way of waiver of the rights conferred.

Therefore, the effect of a law of general application cannot be further eroded. This position is in line with need to preserve fundamental rights and freedoms in the Constitution which include the right of employees to freedom of association. The requirement of law of general application is consistent with international standards on the right to freedom of association.[846]

4.6.2 The limitation must be fair, reasonable, necessary and justifiable in a democratic society

One of the fundamental requirements for a permissible limitation is that it must be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom taking into account all the relevant factors.[847] Section 86(2) of the Zimbabwean Constitution elaborates on factors which can be taken into account in determining whether a limitation is fair, reasonable, necessary and justifiable in a democratic society.[848]

Therefore, the Zimbabwean Constitutional Court correctly observed in the *Sogolani* case that an examination of the requirements of acceptable limitations of a derogable fundamental right or freedom shows that the object of section 86(2) of the Zimbabwean Constitution is to ensure the essence of the fundamental right or freedom is preserved. The court further observed that the primary duty of the State was to protect and promote fundamental rights and freedoms in the Declaration of Rights and that the limitations were an exception to this fundamental duty. Consequently, limitations must be construed strictly and narrowly.[849] In the *Makwanyane* case, the South African Constitutional Court held that section 36 was

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846 See, for example, Article 4 of the ICESCR.

847 Section 86(2) of the Zimbabwean Constitution. See also section 36 for the South African Constitution.

848 See again section 36 of the South African Constitution which provides for similar requirements.

849 The *Sogolani* case at 46.

based on the proportionality test. A similar reasoning has been followed in Zimbabwe.[850] However, the Supreme Court of Zimbabwe warned in the *In re Munhumeso* case that what is reasonably justifiable in a democratic society is an elusive concept and it cannot be precisely defined by the courts. It further observed that there is no legal measure except to say the standard of reasonableness of the impugned provision is to be decided according to whether it arbitrarily or excessively invades into the enjoyment of a constitutionally guaranteed right.[851]

It is apparent that the question of proportionality involves a value judgment by the court taking into account all the relevant considerations. It is submitted that courts should be proactive to ensure that the right of employees to freedom of association is not arbitrarily taken away. Rautenbach points out that it is not only a matter of weighing and balancing competing interests but such weighing and balancing must produce a specific substantive result that can be justified in an open and democratic society based on human dignity, equality and freedom.[852]

4.7 Alternative enforcement mechanisms for the constitutional right to freedom of association

It has been highlighted that human rights under the Declaration of Rights are justiciable. One can approach courts citing an infringement of a fundamental right including the right of employees to freedom of association. Apart from courts, the Zimbabwean Constitution establishes other independent commissions and the focus of the research is on the Zimbabwe Human Rights Commission (ZHRC). The reason is that the ZHRC has a specific mandate to ensure the observance of human rights. The functions of the ZHRC have a direct bearing on the enjoyment of the employee's right to freedom of association.[853] It is established under Chapter 12 of the Zimbabwean Constitution titled, "Independent Commissions

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850 *Madanhire & Anor v AG* CCZ-2-14 (hereinafter the *Madanhire* case); The *Nyambirai* case.

851 The *In re Munhumeso* case at 64B-C.

852 Rautenbach 2014 *PELJ* 2250. See also Mavedzenge & Coltart *A constitutional law guide* at 20 regarding a detailed analysis of each limitation requirement.

853 Section 242 of the Zimbabwean Constitution.

Supporting Democracy." Similarly, there is a Human Rights Commission (SAHRC) in South Africa which was established as an independent institution to support its constitutional democracy.[854] Generally, the objectives of independent commissions including the ZHRC include supporting and entrenching human rights and democracy, to promote constitutionalism, to secure the observance of democratic values and principles by the State and all institutions and agencies of government and government controlled entities and to ensure that injustices are remedied.[855] Hence, the ZHRC's mandate should be understood within the objectives of supporting the observance of human rights including the employees' right to freedom of association.

In order for the ZHRC to be effective, it must be independent. There are constitutional safeguards to ensure its independence. Firstly, the Zimbabwean Constitution requires that all independent commissions including the ZHRC must be independent and should not be subject to the direction or control of anyone.[856] Secondly, they must act in accordance with the Constitution and they must exercise their functions without fear, favour or prejudice subject to accountability to parliament.[857] In addition, the State and all its organs has an obligation to take appropriate legislative and other measures to assist and protect the independence, impartiality, integrity and effectiveness of independent commissions including the ZHRC.[858] The Zimbabwean provisions on the independence of the ZHRC replicate similar provisions in the South African Constitution.[859] Thus, the ZHRC must be independent from the control of the State or employers when it deals with the promotion and protection of the employees' right to freedom of association.

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854 See Chapter 9 of the South African Constitution.
855 Section 233 of the Zimbabwean Constitution.
856 Section 235 (1) (a) of the Zimbabwean Constitution.
857 Section 235 (1) (b) - (c) of the Zimbabwean Constitution.
858 Section 235 (2) of the Zimbabwean Constitution.
859 Section 181 of the South African Constitution.

4.7.1 The constitutional functions of the Zimbabwe Human Rights Commission

The Zimbabwe Human Rights Commission enjoys a broad range of functions in terms of the Zimbabwean Constitution. The functions include the promotion of awareness of and respect for human rights and freedoms at all levels, the protection, development and attainment of human rights and freedoms, monitoring, assessing and ensuring the observance of human rights and freedoms, receiving and considering complaints from the public and to take appropriate action, investigating cases of human rights abuses and to secure appropriate remedies, directing the Commissioner-General of police to investigate cases of suspected criminal violations of human rights and to report to it, recommending to parliament effective measures to promote human rights and freedoms, to conduct research on human rights and to visit places of interest such as prisons and detention camps.[860] The SAHRC has similar powers in terms of the South African Constitution.[861]

Therefore, at least at the theoretical level, there is sufficient scope for the protection and promotion of the right of employees to freedom of association by the ZHRC under the Zimbabwean Constitution. However, a lot of challenges have hampered the work of the ZHRC since its formation. Firstly, it does not have sufficient resources to carry out its mandate effectively. This state of affairs contradicts the Zimbabwean Constitution which stipulates that parliament should ensure that independent commissions, including the ZHRC are adequately funded.[862] In addition, the Zimbabwe Human Rights Commission Act[863] provides that the ZHRC should get funding through the State budget, donations, grants or any other moneys that may accrue to it.[864] The provision of funds by the State means that the ZHRC does not have financial independence. Its effectiveness depends on the commitment of the State to provide adequate resources to it.

860 Section 243 of the Zimbabwean Constitution.
861 Section 81 of the South African Constitution.
862 Section 322 of the Zimbabwean Constitution.
863 [Chapter 10:30] (hereinafter referred to as the Zimbabwe Human Rights Commission Act).
864 Section 17 of the Zimbabwe Human Rights Commission Act.

The economic challenges that have faced Zimbabwe since the formation of the ZHRC has not spared it in terms of availability of resources. This fact was noted by the former Chairperson of the ZHRC, Professor Reginald Austin who resigned from the commission citing lack of financial support, operational challenges absence of adequate office space and lack of political support.[865] The ZHRC also echoed similar sentiments in 2014.[866] It only managed to secure offices in Harare through the benevolence of donors.[867] However, the acquisition of such donor funds requires the approval of the Minister.[868] Thus, the ZHRC is not adequately funded which makes it a toothless bulldog in the protection and promotion of the constitutional right of employees to freedom of association.

Secondly, the ZHRC is not an independent institution because of the involvement of the executive arm of the state in the appointment of commissioners.[869] Thus, the involvement of politicians in the appointment of commissioners ensures that only those who are loyal to the government have a greater chance of appointment. Resultantly, commissioners are likely to be subjected to the wishes of politicians. Thirdly, the ZHRC should rely on other state organs in order to carry out its functions. One such example is the involvement of the Commissioner-General of police in cases of suspected criminal violations of human rights and freedoms.[870] The police may not fully investigate such complaints or they may be reluctant altogether. This makes the work of the ZHRC difficult.

Despite the challenges the ZHRC has faced in the discharge of its mandate, it has managed to fulfil some of its duties. In 2020, for example, it managed to conduct public outreaches throughout Zimbabwe and accepted complaints from the public for investigation through its website, hotline, social media platforms and mobile legal clinics.[871] Despite the fact that it has offices in Harare and Bulawayo only, it

865 http://m.news24.com/news24/Africa/Zimbabwe (Date of use: 23 September 2021).
866 http:// www.the independent.co.zw/2014/12/24 (Date of use: 23 September 2021).
867 http:// www.zw.undp.org/content/Zimbabwe (Date of use: 23 September 2021).
868 Section 17 of the Zimbabwe Human Rights Commission Act.
869 Section 237 of the Zimbabwean Constitution.
870 Section 243 of the Zimbabwean Constitution.
871 https://zw.usembassy.gov>News & Events (Date of use: 23 September 2021).

has managed to reach out to a wider audience through the internet.[872] Thus, more and more Zimbabweans have become aware of the presence of the ZHRC since 2016.[873] However, the Parliamentary Thematic Committee on Human Rights noted that there was lack of public awareness programmes.[874] It is submitted that the ZHRC should continue to reach out to a wider audience so that more people become aware of their fundamental rights and freedoms which include the employees' right to freedom of association.

The issue of funding is not peculiar to Zimbabwe alone. The SAHRC has faced similar challenges in discharging its human rights obligations in South Africa. One glaring example is found in the SAHRC 2018/2019 Annual Performance Plan where issues of underfunding of its operations were raised.[875] In addition, it has also faced the problem of lack of political will to push the human rights agenda. At one point, the SAHRC expressed dismay at the failure of parliament to timeously debate its reports.[876] Just like in Zimbabwe, commissioners who serve in the SAHRC are also presidential appointees.[877] Although a commissioner is required to act independently and in an impartial manner without favour, bias or prejudice, his or her appointment by the executive may compromise such independence.[878] One of the SAHRC's success stories is that it managed to have offices in all South African provinces.[879] Hence, it is more accessible to ordinary citizens who include employees in the South African private sector.

Just like its Zimbabwean counterpart, the SAHRC has carried out its constitutional mandate of protecting and promoting fundamental human rights and freedoms which include the employees' right to freedom of association. The work of the ZHRC and SAHRC require the full support of its citizens and the State because

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872 https://www.researchgate.net>publication (Date of use: 23 September 2021).
873 https://www.researchgate.net>publication (Date of use: 23 September 2021).
874 http://www.veritaszim.net>sites>veritas (Date of use: 23 September 2021).
875 https://www.sahrc.org.za>files (Date of use: 23 September 2021).
876 https://www.hrw.org>africa>southafrica (Date of use: 23 September 2021).
877 See section 3 of the Human Rights Commission Act 54 of 1994 (hereinafter referred to as the Human Rights Act).
878 Section 4 of the Human Rights Act.
879 https://ohchr.org>issues (Date of use: 23 September 2021).

the nature of their constitutional mandate mainly require the cooperation of all the relevant actors. As an example, parliament should be prepared to act on recommendations that are made to it by the commission.

4.8 Conclusion

In this chapter, the impact of constitutionalising the employees' right to freedom of association in Zimbabwe was discussed. It was highlighted that the right to freedom of association and its components were entrenched in the Zimbabwean Constitution's Declaration of Rights. The 1980 Constitution had provided for the general right to freedom of association in its Declaration of Rights without incorporating the other components of the right which include the rights to organise, bargain collectively and strike.[880] It was also noted that the Zimbabwean constitutional provisions on the employees' right to freedom of association closely resemble those in the South African Constitution which provided a fertile ground for comparative analysis.[881] It was further highlighted that there was a strong basis for taking such a comparative analysis since South Africa has developed its constitutional jurisprudence on the employees' right to freedom of association since 1996.

The chapter began by giving a brief background which led to the enactment of the Zimbabwean Constitution in 2013.[882] It was highlighted that it was one of the objectives of forming the GNU in 2009. It was noted that there were several attempts to come up with a new constitution since the 1980 Constitution was viewed as a transitional document. There was a need to come up with a home grown constitution. These attempts began with the 1999 Constitutional Commission Draft Constitution and culminated in the Zimbabwean Constitution.[883] It became clear from these draft constitutions that the idea of a constitutionally protected right to freedom of association and its components was mooted and

880 See [4.1] hereof above.
881 See [4.1] hereof above.
882 See [4.2] hereof above.
883 See [4.2] hereof above.

embraced. It was further highlighted that the writing of the Zimbabwean Constitution was driven by political parties, a phenomena which was similar to the South African constitution-making process.[884] However, the South African constitution-making process was more consultative and its compliance with principles that were set out in the Interim Constitution of South Africa was certified by the South African Constitutional Court.

The chapter proceeded to discuss the right of employees to freedom of association under the Zimbabwean Constitution.[885] The focus was on sections 58 and 65 of the Zimbabwean Constitution which provide for the right of employees to freedom of association and its components. Just like in the South African Constitution, these rights are bestowed on different groups such as employees, employers, trade unions and employers' organisations. Some of the rights are bestowed on 'every person'. Thus, the meaning, application and scope of 'every person' under section 65 of the Zimbabwean Constitution was discussed.[886] It was submitted that Zimbabwe should follow the South African jurisprudence that has been developed around the word 'everyone' to mean a party to an employment relationship. In addition, the meaning of 'employee' and 'employer' under section 65 of the Zimbabwean Constitution were also discussed in order to demarcate the holders of different rights and obligations bestowed by it.[887]

Furthermore, the application of constitutional provisions on the employees' right to freedom of association was considered.[888] To that end, section 45 of the Zimbabwean Constitution provides for a vertical and horizontal application of the Declaration of Rights which include the right of employees to freedom of association. The State, employers and employers' organisations are bound to uphold, respect and promote the rights of private sector employees to freedom of association. It was also noted that there are similar provisions in the South African

884 See [4.2.1] hereof above.
885 See [4.3] hereof above.
886 See [4.3.1] hereof above.
887 See [4.3.2] - [4.3.3] hereof above.
888 See [4.4.] hereof above.

Constitution. It was further highlighted that the Declaration of Rights can either apply directly or indirectly. Thus, the aggrieved party should not by-pass legislation or any law giving effect to a constitutional right and rely directly on the constitutional provisions unless the constitutionality of that law is impugned.[889]

The interpretation of the constitutional provisions on the employee's right to freedom of association was also dealt with in this Chapter.[890] There was an extensive discussion of section 46 of the Zimbabwean Constitution which provides an interpretative guide on the Declaration of Rights which includes the right to freedom of association. It was observed that, just like in South Africa, courts adopt a purposive interpretation to the Declaration of Rights.[891] This is done in order to give full effect to the rights and freedoms that are enshrined in the Declaration of Rights including the right of employees to freedom of association. Thus, the interpretative guidelines are designed to achieve that end. The Declaration of Rights is so wide that it captures the letter and spirit of the constitution itself and other external aids such as international instruments to which Zimbabwe is a party and relevant foreign law.

The chapter further discussed the limitations on constitutional provisions on the right of employees to freedom of association.[892] It was highlighted that the limitations are designed in such a way as to protect the fundamental right to freedom of association rather than to arbitrarily take it away. This is significant as it ensures that the enjoyment of the right to freedom of association by employees in the private sector is guaranteed. It can only be limited in exceptional circumstances which were discussed in this chapter.

Finally, the chapter discussed alternative enforcement mechanisms for the constitutional right to freedom of association.[893] It focused on the work of the ZHRC which has a specific constitutional mandate to deal with human rights

889 See [4.4.1] hereof above.
890 See [4.5] hereof above.
891 See [4.5.1] hereof above.
892 See [4.5] hereof above.
893 See [4.7] hereof above.

issues which include the employees' right to freedom of association. South Africa has the SAHRC with a similar mandate. It was noted that the ZHRC has a plethora of structural and financial challenges which militate against its success. The same applies to the SAHRC. However, these commissions continue to play an important role in the promotion and protection of fundamental human rights and freedoms which include the employees' right to freedom of association.

All in all, the chapter has demonstrated the positive impact on private sector employees that was brought by the Zimbabwean Constitution as far as their right to freedom of association and its components is concerned. In different parts of the chapter areas of concerns were discussed. In addition, useful jurisprudence and interpretative guides from South African law were explored.

CHAPTER FIVE

FREEDOM OF ASSOCIATION FOR PRIVATE SECTOR EMPLOYEES IN TERMS OF THE LABOUR ACT

5.1 Introduction

In this chapter, the right of private sector employees to freedom of association is discussed. It was indicated in chapter 4 that sections 58 and 65 of the Zimbabwean Constitution provide for the right of employees to freedom of association and its components. A study of the provisions of the Labour Act is justified because they are the ones which give effect to the constitutional right to freedom of association and its components as far as the right of private sector employees to freedom of association in Zimbabwe is concerned. In addition, the constitutional right of employees to freedom of association may be limited only in terms of a law of general application.[894] The Labour Act is the law of general application that provides for substantive and procedural rules that govern the right of employees to freedom of association. In South Africa, the Labour Relations Act has detailed provisions on how the right of employees to freedom of association is exercised. This provides a rich ground for comparative analysis.

Thus, the chapter begins by discussing the scope and import of the employees' right to organise under the Labour Act. It then proceeds to deal with the right of employees to collective bargaining and to strike. The relevant provisions are analysed in order to test whether they are consistent with the constitutional provisions and international best practices.

5.2 The employees' right to organise in terms of the Labour Act

Pivotal to their survival is the protection of the right of employees to form and join trade unions.[895] Within the Zimbabwean context, the Labour Act recognises the

894 Section 86 (2) of the Zimbabwean Constitution.
895 Grogan *Collective labour law* 69.

right of employees to form and join a trade union.[896] The rights under section 4 of the Labour Act apply whether the trade union is registered or not. In fact, it is possible to join a trade union that belongs to a different industry from where one is employed. In the case of *Water Authority Workers' Union of Zimbabwe v City of Harare*[897], the applicant was a workers' union representing Zimbabwe National Water Authority (ZINWA) employees. Some of the ZINWA employees were transferred to local authorities including the respondent. Disputes arose between the applicant and the respondent over the submission of union fees by the respondent to the applicant on the basis that the applicant belonged to a different industry. The respondent threatened to discontinue the deductions and the applicant successfully applied for an interdict against the respondent's threats.[898]

Another salient feature that relates to the employees right to form and join a trade union is that an employee has a right to be a member of an existing trade union as long as he/she meets the conditions of membership.[899] Thus, the Labour Act provides an easy avenue for employees to become trade union members. Madhuku argues that section 4(2) of the Labour Act takes away the discretion of trade unions to decide on their membership but it passes the constitutionality test on the basis of reasonableness, fairness and justifiability in a democratic society.[900]

It is submitted that the provision of an easy avenue for employees to become members of existing trade unions by the Labour Act is consistent with the constitutional right of employees to form and join trade unions.[901] In South Africa,

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896 Section 4 of the Labour Act.

897 HH-123-11 (hereinafter the *Water Authority Workers' Union* case).

898 See also *POSB v Chimanikire & Others* 2005 (1) ZLR 285 (H) (hereinafter the *POSB* case); *Zimbabwe Banking & Allied Workers Union & Anor v Beverley Building Society & Others* 2010 (1) ZLR 292 (S) (hereinafter the *Beverley Building Society* case).

899 Section 4(2) of the Labour Act.

900 Madhuku *Labour law in Zimbabwe* 286.

901 See section 65 of the Zimbabwean Constitution.

the Labour Relations Act also provides for the right of every employee to form and join a trade union of his or her choice and to participate in its lawful activities.[902]

5.2.1 The organising role of trade unions under the Labour Act

Trade unions play a pivotal role in organising employees at the workplace. This is because statutory organisational rights are enjoyed by trade unions as opposed to individual employees.[903] The act of forming a trade union is different from the act of registering it.[904] Hence, employees have a right to form and join a registered or an unregistered trade union. However, registered trade unions enjoy certain advantages in terms of the Labour Act whilst unregistered trade unions suffer from many legal handicaps.[905] The trade union organisational rights are discussed below.

5.2.1.1 Access to the employer's premises

Firstly, only registered trade unions have the right of access to employees at the workplace.[906] If a trade union does not have access rights, it means it cannot recruit members more effectively or establish communication with existing members.[907] On the other hand, unregistered trade unions do not enjoy the right of access to employees at the workplace.[908] It is submitted that the registration requirement is designed to ensure that the activities of trade unions are regulated. It is only the form of regulation or interference that may be intrusive to the employees' right to freedom of association.

The right of access to employees at the workplace is granted to all registered trade unions regardless of its size.[909] This is a significant development as it allows minority trade unions to recruit more members and grow. Consequently, the right

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902 Section 4 of the Labour Relations Act.
903 Esitang The impact of threshold agreements on organizational rights of minority trade unions 136.
904 Madhuku *Labour law in Zimbabwe* 288.
905 See, for example, sections 29 and 30 of the Labour Act.
906 Section 7(2) as read with section 29(2) (b) of the Labour Act.
907 Grogan *Collective labour law* 71.
908 Section 30 of the Labour Act.
909 Section 29 (4) of the Labour Act.

of minority trade unions to freedom of association is enhanced as long as they are registered.

Similarly, the Labour Relations Act grants access rights to registered trade unions only.[910] However, there is a further limitation in the Labour Relations Act. Only a sufficiently representative trade union or two or more trade unions acting jointly that are sufficiently representative of the respective employees at the workplace enjoy the right of access.[911] The thresholds of representativity are not set out in the Labour Relations Act. However, disputes relating to whether trade unions are sufficiently representative of the employees concerned are referred to the CCMA.[912] The commissioners will take into account various factors laid down in section 21(8) of the Labour Relations Act.[913] It is therefore, apparent that not all registered trade unions are entitled to the right of access to the workplace in South Africa. It can be argued that this places an unnecessary limitation on minority trade unions to grow in South Africa. Unlike the position in South Africa, Zimbabwean law recognises the right of access to the workplace by all registered trade unions.

The position of minority unions in South Africa is worsened by the fact that employers and majority trade unions can enter into collective agreements which set thresholds for representativity in order to enjoy access rights.[914] Kruger & Tshoose correctly note that, while the Labour Relations Act seems to promote a pluralistic approach to organisational rights, it is clearly biased towards majoritarianism.[915] The majority unions and employers can set thresholds that are too high for minority unions. The CFA has clearly stated that, while it benefits

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910 Sections 11 and 12 of the Labour Relations Act.

911 See the definition of a "representative trade union" under section 11 of the Labour Relations Act.

912 See section 21 of the Labour Relations Act.

913 The commissioner must seek to minimise the proliferation of trade union representation in a single workplace and encourage a system of a representative trade union and to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union. Thus, the commissioner must consider the nature of the sector in which the workplace is situated, the nature of the workplace, the nature of the organisational right to be exercised and the organisational history of the workplace.

914 Section 18 of the Labour Relations Act.

915 Kruger & Tshoose 2013 *PELJ* 287.

employers to avoid a multiplicity of trade unions, the unification through state intervention, whether direct or indirect result of legislation is contrary to Articles 2 and 11 of Convention 87.[916] Minority trade unions can get access rights in terms of section 21(8) of the Labour Relations Act or through strikes if they are not sufficiently representative.[917] It is submitted that, despite the limited avenues that are granted to trade unions which are not sufficiently representative to gain access rights in South Africa, they are more disadvantaged as compared to their Zimbabwean counterparts.

5.2.1.2 Collection and payment of union fees

Union fees (referred to as 'union dues' in the Labour Act) are the lifeblood of trade unions as they enable them to finance their operational needs.[918] The Labour Act recognises the right of registered trade unions to levy, collect and sue for union fees.[919] The only problem with the Labour Act is that it gives the Minister sweeping powers to regulate every aspect of the payment of union fees.[920] For instance, the Minister has the power to prohibit or modify any arrangements made by the employer and the employees regarding the payment of union fees.[921] In addition, he/she can also make regulations for the collection and use of union fees.[922] It is submitted that the powers of the Minister represent a glaring intrusion into the right of employees to freedom of association. The Minister can punish a trade union even on political grounds through the reduction of union fees.

Trade union fees are paid by means of a check off scheme or in any other way agreed by employees and trade unions on one hand and the employer or an

916 Kruger & Tshoose 2013 *PELJ* 301.
917 See *NUMSA v Bader Bop (Pty) Ltd & Anor* 2003 (3) SA CC (hereinafter the *Bader Bop* case); *Group 4 Falck (Pty) Ltd v DUSWO* [2003] 4 BALR 422 (CCMA) (hereinafter the *DUSWO* case).
918 Grogan *Collective labour law* 72.
919 Section 29 (4) (h) of the Labour Act. See also sections 52 and 53 of the Labour Act.
920 See Gwisai *Labour and employment law in Zimbabwe* at 336 on the disadvantages of registering a trade union in Zimbabwe.
921 Section 54 of the Labour Act.
922 Section 55 of the Labour Act.

employers' organisation on the other hand.[923] It is only when an agreement fails that authorisation in writing of an individual employee who is a member of a trade union concerned is required.[924] It can be argued that the deduction of trade union fees should always require the written authorisation of the relevant employee. This is in line with the individual employee's freedom to associate with the trade union that requires clear consent on matters that are crucial to the employee.

Requiring written authorisation of the employee is the legal requirement in South African law.[925] Section 13 of the Labour Relations Act only requires the written authorisation of the employee. The Minister does not have a role to play in that agreement between the trade union and the employee in South Africa. This is in sync with the employees' right to freedom of association which requires trade unions to regulate their internal affairs without external interference. The only problem with the Labour Relations Act is that lawful authorisation can only be given by an employee who is a member of a sufficiently representative trade union or joint trade unions with sufficient representation at any given workplace.[926] It means that trade unions which are regarded as not being sufficiently representative are unable to collect fees unless they acquire the right through a strike or through arbitration. This is inconsistent with the right to freedom of association under the South African Constitution which does not discriminate between unions based on their size. A poorly funded trade union will not grow or recruit more members.

5.2.1.3 Trade union leave

Trade union representatives can only represent their members effectively if they get sufficient time to do trade union business. This is an important organisational right as it enables employees to fully enjoy their right to freedom of association through effective representation. Zimbabwe recognises two forms of trade union

923 Section 54 (1) (a) of the Labour Act.
924 Section 54 (1) (b) of the Labour Act.
925 See section 13 of the Labour Relations Act.
926 Section 11 as read with section 13 of the Labour Relations Act.

leave. The first one is a special leave that is granted on full pay not exceeding twelve days in a calendar year to an employee who is required to attend any meeting as a delegate or office-bearer of a registered trade union in the industry or undertaking in which the employee is employed.[927] It is submitted that the twelve-day period per year is not enough as it covers many other things and it is not restricted to trade union leave only.

The second form of trade union leave is granted to an official or office-bearer of a registered trade union. Those persons are entitled to take reasonable paid or unpaid leave during working hours to enable the officials to perform the functions of their office.[928] It is submitted that section 29 (4a) of the Labour Act is wider in scope as it allows for the conclusion of collective agreements which can provide for all the relevant factors that ensure the maximum recognition and protection of the right to trade union leave. There are similar provisions in the Labour Relations Act on trade union leave in South Africa.[929] The only problem in South Africa is that such leave can only be enjoyed by office-bearers of sufficiently representative trade unions. It is up to the responsible authorities to ensure that the set thresholds do not unnecessarily impede the right of minority unions from enjoying trade union leave.

5.2.1.4 Right to information

Trade unions need sufficient information not only for the purposes of collective bargaining but also to effectively represent their members.[930] It can be argued that the duty of disclosure of information by the employer under the Labour Act is limited. It is only provided in certain limited circumstances. Examples include disclosure of names of employees and particulars of their wages,[931] disclosure for

927 Section 14B of the Labour Act. The 12-days per year period is not meant for trade union business only but also for other reasons that require special leave like absence from duty on the instructions of a medical practitioner, court attendance, detention by the police, death of a close family member or any other justifiable ground.
928 Section 29(4a) of the Labour Act.
929 Section 15 of the Labour Relations Act.
930 Grogan *Collective labour law* 78.
931 Section 29 of the Labour Act.

the purpose of collective bargaining,[932] and disclosure of the financial position of the employer when it alleges financial incapacity in collective bargaining.[933] To this end, the scope of disclosure should be wide enough in order to allow trade unions to make decisions from an informed position unless the requested information cannot be lawfully disclosed. Adequate disclosure of information allows employees to fully enjoy their right to freedom of association.

In South Africa, the duty to disclose information is wide enough as it covers all relevant information that should be disclosed to a trade union representative in order to allow him/her to assist and represent the employee in grievance and disciplinary proceedings, to report any violations of the law to relevant authorities, to monitor compliance with the law, to engage effectively in consultation and collective bargaining.[934] Although the duty of disclosure is subject to limitations on the grounds of relevance, majority unions and privilege, the range of potentially relevant information remains wide.[935] Thus, Zimbabwe should follow the South African example on the duty of disclosure. It is the Labour Relations Act's approach that puts emphasis on majoritarianism that only appears to be problematic. The right to information should be enjoyed by all genuine trade unions.

5.3 Employees' organisational rights at shop floor level in terms of the Labour Act

The Labour Act recognises the right of employees to organise at shop floor level. Thus, employees can enjoy the right to freedom of association at that level. However, it is sensitive to the need to create harmony between shop floor institutions and trade unions. The first important institution that can be formed by employees at the workplace level is the workers' committee.[936] The reference under section 23 of the Labour Act to any "employees employed by any one

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932 Section 75 of the Labour Act.
933 Section 76 of the Labour Act.
934 Section 16 as read with section 14 (4) of the Labour Relations Act.
935 See section 16 of the Labour Relations Act on these limitations and Grogan *Collective labour law* 78.
936 Section 23 of the Labour Act.

employer" means a workers' committee is not a plant level institution and several plants under one employer can have a single workers' committee.[937] The Labour Act provides for two sets of workers' committees, that is managerial workers' committees and ordinary employees workers' committees. The workers' committee is different from a trade union in that it should represent the interests of all employees regardless of whether or not they are members of the trade union.[938] All members of the workers' committee qualify for election into that workers' committee.[939]

The creation of the workers' committee at the shop floor level ensures that all employees are represented. The antithesis of the provisions on the workers' committee is their preference on majoritarianism. They provide that all members of the workers committee must belong to a trade union that represents at least fifty percent of employees at the workplace.[940] This provision is clearly inimical to the employees' right to freedom of association in terms of the Zimbabwean Constitution and international best practices. Employees are forced to belong to the majority trade union.

A workers' committee has a general mandate to represent the employees on any matters affecting their rights.[941] Closely related to the workers' committee is the works council that is formed at shop floor level in terms of the Labour Act.[942] The works council has equal number of representation between members who represent the employer and the employee.[943] The works council performs various

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937 Madhuku *Labour law in Zimbabwe* 307.

938 Mucheche *A guide to collective bargaining and wage negotiations in Zimbabwe* 18.

939 Mucheche *A guide to collective bargaining and wage negotiations in Zimbabwe* 18.

940 Section 23(1b) of the Labour Act.

941 Section 24 of the Labour Act. These matters include negotiating collecting bargaining agreements, recommend collective job action and electing members to represent employees on the works council.

942 Section 25A of the Labour Act.

943 Section 25A (2) of the Labour Act.

functions in ensuring that relations between the employer and employees are improved at the workplace.[944]

A striking role of the works council is that, subject to the collective agreement in place, it should be consulted by the employer on proposals relating to restructuring as a result of new work methods or technology, job grading, training, education and product development plans, implementation of employment codes, plant closures, payment of discretionary bonuses and the criteria for merit increases, retrenchment of employees.[945] The employer should afford the employees an opportunity to make representations and to give alternative proposals. Parties should strive to reach an agreement. If the employer does not agree with the proposal by the works council, it should give reasons for the disagreement.[946]

The participation of the employees at shop floor level in matters that directly affect them in Zimbabwe is consistent with the objectives of the employees' right to freedom of association.

5.3.1 Workplace forums in South Africa

Just like the workers' committees in Zimbabwe, the Labour Relations Act establishes workplace forums in South Africa for any workplace in which the employer employs one hundred or more employees. The Labour Relations Act clearly distinguishes senior managerial employees who are not eligible to become members of the workplace forum for ordinary employees.[947] As alluded to under the Zimbabwean workers' committees, the idea that ordinary workers cannot be in the same workers representation forum with senior managers is similar to the position in South African law.

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944 See section 25A (4) on the functions of a works council which include ensuring that there is efficient use of resources, promotion of good relations between the employer and employees, promotion of the general welfare of employees and the promotion of effective participation of employees within the establishment in the spirit of industrial harmony.

945 Section 25A (5) of the Labour Act.

946 Section 25A (6) of the Labour Act.

947 See section 78 of the Labour Relations Act on the definition of the 'employee' for purpose of establishing a workplace forum.

The Labour Relations Act follows the majoritarian approach to the establishment of the workplace forum. Only a registered trade union or two or more registered trade unions with majority of employees at any given workplace can apply for the establishment of a workplace forum.[948] This means minority unions which are sufficiently representative cannot form workplace forums. It is submitted that it is contrary to the employees' right to freedom of association. Minority unions are subjected to the control of majority trade unions. This undesirable approach has been highlighted above where members of a workers committee are forced to belong to a majority trade union in Zimbabwe.[949]

A majority trade union can also apply for the establishment of a workplace forum if it enters into a recognition agreement with the employer for the purpose of collective bargaining.[950] Such a workplace forum can only be led by the trade union's elected representatives.[951] There is a clearly marked preference towards majoritarianism.

The purpose of introducing workplace forums in South Africa was explained by the Ministerial Task Team as follows:

> Workplace forums are designed to facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects. In creating a structure for on-going dialogue between management and workers, statutory recognition is given to the realisation that unless workers and managers work together more effectively, they will fail adequately to improve productivity and living standards. Workplace forums are designed to perform functions that collective bargaining cannot easily achieve: joint solution of problems and the resolution of conflicts over production. Their purpose is not to undermine collective bargaining but to supplement it …[952]

The joint solution to the problems is achieved through the general functions which are assigned to the workplace forum.[953] Thus, a workplace forum has a right to be

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948 Section 78 as read with section 80 of the Labour Relations Act.

949 See again section 23 (1b) of the Labour Act.

950 Section 81 of the Labour Relations Act.

951 Section 81(2) of the Labour Relations Act.

952 Quoted in Quansah 1997 *Journal of Africa law* 137.

953 See section 79 of the Labour Relations Act on the general functions of a workplace forum. They include the promotion of interests of all employees at the workplace even if they are not trade union members, enhancing efficiency at the workplace, the right to be consulted

consulted on a wide range of matters.[954] In addition to matters which are listed in the Labour Relations Act, a bargaining council, a majority trade union or any other law may confer additional matters which entitle the workplace forum the right to be consulted.[955] It is instructive to note that the scope of the workplace forums' right to be consulted in South Africa is similar to the works councils' right to be consulted in Zimbabwe. Thus, employees are in a position to improve their conditions of service through their exercise of the right to freedom of association. The only challenge is that the law in Zimbabwe and South Africa favours majority trade unions at the expense of minority trade unions. To that end, the right to freedom of association of employees who belong to minority trade unions is severely compromised.

The South African workplace forum should not only be consulted on certain subjects but is also entitled to participate in joint decision making with an employer and reach consensus on various subjects unless they are regulated by a collective agreement.[956] A majority trade union or any other law can provide for additional subjects on which the workplace forum should enjoy the right to participate in joint decision-making.[957] A striking feature in the joint-decision making process is that the employer cannot proceed to implement a proposal if there is a disagreement, but it should refer the dispute to arbitration or the CCMA[958] The Labour Act is silent on the right of the works council to participate in joint decision making with

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by the employer on certain matters and to participate in joint decision making on certain matters.

954 Section 84 of the Labour Relations Act. It should be consulted by the employer on proposals relating to restructuring at the workplace as a result of new work methods or new technology, plant closures, mergers and transfers which affect employees, changes in the organisation of work, retrenchments, job grading, education and training, export promotion, production development plans and criteria for merit increases and payment of discretionary bonuses.

955 Section 84 (3) - (5) of the Labour Relations Act.

956 Section 86 of the Labour Relations Act. These matters include: Rules on proper regulation of the workplace which do not relate to the work performance of employees, disciplinary codes and procedures, changes to rules regulating social benefits schemes by the employer or its representatives on trusts or boards of schemes controlled by the employer and affirmative action measures targeting those persons disadvantaged by unfair discrimination.

957 Section 84 (2)-(3) of the Labour Relations Act.

958 Section 84 (4) of the Labour Relations Act.

the employer. It is submitted that such a right is necessary at the shop floor level in Zimbabwe if employees are to fully enjoy their constitutional right to freedom of association.

It is worth noting that the workplace forum is an important shop floor institution in South Africa. Trade unions have a role to play in their establishment and operation which minimizes conflicts between the two institutions. Van Niekerk & Smit make the following important observations about workplace forums:

> Despite the wide powers and broad functions that the Labour Relations Act confers on a workplace forum, a negligible number of statutory forums have been established. It is fair to say that this is a function of mutual hostility shown to the concept by both employers and trade unions. Employers no doubt regard workplace forums as an unwarranted intrusion into managerial prerogative, and unions are no doubt concerned that forums will undermine collective bargaining structures.[959]

Kruger & Tshoose also share similar sentiments by noting that the idea of workplace forums has failed dismally in South Africa as very few of them have been established in real practice. They rightly point out that one of the major reasons for their failure is their dependence on majority trade unions to the exclusion of minority trade unions in key decisions regarding their formation.[960] The net effect of this development is that the majority of South African employees do not enjoy this right to freedom of association at shop floor level in real practice. Nevertheless, there are important lessons for Zimbabwe to emulate.

5.3.2 Shop floor trade union representatives in South Africa

Unlike the Labour Act, the Labour Relations Act provides for workplace trade union representatives who are commonly referred to as shop stewards.[961] There is a prescribed number of shop stewards for any given workplace.[962] Grogan describes

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959 Van Niekerk & Smit *Law@work* 407.

960 Kruger & Tshoose 2013 *PELJ* 313.

961 Section 14 of the Labour Relations Act.

962 Section 14(2) of the Labour Relations Act. For instance, one shop steward is required for 10 members of the trade union who are employed at the workplace. If more than 10 members, two shop stewards are needed. If there are more than 50 members of the trade union at the workplace, two shop stewards should be appointed for the first 50 employees and a further shop steward for every 50 members up to a maximum of seven shop

shop stewards as the infantry of a trade union as they perform the day-to-day functions of looking after the interests of their members at the workplace.[963]

Workplace forums (the equivalence of workers' committees in Zimbabwe) are designed to represent all employees at the workplace. On the other hand, shop stewards only look after members of their trade unions to ensure that they are adequately represented in line with the objectives of particular trade unions.[964] The antithesis of the provisions on shop stewards is that the right is only enjoyed by a majority trade union acting individually or collectively.[965] This glaring preference towards majoritarianism means minority trade unions are excluded from enjoying this fundamental aspect of the right to organise.

It is clear from the above analysis that shop stewards have obvious advantages to employees. They can ensure that there is adequate representation in large corporates with many plants. It becomes justified to argue that Zimbabwe should also follow the system of shop stewards at shop floor level in order to augment the work of workers' committees.

5.4 Employees' right to collective bargaining in terms of the Labour Act

The Labour Act does not define the term 'collective bargaining' but it defines a collective bargaining agreement as an agreement "negotiated" in terms of it which regulates the "terms and conditions of employment of employees."[966] Thus, the Labour Act contemplates collective bargaining as a negotiation process.[967] In the South African case of *Metal & Allied Workers' Union v Hart Ltd*[968] the South African Industrial Court (now the Labour Court) held that bargaining was different

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stewards. The number of shop stewards increases as the number of members of the trade union employed at the workplace continue to increase.

963 Grogan *Collective labour law* 73. The functions of shop stewards are spelt out under section 14 (4) of the Labour Relations Act.

964 See Madhuku *Labour law in Zimbabwe* at 313 on the differences between a workers' committee and a shop steward.

965 Section 14 (1) of the Labour Relations Act.

966 Section 2 of the Labour Act.

967 Madhuku *Labour law in Zimbabwe* 319.

968 (1985) 6 ILJ 478 (IC) (hereinafter the *Hart Ltd* case).

from mere consultations. It held that consultation involves mere seeking of information or advice without leading to any agreement whereas to bargain means to give or take in order to arrive at some sort of agreement. It further held that the term to 'negotiate' was akin to bargaining.

The Supreme Court of Zimbabwe reiterated the South African Industrial Court's position on the meaning of the term 'negotiation' in the case of *TM Supermarket v TM National Workers' Committee*.[969] It held that negotiation means a discussion between the parties leading towards a conclusion on a certain issue. However, the court noted that it is possible that parties may disagree after negotiations but it does not mean that negotiations did not take place.

Gwisai posits that the theoretical foundations of collective bargaining emanates from pluralism which have the following assumptions: the voluntary and autonomous character of collective bargaining where the role of the State is limited to protecting the bargaining process, recognition of divergent interests of employers and employees as a source of conflict, the need for relative equilibrium of power through the use of strikes or lock outs in order to make collective bargaining effective and the recognition by parties that they still need to complement each other.[970] To this end, this part discusses the key provisions of the Labour Act on collective bargaining with a view to understanding the extent to which they uphold the right of employees to freedom of association.

5.4.1. Levels of collective bargaining

Two levels of collective bargaining are implied from the Labour Act, that is, workplace level collective bargaining and the industry level collective bargaining.[971] Workplace level collective bargaining takes place between an employer and the workers' committee at the workplace.[972] Collective bargaining at

969 SC-19-04 (hereinafter the *TM Supermarket* case).

970 Gwisai *Labour and employment law in Zimbabwe* 312. See also Mucheche *A guide to collective bargaining law and wage negotiations in Zimbabwe* 9.

971 Madhuku *Labour law in Zimbabwe* 327.

972 See section 24 of the Labour Act.

the workplace level only arises in three situations. Firstly, if there is no appropriate trade union for the employees concerned, the workers' committee becomes the only lawful representative of those employees at the workplace.[973] Secondly, where there is an appropriate trade union for the employees but it does not have a collective bargaining agreement with the concerned employer, workplace collective bargaining requires the authorisation in writing of the relevant trade union.[974] Thirdly, where there is a collective bargaining agreement for that particular industry, collective bargaining at the workplace only takes place to the extent permitted by that industry-wide collective bargaining agreement.[975]

What is apparent from the situations in which collective bargaining arises at workplace level is that trade unions are given a bigger role to play in workplace collective bargaining. In addition, workplace collective bargaining is subordinate to industry-wide collective bargaining.[976] This position is further buttressed by the provision that any conflict between a workplace collective bargaining agreement and an industry-wide collective bargaining agreement is solved in favour of an industry-wide collective agreement unless the workplace collective bargaining agreement provides for better conditions than the industry-wide collective bargaining agreement.[977] It is submitted that the provisions make perfect sense as they ensure that there are necessary checks and balances at the workplace. Trade unions are much stronger than workers' committees and they should be involved either directly or indirectly in negotiations between the employer and the employees at the workplace level for collective bargaining to become more effective. In that way, the right of employees to freedom of association is secured.

For a workplace collective bargaining agreement to become binding, it requires the approval of the relevant trade union and more than fifty percent of employees at

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973 Section 24 (2) of the Labour Act.
974 Section 24 (3) (a) of the Labour Act.
975 Section 24 (3) (c) of the Labour Act.
976 Gwisai *Labour and employment law in Zimbabwe* 315.
977 Section 25 (1) of the Labour At. See also *Old Mutual v Old Mutual Workers' Committee* S-257-96 (hereinafter the *Old Mutual* case).

the workplace.[978] As highlighted above, the involvement of the relevant trade union is crucial in the protection of the employees' right to freedom of association. In addition, the requirement that the majority of employees at the relevant workplace should approve the collective bargaining agreement is consistent with the principle of voluntarism where workers should be given an opportunity to decide on what is good for them.

The industry level collective bargaining takes place between registered trade unions, employers or employers' organisations including federations.[979] Collective bargaining at industry level takes place through employment councils.[980] The Labour Act provides for two types of collective bargaining agreements that can be negotiated at industry level, that is, the statutory and non-statutory collective bargaining agreements.[981] Statutory collective bargaining agreements are negotiated between registered trade unions, employers or employers' organisations or their federations, whereas, non-statutory collective bargaining agreements are negotiated between unregistered trade unions and unregistered employers' organisations.[982] Statutory collective bargaining should comply with the provisions of the Labour Act while non-statutory collective bargaining is governed by the common law.[983] In Mucheche's own view, the absence of legislative provisions which compel good faith negotiations and prevent unfair labour practices in non-statutory collective bargaining presents a lacuna in the Zimbabwean law that flies in the face of Article 5 of Convention 98.[984]

Be that as it may, there is a clear recognition of the role of unregistered trade unions in collective bargaining in the Labour Act. This is consistent with the employees' right to freedom of association in the event that they decide to form or

978 Section 25 (1) of the Labour Act.
979 Section 74 of the Labour Act.
980 See Part viii of the Labour Act.
981 Section 74 of the Labour Act.
982 For a further discussion of this distinction, see Mucheche *A guide to collective bargaining law and wage negotiations in Zimbabwe* 22-24.
983 Gwisai *Labour and employment law in Zimbabwe* 316.
984 Mucheche *A guide to collective bargaining law and wage negotiations in Zimbabwe* 22.

join unregistered trade unions. It is the absence of the regulation of the collective bargaining process outside the Labour Act that seems to be problematic.

Trade unions and employers in Zimbabwe may negotiate collective bargaining agreements on "any conditions of employment which are of mutual interest to the parties thereto".[985] The Labour Act then proceeds to provide a non-exhaustive list of items which can be on the agenda for collective bargaining such as deduction from wages, requirements for occupational safety, hours of work and overtime among other things.[986] In the case of *Catering Employees Association of Zimbabwe v Zimbabwe Hotel and Catering Workers Union & Anor*[987] the Court confirmed that there is need to take a broad interpretation of the phrase "any conditions of employment which are of mutual interest to the parties" and it was held to mean "any matter that may be of concern to the parties". Linked to the right of employees to freedom of association, the liberalisation of what can be discussed between trade unions and employers promotes and protects that right. In addition, it is in line with the principle of voluntarism which is promoted by international labour law.

Unlike the Labour Act which expressly provides for collective bargaining at workplace level, the Labour Relations Act is silent on collective bargaining at that level. Its focus is on collective bargaining at sectoral level through bargaining councils and statutory councils.[988] The Labour Relations Act clearly provides for its focus under its purposes. One of its purposes is to provide for orderly collective bargaining at sectoral level.[989] Such need to create orderly collective bargaining has been the force behind the rejection of pluralism and the preference of

985 Section 74 (2) of the Labour Act.
986 Section 74 (3) of the Labour Act.
987 HH-206-00 (hereinafter the *Catering Employees Association of Zimbabwe* case).
988 Grogan *Collective labour law* 97.
989 Section 1 (d) (i) - (ii) of the Labour Relations Act.

majoritarianism in South African law.[990] It explains why majority trade unions enjoy a range of statutory rights in collective bargaining.[991]

Macun rightly points out that the message in the Labour Relations Act is that South African trade unions should either grow or perish.[992] It can be argued that the South African law's emphasis on centralised bargaining that largely favours bigger trade unions may be inimical to the employees' right to freedom of association as it takes away the right of minority trade unions to fully participate in collective bargaining. On the other hand, collective bargaining that is led by stronger trade unions is likely to produce better results than those that are negotiated by weaker trade unions. Du Toit rightly points out that collective bargaining ultimately depends on the power of each party to compel its demands.[993]

Despite the advantages of sectoral collective bargaining that is favoured in South Africa, it is submitted that the Zimbabwean approach is better since it expressly provides for workplace collective bargaining. The workplace collective bargaining process has sufficient checks and balances since trade unions are directly or indirectly involved in the process. Workplace collective bargaining also ensures that employees who are not members of any trade union are able to directly participate in negotiations which affect them.

5.4.2 The duty to bargain in good faith

In line with the need to regulate the collective bargaining process so that it becomes a success, the Labour Act creates a duty on the part of the employer to negotiate in good faith. It is an unfair labour practice for the employer to refuse to

990 Esitang *The impact of thresholds agreements on organisational rights of minority trade unions* 140.

991 Examples include the right to enter into collective agreements on thresholds of representativity in terms of section 18 of the Labour Relations Act, the right to enter into agency and closed shop agreements in terms of sections 25 and 26 of the Labour Relations Act, the right to conclude a collective agreement that binds employees who are not members of the union party to the agreement in terms of section 23 of the Labour Relations Act.

992 Macun 1997 *Law, democracy and development* 73.

993 Du Toit 2007 *ILJ* 1419.

negotiate in good faith with a workers' committee or a trade union which has been duly formed to represent employees in such negotiations.[994] The scope of the duty to negotiate in good faith is amplified in section 75 of the Labour Act which requires parties to disclose all information relevant to negotiations, not to make false or fraudulent misrepresentations regarding bargaining subjects and to attempt to reach at a successful conclusion expeditiously. In addition, section 75 of the Labour Act raises the bar of good faith by requiring parties to negotiate in "absolute good faith". Furthermore, a party has a duty to make full disclosure of its financial position to the other party where it alleges financial incapacity as a reason for not agreeing to any terms and conditions during negotiations.[995]

Examples of failure to negotiate in good faith include refusal to bargain at all with a representative trade union or workers committee,[996] failure to negotiate with "an open mind",[997] making unilateral changes to the bargaining agenda,[998] victimizing trade union representatives and sending delegates who have no full mandate to enter into serious negotiations. Thus, the duty of good faith is wide enough to ensure that the negotiation process is done properly even if parties fail to agree on anything.

What comes out of the concept of 'unfair labour practices' in relation to the duty to bargain in good faith is that the Labour Act literally creates a duty to bargain on the part of the employer. Madhuku correctly observes that the effect of the concept of 'unfair labour practices' is that employees can get a court order that compels an employer to negotiate with them.[999] Hence, the employer should enter into

994 Section 8 (c) of the Labour Act.
995 Section 76 of the Labour Act.
996 *Thomas Meikle Centre (Pvt) Ltd v TM National Workers' Committee & Others* S-77-02 (hereinafter the *Thomas Meikle Centre Pvt Ltd* case).
997 *Biti v Ministry of State Security* 1999 (1) ZLR 105 (S) (hereinafter the *Biti* case).
998 The *Thomas Meikle Centre (Pvt) Ltd* case.
999 Madhuku *Labour law in Zimbabwe* 330.

negotiations with a trade union or a workers' committee unless the request to do so is grossly unreasonable.[1000]

In South Africa, the duty of good faith manifests itself from the provisions of the Labour Relations Act. A good example is the duty of the employer to disclose all the information that is relevant for collective bargaining unless such information cannot be legally disclosed.[1001] Despite the various manifestations of the requirement of good faith in the Labour Relations Act, there is no statutory duty to bargain in South African law.[1002] The South African approach is consistent with the distinct preference to voluntarism that emerges from Conventions 87 and 98.

The problem with the Zimbabwean approach is that it is difficult to compel an employer to negotiate and then expect him or her to negotiate in good faith. Thus, the merits of promoting a voluntarist approach to collective bargaining far outweigh its demerits. Therefore, it can be argued that it is not in the interests of promoting the employees' right to freedom of association to impose a duty to bargain on the employer.

5.4.3 The binding effect of the industry level collective bargaining agreement

Since a collective bargaining agreement is an outcome of a voluntary process, it should bind the parties to it in line with the right of employees to freedom of association. In sharp contrast to that position, the Labour Act provides that a collective bargaining agreement binds not only parties to it and their members but also all employers, contractors and their employees in the industry or undertaking in which it applies[1003]. Thus, it binds non-parties to itself even those who may not want to be bound by it, which is contrary to their right to freedom of association.

1000 *Olivine Industries (Pvt) Ltd v Olivine Workers' Committee* 2000 (2) ZLR 200 (S) (hereinafter the *Olivine Industries (Pvt) Ltd* case).

1001 Section 16 of the Labour Relations Act.

1002 See Macun 1997 *Law, democracy and development* at 74 where the author argues that the granting of organisational rights can be viewed as a replacement of a duty to bargain that is imposed by a statute. See also the *SANDU (2006)* case.

1003 Section 82 of the Labour Act

In Zimbabwe, a collective bargaining agreement does not become automatically binding upon its conclusion. It must be submitted to the Registrar for its registration.[1004] Furthermore, it must be published by the Minister as a statutory instrument.[1005] Publication by the Minister as a statutory instrument means that it becomes binding like any other statutory provision. The registration and publication stages require the involvement of the Minister.

There have been mixed reactions to the Minister's powers to refuse registration of a collective bargaining agreement. Gwisai argues that the power of the Minister to order a renegotiation of the collective bargaining when it appears to be unfair is justifiable because of too many restrictions on the right to strike which weaken the position of employees in collective bargaining and the need for State intervention in improving the conditions of service of employees.[1006] On the other hand, Madhuku argues that the phrase "unreasonable and unfair" which can be relied by the Minister to refuse registration is not defined and it gives the Minister too wide powers.[1007] He further argues that the consideration of public interest should not be done by the Minister alone. Although he agrees that the State has a legitimate interest in collective bargaining, he doubts whether such interest goes beyond the provision of a framework for collective bargaining.[1008]

For Mucheche, the discretionary power of the Minister under section 79 of the Labour Act violates the principle of autonomy of the parties which is the hallmark of collective bargaining.[1009] It is submitted that the Labour Act gives too much power to the Minister to interfere with a collective bargaining agreement. Such powers are not in sync with the full enjoyment of the right to freedom of association by the employees.

1004 Section 79 of the Labour Act.
1005 Section 80 of the Labour Act.
1006 Gwisai *Labour and employment law in Zimbabwe* 324.
1007 Madhuku *Labour law in Zimbabwe* 345.
1008 Madhuku *Labour law in Zimbabwe* 345.
1009 Mucheche *A guide to collective bargaining law and wage negotiations in Zimbabwe* 37.

In South Africa, a collective agreement does not require Ministerial approval to become binding on its members.[1010] The Minister comes in when a bargaining council requests him or her to extend a collective agreement to non-parties.[1011] This approach accords well with the principle of voluntarism that is promoted by international labour law. Non-parties are not automatically bound by a bargaining council collective agreement which they are not privy to.

Despite the minimum role of the Minister in collective agreements in South Africa as compared to Zimbabwe, the majoritarian approach that is adopted by the Labour Relations Act has the effect of binding non-parties to collective agreements. There are many examples which include thresholds agreements,[1012] agency shop agreements[1013] and closed shop agreements.[1014] All these collective agreements directly take away the right of minority trade unions to freedom of association. To further buttress these examples, if the majority trade union raises the threshold of representativity beyond the reach of an existing trade union, the later union may lose members.[1015] It means employees are forced to abandon the minority trade union in favour of larger unions. This is inconsistent with the employees' right to freedom of association as they will not be in a position to freely choose which trade union to join or not.

An agency shop agreement is a collective agreement that is concluded between an employer or employers' organisation and the majority trade union. It requires the employer to deduct from employees who are not members of the trade union an agreed agency fee.[1016] With such an arrangement, members of minority trade unions may be subjected to payment of a double fee, that is, payment to their union and to the agent union.[1017] Thus, it forces employees to join larger unions against their will. The agency fees have been justified as they discourage

1010 See sections 23 and 31 of the Labour Relations Act.
1011 Section 32 of the Labour Relations Act.
1012 Section 18 of the Labour Relations Act.
1013 Section 25 of the Labour Relations Act.
1014 Section 26 of the Labour Relations Act.
1015 See Kruger & Tshoose 2013 *PELJ* at 295 for a further discussion of this point.
1016 Section 25(1)-(2) of the Labour Relations Act.
1017 Van Niekerk & Smit *Law@work* 372.

employees from benefiting from the efforts of a trade union without contributing anything. Secondly it promotes stronger trade unions who are the cornerstone of orderly collective bargaining at sectoral level.[1018] Despite the justifications for an agency shop collective agreement, it is a clear violation of the right of employees not to associate with a particular trade union.

With a closed shop collective agreement, the employer and the majority trade union enter into an agreement that requires all employees who are covered by that agreement to become members of the trade union.[1019] Madhuku posits that a closed shop is an infringement of the right of employees to freedom of association although it may be justifiable in certain circumstances on public interest grounds if it satisfies the proportionality test.[1020] In spite of the justifications for a closed shop collective agreement, it clearly violates the right of employees to freedom not to associate with a particular trade union.

5.5 Employees' right to collective job action in terms of the Labour Act

The functional approach views the right to strike as an essential and integral element of collective bargaining"[1021] Van Niekerk & Smit opine that the right to strike is an "essential means for the promotion of the social and economic interests of employees and trade unions, based on the proposition that trade unions should be free to organise their activities and formulate their programmes for the purposes of defending the interests of their members".[1022] To that end, the right to strike is an important weapon that is available to employees in their pursuit of the right to freedom of association.

1018 See again Van Niekerk *Law@work* 373.
1019 Section 26(1) of the Labour Relations Act.
1020 Madhuku *Labour law in Zimbabwe* 280.
1021 *NUM v East Rand Gold Mine and Uranium Co. Ltd* (1999) 12 ILJ 1221 (hereinafter the *NUM* case).
1022 Van Niekerk & Smit *Law@work* 415.

5.5.1 The meaning of 'collective job action'

The Labour Act provides for the right of employees, workers committees and trade unions to resort to collective job action in order to resolve disputes of interest.[1023] The Labour Act uses the broader term 'collective job action' instead of a 'strike' which means all forms of industrial action are protected.[1024] It is clear from the definition in section 104 of the Labour Act that the right to strike is not an individual right but a collective right and it can be enjoyed by employees even if they are not members of a trade union. The term "collective job action" is defined as "an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment and includes a strike, boycott, lockout, sit-in or sit-out or other such concerted action".[1025] Thus, the demand must be related to employment which rules out political strikes and sympathy strikes.[1026]

In South Africa, the definition of a "strike" is much broader to include "persons who are or have been employed by the same employer or by different employers".[1027] In the case of *National Automobile & Allied Workers' Union v Borg Warner SA (Pty) Ltd*[1028] it was held that the employment relationship extends beyond the termination of the employment contract. It follows that the effect of the definition is that employees can continue to strike after dismissal.[1029] The definition in the Labour Relations Act gives more protection to employees who may be dismissed as a result of a strike. This position is consistent with the employees' right to freedom of association. It can be argued that Zimbabwe should follow suit.

1023 Section 104 (1) of the Labour Act.

1024 Madhuku *Labour law in Zimbabwe* 439.

1025 Section 2 of the Labour Act. See also the following cases which have considered the effect of the definition of 'collective job action': *Securitas (Pvt) Ltd v Dangirwa & Anor* LC -H-184-05 (hereinafter the *Dangirwa* case); *Rutunga & Others v Chiredzi Town Council & Anor* S-117-02 (hereinafter the *Rutunga* case); *Tsingano & Others v Munchville Investments (Pvt) Ltd t/a Bernstein Clothing* S-163-98 (hereinafter the *Tsingano* case).

1026 Madhuku *Labour law in Zimbabwe* 440.

1027 Section 213 of the Labour Relations Act.

1028 (1994) 15 ILJ 509 (A) (hereinafter the *National Automobile & Allied Workers' Union* case).

1029 See *FGWU v Minister of Safety and Security* (1999) 20 ILJ 1258 (LC) (hereinafter the *FGWU* case).

5.5.2 Secondary strikes in South Africa

The Labour Relations Act expressly provides for secondary strikes.[1030] From the definition of a 'secondary strike' in the Labour Relations Act, it is clear that it is a strike by employees in support of a primary strike. The strike targets another employer who does not employ the employees on secondary strike.[1031] Secondary strikes are justified because some business entities are closely related like holding companies and their subsidiaries. In addition, they can force other employers to exert pressure on the primary employer.[1032]

The secondary strike must be reasonable with regards to its effect on the business of the primary employer.[1033] The requirement of 'reasonableness' involves the application of the proportionality test which is a factual one and it involves an assessment of the impact of the secondary strike.[1034] The first leg of the enquiry is to assess the nature and effect of the strike on the secondary employer and the second leg of the enquiry is to determine whether the secondary strike is capable of having any effect on the business of the primary employer and the extent thereof.[1035] Thus, secondary strikes in South Africa have broadened the right of employees' to freedom of association. The employees' bargaining power is strengthened if they are allowed to engage in strikes in support of each other.

The Labour Act is silent on the employees' right to secondary strikes in Zimbabwe.[1036] Sadly, the scope of the right to strike is limited in Zimbabwe as compared to South Africa. It can be argued that the constitutional right to strike requires all interested employees to be afforded the right to strike. The more the employees are able to exert more pressure on their employers as a unit, the more they will be able to improve their conditions of work.

1030 Section 66 of the Labour Relations Act.
1031 See Grogan *Collective labour law* 275.
1032 See again Grogan *Collective labour Law* 275.
1033 Section 66 (2) (c) of the Labour Relations Act.
1034 Van Niekerk & Smit *Law@work* 431.
1035 Van Niekerk & Smit *Law@work* 431.
1036 Madhuku *Labour law in Zimbabwe* 440.

5.5.3 Protest action in South Africa

The Labour Relations Act recognises the withdrawal of labour which is closely related to strikes that is known as a protest action. The only difference between a strike and a protest action lies in the purposes and aims of those who take part in each of the two.[1037] The aim of a protest action is to defend or promote the "socio-economic interests of workers".[1038] On the other hand, a strike is designed to deal with matters that arise from the workplace.[1039]

The phrase 'socio-economic interests' has been interpreted broadly by the South African courts. One such example is the case of *Government of the Western Cape Province v Congress of SA Trade Unions*[1040] where the court observed that the phrase 'socio-economic interests' should be interpreted within the constitutional context which is meant to correct historical wrongs and imbalances.[1041] Thus, a demand that the Western Cape government should take action to prevent an educational crisis in provincial schools was held to fall within the meaning of 'socio-economic interests'.[1042]

It follows that the recognition of protest action in South African law, which is also a form of withdrawal of labour, is consistent with the full promotion of the employees' right to freedom of association. Some of the conditions of employment which may affect employees at the workplace may be caused by the broader socio-economic factors that require an action from organised labour. There is no such recognition of protest action by employees through the Labour Act in Zimbabwe.

Though illegal, trade unions in Zimbabwe have called for stay aways over the economic conditions of workers. In 2007, the ZCTU called for a two-day stay away action which was spurred by Zimbabwe's economic crisis which had caused

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1037 Grogan *Collective labour law* 292; Van Niekerk & Smit *Law@work* 432.
1038 Section 77 of the Labour Relations Act.
1039 See the definition of a strike under section 213 of the Labour Relations Act.
1040 (1999) 20 ILJ 151 (LC) (hereinafter referred to as the *COSATU* case).
1041 The *COSATU* case [19].
1042 The *COSATU* case [18].

inflation to soar resulting in many families failing to feed themselves.[1043] The government accused the ZCTU of working in cahoots with the opposition party, the MDC in order to remove it from power. Therefore, the government maintained a heavy police presence in order to thwart the stay away. In January, 2019, the ZCTU also called for a stay away after what it described as an "insensitive and provocative increase of the fuel price".[1044] The stay away was again thwarted by the police. Thus, the abortive stay aways present a gap in the Zimbabwean labour law which does not provide for the right to protest action over socio-economic interests. This is inconsistent with the employees' right to freedom of association.

5.5.4 Limitations on the right to strike

For a strike to become lawful it should pass both substantive and procedural limitations. Employees who engage in a lawful strike are referred to as 'protected persons'.[1045] They are entitled to rights and protections such as protection from disciplinary action and dismissal, immunity from civil and criminal liability and remuneration in kind.[1046] Thus, this part discusses the impact of those limitations on the right to strike in Zimbabwe. Necessary comparisons shall be drawn from South African law. Employees in essential services are not discussed in this part since they were discussed in Chapter 4.

5.5.4.1 The strike notice

The Labour Act requires that a 14 days written notice should be served on the employer, the relevant employment council and other interested parties.[1047] In *Moyo & Others v Central African Batteries (Pvt) Ltd,*[1048] it was held that if a notice is not served directly to the employer, it becomes invalid. In South Africa, the

1043 https://www.reuters.com (Date of use: 11 December 2021).
1044 https://www.news24.com>zimbabwe (Date of use: 11 December 2021).
1045 Section 108 of the Labour Act.
1046 See Gwisai *Labour and employment law in Zimbabwe* 358-360. See also *NRZ v ZRAU & Others* S-8-08 (hereinafter the *NRZ* case); *CASWUZ v ZIMPOST & Anor* LC-H-68-04 (hereinafter the *ZIMPOST* case).
1047 Section 104 (2) (a) of the Labour Act.
1048 2002 (1) ZLR 615 (S) (hereinafter the *Central African Batteries (Pvt) Ltd* case).

Labour Relations Act provides that a 48 hours written notice should be served on the relevant parties before the commencement of the strike.[1049] Given the shorter notice period in South Africa, one would agree with Madhuku that the notice period in Zimbabwe is too long to pass the constitutionality test.[1050] A notice is meant to give the employer a warning of the strike so that it can take the appropriate steps to protect its business.[1051] To that end, it does not require 14 days for the employer to take necessary steps to protect its business.

The obligation of employees to give a strike notice is accepted by the CFA on condition that it is reasonable and does not substantially limit the right to strike.[1052] Thus, a 14 days-notice period is so long that it substantially limits the right of employees to strike in Zimbabwe.

5.5.4.2 Conciliation of the dispute

Before employees can embark on a strike, the Labour Act requires them to refer the dispute to conciliation followed by certificate of no settlement.[1053] Three requirements must be met, that is, reference of the dispute to the conciliator followed by an attempt to conciliate the dispute by the conciliator and the issuance of a certificate of no settlement after the failure of conciliation.[1054]

Similarly, the Labour Relations Act in South Africa requires that the dispute should be referred to the CCMA or to the bargaining council before employees can resort to a strike.[1055] Referral of the dispute to the CCMA or the bargaining council serves two purposes. Firstly, it ensures that employees do not resort to strikes reflexively and secondly that parties are given an opportunity to solve the dispute

1049 Section 64 (1) (b) of the Labour Relations Act.
1050 Madhuku *Labour law in Zimbabwe* 448.
1051 *County Fair Foods (a division of Astral Operations Ltd) v Hotel, Liquor, Catering, Commercial and Allied Workers Union & Others* [2006] 5 BLLR 478 (LC) (hereinafter the *County Fair Foods* case).
1052 Gernigon, Odero & Guido 1998 *International labour review* 454.
1053 Section 104 (2) (b) of the Labour Act.
1054 Madhuku *Labour law in Zimbabwe* 442.
1055 Section 64 (1) (a) of the Labour Relations Act.

with the help of an external person who is neutral.[1056] Before referring the dispute to the CCMA or bargaining council for conciliation, there must be a clear disagreement or stalemate.[1057] The right to strike only accrues 30 days after such referral unless the period has been extended.[1058]

According to the CFA, it is permissible for the law to refer a dispute to conciliation before the actual strike is allowed, as long as such conciliation is effective, impartial and expeditious while involving the concerned parties.[1059] Therefore, it is perfect to refer parties to conciliation before the employees' right to strike is exercised.

5.5.4.3 The strike ballot

The Labour Act requires that a secret strike ballot should be conducted before the employees resort to a strike.[1060] The strike should be approved by the majority of employees. In an industry-wide strike, only members of the trade union that is calling for a strike can vote.[1061] Madhuku correctly argues that the participation of trade union members only in the strike ballot is against the right of employees who are non-members to freedom of association as they are excluded from this key decision-making process.[1062] However, such a requirement does not apply to a strike that is organised by a workers' committee since a workers' committee represents all members at the workplace.[1063] Gwisai argues that the requirement of a strike ballot is a remnant of colonialism that is designed to give the employers, the media and the State an opportunity to intimidate employees from resorting to

1056 Grogan *Collective labour law* 217.
1057 See *City of Johannesburg Metropolitan Municipality v SA Municipal Workers' Union* (2008) 29 ILJ 650 (LC) (hereinafter the *City of Johannesburg Metropolitan Municipality* case).
1058 Section 64(1) of the Labour Relations Act.
1059 Gernigon, Odero & Guido 1998 *International labour review* 454.
1060 Section 104(2) (e) of the Labour Act.
1061 Section 8 (9) of Labour (Settlement of Disputes) Regulations, 2003 (SI 217 of 2003).
1062 Madhuku *Labour law in Zimbabwe* 447.
1063 See section 24 of the Labour Act.

strike.[1064] However, a strike ballot is an accepted procedural requirement in terms of international labour law.[1065]

In South Africa, the strike ballot should be incorporated in the constitutions of trade unions but it is not a requirement for protection.[1066] This position is more favourable to the enjoyment of the employees' right to freedom of association. Employees are protected in terms of the Labour Relations Act even if they do not conduct a secret ballot in terms of their trade union's constitution.[1067] The right to strike compliments the right to freedom of association since both rights are meant to achieve the common goal of placing the employer-employee relationship on an equal basis.[1068]

5.5.4.4 Authorisation or approval by a registered trade union

It applies where the proposed strike has been called by a workers' committee or employees on their own.[1069] In those situations, the Labour Act requires the authorisation by the relevant trade union.[1070] The relevant trade union is the one that is registered. It is only that registered trade union that can also call for a strike on its own.[1071] Thus, there is no scope for unregistered trade unions on issues to do with strikes. Employees can only enjoy the right to strike fully if they form and join registered trade unions. It can be argued that the registration requirements are inconsistent with the provisions of the Zimbabwean Constitution which gives the right to every employee to participate in collective job action.[1072]

On the other hand, the authorisation requirement ensures that trade unions retain control of their members' activities at the workplace. It also provides checks and

1064 Gwisai *Labour and employment law in Zimbabwe* 356.
1065 Gernigon, Odero & Guido 1998 *International labour review* 454.
1066 Grogan *Workplace law* 439.
1067 Grogan *Collective labour law* 217.
1068 Manamela & Budeli 2013 *CILSA* 310.
1069 Madhuku *Labour law in Zimbabwe* 445.
1070 Section 104 (3) (b) of the Labour Act.
1071 Section 104 (3) (c) of the Labour Act.
1072 Section 65 of the Zimbabwean Constitution.

balances at the workplace by ensuring that decisions by workers' committees or employees on strikes are properly made and the required procedures are followed.

5.5.4.5 Referral of the dispute to arbitration

The Labour Act prohibits employees from resorting to strike action if parties have agreed to refer the dispute to arbitration.[1073] The agreement must have been entered into after the dispute had arisen.[1074] There is a similar provision in the Labour Relations Act in South Africa.[1075] The law clearly favours a non-disruptive way of dispute resolution by banning a strike where parties can resolve the dispute through arbitration. In addition, it is a recognition of the freedom of parties to enter into binding agreements which regulate the workplace. It is submitted that reference of a dispute to arbitration does not violate the employees' right to strike provided that the arbitration procedure is effective, impartial and expeditious.

5.5.4.6 Disputes of right

A strike is prohibited where it seeks to redress a dispute of right.[1076] Employees can only strike in relation to a dispute of interest.[1077] The Labour Act defines a dispute of interest as "any dispute other than a dispute of right."[1078] On the other hand, a dispute of right is defined as any dispute involving legal rights and obligations which include unfair labour practices and violations of any law, collective bargaining agreement or the contract of employment.[1079] It can be deduced from the above definition that a dispute of interest does not involve the enforcement of existing rights but it involves the creation of new rights.

1073 Section 104 (3) (a) of the Labour Act; *Chisvo & Ors v Aurex (Pvt) Ltd* 1999 (2) ZLR 334 (hereinafter the *Chisvo* case).
1074 Madhuku *Labour law in Zimbabwe* 444.
1075 Section 65 (1) (b) of the Labour Relations Act.
1076 Section 104 (3) (a) of the Labour Act.
1077 See section 104 (1) of the Labour Act; *CSWUZ v Telone (Pvt) Ltd* HH-91-05 (hereinafter the *Telone* case).
1078 Section 2 of the Labour Act.
1079 Section 2 of the Labour Act.

There is justification in restricting strikes to disputes of interest. The reason is that the Labour Act provides many methods for dispute settlement when it involves disputes of right such as conciliation, arbitration and adjudication. Disputes of rights can easily be brought before formal platforms as one simply needs to refer to a particular provision that has been breached. Illustratively, if one earns R2000 per month, he can easily enforce it in a court of law if he does not get paid that amount because it is something that is already there. On the other hand, if the employees who are employed by that employer want an increment to R3000, they cannot enforce it in a court of law since they do not have a right to earn R3000, but to earn R2000. They can either resort to collective bargaining or strike.

In South Africa, a marked divide between a dispute of right and a dispute of interest also exists.[1080] Either party should have the right to refer the dispute for arbitration or adjudication in order to be hit by section 65(1) (c) of the Labour Relations Act.[1081] The intention behind the legislation is that certain disputes are properly settled by litigation than through strikes.[1082] Thus, it can be argued that the limitation of the employees' right to strike to disputes of interest does not violate that right as disputes of right have adequate remedies to cater for them.

5.5.4.7 Compliance with and exhaustion of internal remedies in a union agreement

A workers' committee cannot resort to a strike if there is a "union agreement which provides for or governs the matter in dispute and such agreement has not been complied with or remedies specified therein have not been exhausted as to the issue in dispute".[1083] A union agreement is a collective bargaining agreement that is entered into by an agent union and the employer.[1084] It only applies where there

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1080 Section 65 (1) (c) of the Labour Relations Act.
1081 Grogan *Collective labour law* 244.
1082 Grogan *Collective labour law* 245.
1083 Section 104(3) (d) of the Labour Act; *ZISCO Ltd v Dube & Others* 1997 (2) ZLR 172 (S) (hereinafter the *ZISCO Ltd* case).
1084 Section 2 of the Labour Act.

is no registered trade union or where the existing trade union is no longer competent to represent its members.[1085]

What is clear from the Labour Act is that section 104(3) (a) applies to collective bargaining agreements that have been negotiated by an agent union only. In South Africa, the right to strike does not accrue where the person is bound by a collective agreement that prohibits a strike in relation to the dispute in issue.[1086] In the case of *Vista University v Botha,*[1087] the trade union agreed not to strike over disputes which were defined in the agreement itself. The court interpreted the agreement and concluded that the dispute fell within the 'peace clause' and that the strike was unlawful.[1088] This is in line with the employees' right to freedom of association where they should be able to define how they wish to enjoy the right to strike through collective bargaining. It is submitted that all trade unions in Zimbabwe should be accorded this right but there must be a balance between the exercise of the right to strike and collective bargaining because both rights are always important to employees at all times.

5.5.5 Circumstances which justify an immediate strike

The Labour Act creates two situations where one does not need to follow any procedure in order for a strike to be protected. Firstly, employees can resort to strike in order to protect themselves from an occupational hazard that is reasonably feared to pose an immediate threat to their health and safety provided that they are not to blame for it and the strike remains proportional to the occupational hazard from the beginning until the end.[1089] This is significant in the protection of the employees' right to strike as they can use the right to protect themselves from employers who put them at risk.

1085 Section 31 of the Labour Act.
1086 Section 65(1) (b) of the Labour Relations Act.
1087 (1997) 18 ILJ 1040 (LC) (hereinafter the *Vista University* case).
1088 See also *Cape Gate (Pty) Ltd v NUMSA* (2007) 28 ILJ 871 (LC) (hereinafter the *Cape Gate (Pty) Ltd* case).
1089 Section 104(4) (a) of the Labour Act.

Secondly, employees can resort to an immediate strike in defence of an immediate threat to the existence of a workers' committee or a registered trade union.[1090] This is significant in the protection of the employees' right to freedom of association. The existence of their representatives should not be threatened if they are to fully realise their constitutional right to strike.[1091]

South African law sets out grounds which justify an immediate strike which are slightly different from Zimbabwe. If parties belong to a bargaining council and the bargaining council has dealt with the matter in terms of its constitution then referral to the CCMA or strike notice is not required.[1092] Grogan argues that the provision suggests that bargaining councils' resolution procedure overrides those of the Labour Relations Act if they conflict.[1093] The provision recognises the freedom of employees to negotiate their own dispute resolution mechanism with their employer. The same applies to section 64(3) (b) of the Labour Relations Act which gives primacy to strike procedures in collective agreements over the procedures in the Labour Relations Act. However, a strike remains protected if it fails to comply with a collective agreement in place but complies with the Labour Relations Act.[1094] Thus, the South African law strikes the right balance between the application of the Labour Relations Act and agreements between parties.

Another situation in South Africa where referral to CCMA or strike notice is not required is a strike in response to an illegal lockout by the employer.[1095] Grogan rightly argues that where a party disregard the rules of the game, it should not expect the other party to follow the same rules.[1096] To that end, the provision protects the employees' right to strike by making sure that it is used against employers who fail to observe the procedures which are laid down by the law

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1090 Section 104(4) (b) of the Labour Act.
1091 See *First Mutual Life Assurance v Muzivi* S-62-03 (hereinafter the *Muzivi* case).
1092 Section 64(3) (a) of the Labour Relations Act.
1093 Grogan *Collective labour law* 232.
1094 *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* (1998) 19 ILJ 279 (LC) (hereinafter the *Columbus Joint Venture* case).
1095 Section 64(3) (d) of the Labour Relations Act.
1096 Grogan *Collective labour law* 233.

when they resort to lockouts. Zimbabwe should have a similar provision to deal with similar situations.

Lastly, one does not need to follow the referral or strike notice procedures in South Africa if the employer makes unilateral changes to the terms and conditions of employment, threatens to introduce such changes, fails to take heed of a request to revoke such changes or to stop implementing the same.[1097] The provision makes perfect sense as it deals with employers who completely disregard the rights of employees. The employees' strongest weapon to force the employer to reform is the right to strike. It explains why Manamela & Budeli conclude that employees cannot freely exercise the right to freedom of association if the right to strike is not protected.[1098] They further posit that it is one of the weapons wielded by trade unions.[1099]

5.5.6 Consequences of unlawful strikes

Unlawful strikes are unprotected in terms of the Labour Act. In that vein, there are consequences for unlawful strikes. This part discusses such consequences and the extent to which they may interfere with the employees' right to strike.

5.5.6.1 Ministerial show cause order

The Minister has the power, either acting on his own or upon the application of an interested party, to issue an order that calls upon a responsible person to show cause why a disposal order should not be granted in relation to the strike.[1100] The "show cause order" should specify the date, time and place at which the responsible person should appear before the Labour Court for the hearing of the matter and the provisional order.[1101] In addition, the Minister may direct that the

1097 Section 64(4)-(5) of the Labour Relations Act.
1098 Manamela & Budeli 2013 *CILSA* 308.
1099 Manamela & Budeli 2013 *CILSA* 308.
1100 Section 106(1) of the Labour Act.
1101 Section 106(2) (a) of the Labour Act.

unlawful strike be terminated; postponed or suspended pending the issuance of a disposal order.[1102]

The Minister should only issue a "show cause order" in relation to an unlawful strike.[1103] In addition, the Minister cannot delegate his functions to another person.[1104] Despite these safeguards in the exercise of powers by the Minister, the "show cause order" is still open to abuse. The Minister can terminate an otherwise lawful strike in order to buy time. It militates against the right of employees to freedom of association. In sharp contrast, the Labour Relations Act gives the South African Labour Court the exclusive jurisdiction to deal with unlawful strikes.[1105] Thus, parties are directly subjected to a court of law where the legality of a strike is impartially determined in South Africa. It is in sync with the protection of the employees' right to strike.

5.5.6.2 Disposal order

This is granted by the Labour Court and it can terminate, suspend or postpone the strike.[1106] In addition, it can order the discharge or suspension of the employer's liability to pay wages, order the employer to take disciplinary action against specified employees or the dismissal of certain employees among other powers.[1107] The disposal order must be clearly communicated to the employees.[1108] It is submitted that the involvement of the Labour Court does not raise any challenges. It should have exclusive jurisdiction to deal with unlawful strikes just like in South Africa. It should not decide a matter that has come as a "show cause order" from the Minister. This ensures that the legality of a strike is properly determined in line with the employees' right to strike.

1102 Section 106(2) (b) of the Labour Act.
1103 The *ZIMPOST* case.
1104 *Cargo Carriers (Pvt) Ltd v Zambezi & Others* 1996 (1) ZLR 613 (S) (hereinafter the *Cargo Carriers (Pvt) Ltd* case).
1105 Section 68 of the Labour Relations Act.
1106 Section 107(2) of the Labour Act.
1107 Section 107(3) of the Labour Act; *Border Timbers (Pvt) Ltd v Employees* LC-MC-07-04 (hereinafter the *Border Timbers (Pvt) Ltd* case); *Wingate Farm v Wingate Farm Employees* LC-H-144-04 (hereinafter the *Wingate Farm* case).
1108 Gwisai *Labour and employment law in Zimbabwe* 368.

5.5.6.3 Suspension of the trade union's right to collect union fees

The Minister has the power to issue an order in writing suspending, for a period not exceeding 12 months, the right of a trade union to levy, collect or recover union fees through a check-off scheme.[1109] Such an order may be issued together with or instead of a show cause order.[1110] It ceases to have any effect if criminal proceedings are not instituted within 30 days of serving of the order, if there is no conviction after criminal proceedings and if the Labour Court declines to grant the disposal order.[1111] The Minister's powers are limited to a check-off scheme only and not to other methods of collecting union fees.[1112]

Although the Minister's powers are limited in terms of time and the method of collection of union fees, they represent a direct interference with a trade union's internal operations. Trade unions survive on union fees. It can be argued that it is a direct assault on the employees' right to freedom of association. The Minister can use that power to punish trade unions even on political grounds. The aggrieved party can apply for judicial review.[1113] This can serve as a form of solace against the abuse of power by the Minister.

5.5.6.4 Criminal sanctions

It is a criminal offence in Zimbabwe for a workers' committee, trade union, officials, office bearers and individual employees to recommend, threaten, advise, command, encourage, incite and procure, organise or engage in an unlawful strike.[1114] Thus, the acts which constitute criminal liability are very broad. Liability also covers "any person" which makes it too broad.[1115] The penalty is also too high

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1109 Section 109(3) of the Labour Act.
1110 Section 109(4) of the Labour Act.
1111 Section 109(5) of the Labour Act.
1112 Madhuku *Labour law in Zimbabwe* 460.
1113 Madhuku *Labour law in Zimbabwe* 460.
1114 Section 109(1) of the Labour Act.
1115 Section 109(2) of the Labour Act; Gwisai *Labour and employment law in Zimbabwe* 373.

and it consists of a fine up to level fourteen or imprisonment up to five years or both.[1116]

The CFA does not encourage the use of criminal law in a peaceful strike even if it is unlawful. A strike should only attract criminal sanctions if it involves criminal acts which are committed during the strike.[1117] South Africa adopted the CFA approach and removed the criminal offence of striking from the Labour Relations Act.[1118] The immunity does not apply to criminal offences such as assault, intimidation and trespass in the course of a strike.[1119] To that end, the South African law is consistent with international standards. Zimbabwe should limit criminal offences to acts which are committed during the strike action and not the act of striking itself even if the strike turns out to be unlawful. Sometimes participants only know that the strike was unlawful after it has been declared as such by courts.

5.5.6.5 Civil liability

The Labour Act also imposes civil liability on those who organise or participate in an unlawful strike.[1120] A criminal court that has convicted a responsible party can also make an order for compensation in favour of any person who suffers injury to himself or to his property as a result of the unlawful strike.[1121] Madhuku opines that civil liability in section 109(6) is too wide and he gives the example of civil liability for the death of a person which covers loss of support for the dependants of the deceased.[1122] Gwisai asserts that several big employers including multinationals and state corporations have filed multi-billion Zimbabwean dollar suits against

1116 Section 109(2)-(3) of the Labour Act.
1117 Gernigon, Odero & Guido 1998 *International labour review* 467.
1118 Grogan *Collective labour law* 299.
1119 Section 67(8) of the Labour Relations Act; Grogan *Collective labour law* 299; Manamela & Budeli 2013 *CILSA* 324.
1120 Section 109(6) of the Labour Act.
1121 Section 109(7) of the Labour Act.
1122 Madhuku *Labour law in Zimbabwe* 461.

trade unions, trade union officials and opposition leaders for engaging in unlawful strikes.[1123]

In South Africa, it is only the Labour court that has exclusive jurisdiction to deal with claims for damages.[1124] It can order the payment of just and equitable compensation after considering various factors such as attempts that were made to comply with the law, premeditation, the conduct of the employer, duration of the strike, orderly collective bargaining and the financial position of the parties.[1125] Thus, damages in South Africa are not broadly defined and they are awarded justly and equitably without penalising employees who would have engaged in an unlawful strike. This approach promotes the right of employees' to strike.

5.6. Conclusion

The chapter has explored the right of private sector employees in Zimbabwe to freedom of association and its components under the Labour Act. It took a comparative analysis with the South African law. It began by discussing the employees' right to organise in terms of the Labour Act.[1126] It was highlighted that the Labour Act recognises the right of employees to join and form trade unions of their choice. The role of trade unions in the enjoyment of employees' organisational rights was also considered.[1127] It was noted that most of the statutory organisational rights are enjoyed by trade unions rather than individual employees. In addition, most of these rights which include the right of access to the employer's premises, collection of union fees and the right to information are enjoyed by registered trade unions. It became apparent that registration is an

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1123 Gwisai *Labour and employment law in Zimbabwe* 373. He gives the following examples of such cases: *ZUPCO v Chibhebhe, ZCTU, Tsvangirai & MDC* HH-4232-03 and *Muchengeti v MDC, ZCTU & Anor* HH-4110-03.

1124 Section 68 of the Labour Relations Act.

1125 Section 68(1) (b) of the Labour Relations Act. See also *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2001) 22 ILJ 2035 (LC) (hereinafter the *Mouthpiece Workers Union* case).

1126 See [5.2] hereof above.

1127 See [5.2.1] hereof above.

important aspect of the enjoyment of the right to freedom of association by trade unions.

The chapter proceeded to discuss the employees' right to organise at shop floor level.[1128] It became clear that private sector employees in Zimbabwe have a right to form workers' committees. Workers' committees represent all members at the workplace. However, if there is a majority trade union at the workplace, all members of the trade union automatically become members of the majority trade union. This approach has the effect of violating the right to freedom of association of those who may not want to join the majority trade union. In South Africa, workplace forums were also discussed.[1129] Workplace forums favour majority trade unions in South Africa. However, their mandate is much broader as compared to Zimbabwe's workers' committees as they can also participate in joint-decision making apart from being consulted.

It was further indicated that South Africa has shop stewards who represent employees at the workplace on a day-to-day basis.[1130] This is important in the promotion of the employees' right to freedom of association. The chapter proceeded to discuss the employees' right to collective bargaining in terms of the Labour Act.[1131] The scope and levels of collective bargaining in Zimbabwe were discussed. It was noted that there is workplace level collective bargaining and industry level collective bargaining in Zimbabwe.[1132] Trade unions play a crucial role in collective bargaining by workers' committees. It was also highlighted that South African law favours sectoral collective bargaining in accordance with emphasis on orderly collective bargaining.

The duty to bargain in good faith was also considered within the Zimbabwean context.[1133] It was highlighted that courts have used it together with the concept of

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1128 See [5.3] hereof above.
1129 See [5.3.1] hereof above.
1130 See [5.3.2] hereof above.
1131 See [5.4] hereof above.
1132 See [5.4.1] hereof above.
1133 See [5.4.2] hereof above.

unfair labour practices to create a duty to bargain in Zimbabwe, which is contrary to international standards. The binding effect of industry level collective bargaining agreements was examined. It was indicated that the industry level collective bargaining agreement binds the whole industry in which it is applicable in Zimbabwe. This is contrary to the right of employees to freedom of association as it binds non-members. It was noted that this is also the case in South Africa where many collective agreements which are concluded by majority trade unions bind non-members.

The last component of the right to freedom of association which was considered is the right to strike (commonly referred to as the right to collective job action in the Labour Act).[1134] It was highlighted that the definition of strike in the Labour Relations Act in South Africa is much broader than in Zimbabwe. In addition, the South African law recognises the right to secondary strikes and protest action.[1135] Thus, the right to strike in South Africa is much broader as compared to Zimbabwe.

The limitations on the right to strike were also discussed.[1136] It became apparent that there are issues surrounding some limitations such as the strike notice and the strike ballot in Zimbabwe. However, the CFA recognises these limitations although they need to conform to certain standards which were discussed. The chapter also exposed circumstances in Zimbabwe which justify resorting to a strike without following any procedures.[1137] It was observed that employees can go on strike in order to protect their workers' committee or trade union. This is commendable as it ensures that their right to freedom of association is preserved. It was noted that similar provisions exist in South African law.

1134 See [5.5] hereof above.
1135 See [5.5.2-5.5.3] hereof above.
1136 See [5.5.4] hereof above.
1137 See [5.5.5] hereof above.

Finally, the consequences of an unlawful strike were analysed.[1138] It was highlighted that the Minister's power to interfere with unlawful strikes through show cause orders and union fees restriction orders were an unnecessary interference with the right of employees to freedom of association. It was indicated that Zimbabwe should follow the South African example where the Labour Court has exclusive jurisdiction to deal with an unlawful strike. It was also highlighted that it is undesirable to prescribe criminal sanctions for the act of striking. Criminal sanctions should be reserved for criminal acts during the strike. With civil liability it should not be so wide as to cover circumstances which have not been directly caused by the unlawful strike.

1138 See [5.5.6] hereof above.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The research took a comparative analysis of the right to freedom of association for private sector employees in Zimbabwe. It sought to determine the extent to which the Zimbabwean law protects the right to freedom of association and its components. Direct comparisons were made with South African law because the constitutional provisions on the right of employees to freedom of association in Zimbabwe are strikingly similar to those in the South African Constitution. In addition, the South African constitutional principles have been developed and applied by courts since 1996 which provides important lessons for Zimbabwe which only introduced the rights to organise, to collective bargaining and to strike in its constitution in 2013. Therefore, this Chapter provides the major highlights of the research, its conclusions and recommendations.

6.2 Conclusion

In the research, it was highlighted that the employees' right to freedom of association lies at the heart of all the other labour and workers' rights.[1139] The historical development of the employees' right to freedom of association in Zimbabwe was traced and analysed because it helped to shape and define the current law on the right of private sector employees to freedom of association and its components.[1140] All this started with the colonial occupation of Zimbabwe by the British in 1890 and that process was led by Cecil John Rhodes. Most of the reasons for the occupation of Zimbabwe were economic and the colonial masters wanted to grow their business empires which had a direct effect on the repressive labour laws that they introduced on the territory.[1141] Cecil John Rhodes achieved his desired end of colonising Zimbabwe through entering into treaties with

1139 Budeli 2009 *De jure* 138.
1140 See generally chapter two of the research.
1141 Mlambo *A history of Zimbabwe* 32.

Lobengula who was the Ndebele King. The first one was the Moffat Treaty of 1888.[1142] It was then followed by the Rudd Concession of the same year.[1143] It was highlighted that these treaties allowed Cecil John Rhodes to obtain the Royal Charter from the British government which ultimately led to the occupation of Zimbabwe. It was further noted that the colonialists faced shortages of African labour and they had to resort to repressive legislation and practices in order to obtain cheap labour.[1144]

Some of the early colonial practices include forced labour which was known as 'chibharo' where Africans were forced to work in farms, mines and businesses of the colonialists.[1145] This meant that at the early stages of colonial occupation of Zimbabwe, there was no right of employees to freedom of association to talk about. On the legislative side, some of the pieces of legislation which were introduced by the colonialists to coerce Africans into formal employment include the Hut Tax Ordinance which required African adults to pay hut taxes.[1146] Thus, African labourers had to provide cheap labour in order to raise such taxes.

It was also highlighted that the colonial occupation of Zimbabwe was completed by the Southern Rhodesia Order-in-Council (1898) which introduced a governance structure in the then Southern Rhodesia.[1147] Its significance in this research is that it established a system of courts to deal with any future disputes including those to do with the right of employees to freedom of association. The colonialists further enacted the Natives Employment Ordinance (1899) and the Master and Servants Ordinance (1901). These pieces of legislation were merely designed to control the labour market and they did not provide for the right of employees to freedom of association. For instance, strikes and collective bargaining were expressly

1142 See Mukanya *Dynamics of history* 92.
1143 See again Mukanya *Dynamics of history* 93.
1144 Makambe *The exploitation and abuse of African labour in the colonial economy of Zimbabwe, 1903 - 1930* 81.
1145 Mukanya *Dynamics of history* 107.
1146 Madhuku *Labour law in Zimbabwe* 13.
1147 See section 7 of the Southern Rhodesia Order-in-Council 1898.

prohibited under the Master and Servants Ordinance.[1148] Despite the express prohibition of the right to strike, African employees organised strikes such as the Wankie strike of 1912, although it was quickly crushed.[1149] They further formed the Industrial and Commercial Workers Union in 1927 which was the first black trade union in Zimbabwe. It was the beginning of the expression of the employees' right to freedom of association outside the law.

The thesis also examined the Industrial Dispute Ordinance (1920) which was the first piece of legislation to deal with collective disputes which related to wages.[1150] This was followed by the ICA, 1934 which was the first piece of legislation to recognise the employees' right to freedom of association. It recognised the right of employees to strike, to bargain collectively and to join trade unions.[1151] The antithesis of the ICA, 1934 is that it excluded African employees from its application and they continued to be governed by the Master and Servants Ordinance. In other words, they did not have the right to freedom of association. Despite the apparent legal prohibition of the right to freedom of association, Africans continued to organise themselves showing their resilience. For instance, they formed the Rhodesia Railway African Employees Association in 1944 which organised a strike by railway employees in 1945.[1152]

The African employees' right to freedom of association was only recognised through the ICA, 1959 which included Africans in its definition of an 'employee'.[1153] However, trade unions were strictly regulated so that they did not become part and parcel of the general struggle for political independence.[1154] It was also noted that the first constitutional recognition of the employees' right to freedom of association came through the Southern Rhodesia Constitution of 1961. It created a Bill of

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1148 Gwisai *Labour and employment law in Zimbabwe* 18.
1149 Gwisai *Labour and employment law in Zimbabwe* 19.
1150 Madhuku *Labour law in Zimbabwe* 15.
1151 Gwisai *Labour and employment law in Zimbabwe* 20.
1152 Mlambo A history of Zimbabwe 141.
1153 Madhuku *Labour law in Zimbabwe* 16.
1154 Gwisai *Labour and employment law in Zimbabwe* 22.

Rights which recognised the right of employees to freedom of association.[1155] The major drawback on the part of Africans is that colonial laws such as the LOMA and EPA continued to be applied against any form of organisation by African employees.

Zimbabwe got its independence in 1980 but trade unionism remained weak in the early years after independence.[1156] The 1980 Constitution recognised the general right to freedom of association which also covered employees.[1157] However, it did not provide for the other components for the employees' right to freedom of association such as the right to organise, the right to collective bargaining and the right to strike. To further buttress the rights of employees after independence, the Minimum Wages Act and the Employment Act were enacted which gave employees minimum statutory conditions of service. The provision of minimum conditions of service for employees meant that trade unions had basic statutory rights to defend.

The research also discussed the Labour Relations Act of 1985 which was the first comprehensive piece of labour legislation which was enacted in Zimbabwe after independence. It repealed the ICA, 1959, the Minimum Wages Act and the Employment Act. The right of employees to freedom of association was guaranteed through the protection of the right of employees to form and join trade unions and workers committees.[1158] It gave birth to the right of employees to freedom of association at both shop floor and industry levels. After the enactment of the Labour Relations Act, 1985, trade union activities grew to include their involvement on the broader governance issues. One such example was the involvement of the ZCTU in challenging the harsh economic effects of ESAP.

It is the ESAP which led to the Labour Relations (Amendment) Act of 1992 which sought to de-regulate the labour market by removing the 'one industry one union'

1155 Section 66(1) of the Southern Rhodesia Constitution, 1961.
1156 Madhuku "Trade unions and the law" 108.
1157 Section 21 of the 1980 Constitution.
1158 Part II of the Labour Relations Act, 1985.

principle.[1159] Employees continued to organise themselves against government policies as part of their enjoyment of the right to freedom of association which culminated in the formation of the MDC, a labour-backed political party. The Labour Relations Act was amended again in 2002 through the Labour Relations (Amendment) Act of 2002. It renamed the Labour Act and brought together private and public sector employees under the new Labour Act.[1160] Uniting employees from the public and private sectors was in the interest of promoting their right to freedom of association as they could speak with one voice. However, this was short-lived as the Labour (Amendment) Act of 2005 re-introduced the two-tier labour law system which separated public sector employees from private sector employees.

The year 2013 was significant in the development of the employees right to freedom of association as the Zimbabwean Constitution was enacted which provides for the right of employees to freedom of association and its components. This was followed by the Labour (Amendment) Act of 2015 which dealt with some issues relevant to the right of employees to freedom of association such as the expansion of the number of issues which can be the subject of collective bargaining.[1161]

Chapter three dealt with international standards on freedom of association that are applicable in Zimbabwe. It discussed the right to freedom of association in terms of international human rights law and labour law. To begin with, the UDHR was discussed. It was noted that the UDHR provides for both the positive and the negative right to freedom of association.[1162] Although the UDHR is not binding, it has assumed the status of customary international law which makes it an important source of law.[1163] In addition, the right of employees to freedom of

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1159 Section 45 of the Labour Relations Act, 1985 as amended by the Labour Relations (Amendment) Act, 1992.
1160 Madhuku *Labour law in Zimbabwe* 22.
1161 Section 74 of the Labour Act.
1162 Article 20 of the UDHR.
1163 Baets 2009 *History and theory* 20.

association is also recognised under the ICCPR.[1164] It was further highlighted that the ICCPR's enforcement mechanisms which consist of reporting and intestate complaints procedures are weak as they depend on the cooperation of the concerned State.[1165] Still under international human rights law, there is the ICESCR which provides for the right of "everyone" to form and join trade unions of his/her choice.[1166] Just like the ICCPR, it was observed that the ICESCR mainly depends on the reporting procedure which is a weak method of enforcing the right of private sector employees to freedom of association at international level.

In terms of international labour law, the employees' right to freedom of association has been developed through the work of the ILO and its special committees such as Committee of Experts and the CFA. The ILO managed to develop important conventions such as Conventions 87, 98 and the Workers' Representative Convention which have a direct bearing on the right of employees to freedom of association in Zimbabwe since it ratified them. It was noted that Convention 87 was the first major ILO instrument on freedom of association.[1167] Convention 98 supplements Convention 87 by providing for further safeguards on the right to organise.[1168] In addition, it provides for a framework for collective bargaining. The Workers Representative Convention further supplements Convention 98 and provides for anti-union discrimination.[1169]

The ILO Declaration on Fundamental Principles and Rights at Work was also discussed. One of its principles include the recognition of the employees' right to freedom of association and collective bargaining. Its principles are closely connected to the principles in the Global Compact. The net effect of these instruments is the promotion of the employees' right to freedom of association at international level.

1164 Article 22(1) of the ICCPR.
1165 Articles 40 & 41 of ICCPR.
1166 Article 8(1) of the ICESCR.
1167 Budeli 2009 *De jure* 146.
1168 Budeli 2009 *De jure* 149.
1169 See preamble to Convention 135.

At regional level, States are also alive to the need to promote human rights including the right to freedom of association. To that end, the African Charter provides for both the positive right and the negative right to freedom of association.[1170] Just like other international human rights instruments, it can only enforce its provisions through the cooperation of States. It does not have coercive mechanisms to enforce its provisions. Lastly, Chapter three discussed the right of employees to freedom of association in terms of the SADC Charter. The SADC Charter requires each member State to create a conducive environment that is consistent with the ILO conventions on freedom of association.[1171] Thus, most of the principles under the SADC Charter are a re-statement of international labour law.

Chapter four discussed the constitutional framework on the right of employees to freedom of association and its components in Zimbabwe. It was observed that, before the Zimbabwean Constitution, the constitutional jurisprudence on the right of employees to freedom of association in Zimbabwe had been developed around section 21 of the 1980 Constitution which provided for a general right to freedom of association. The 1980 Constitution did not provide for the rights to organise, to bargain collectively and to strike in its Bill of Rights. This was achieved by the Zimbabwean Constitution.[1172] The significance of this development lies in the supremacy of the constitution and the importance of its Declaration of Rights as highlighted in Chapter four of the research. Useful comparisons with the South African constitutional provisions were undertaken since they have a striking resemblance.

It was highlighted that the constitutional right to strike is given to 'everyone' in Zimbabwe.[1173] In sharp contrast, it is only given to 'workers' in South Africa. Thus, the constitutional right to strike is very broad in Zimbabwe. In addition, the constitutional right to form and join trade unions and employees' organisations is

1170 Article 10 of the African Charter.
1171 Article 4 of the SADC Charter.
1172 Section 65 of the Zimbabwean Constitution.
1173 Section 65 of the Zimbabwean Constitution.

given to ‘every person’.[1174] However, it became clear from the research that the jurisprudence that has been developed around the phrase ‘every person’ in both Zimbabwe and South Africa restricts it to an employment relationship.

The application of the constitutional provisions on the employees’ right to freedom of association was also considered. It was observed that the Declaration of Rights applies both vertically and horizontally, meaning that the State and private players have an obligation to observe its terms including the right of employees to freedom of association.[1175] It was further highlighted that the Declaration of Rights can apply either directly or indirectly. This is important because a litigant should be able to know whether to rely directly on constitutional remedies or on remedies that are provided for by any other law that gives effect to the constitutional right to freedom of association.

The interpretative guide for the Declaration of Rights was also explored. It was observed that courts and other tribunals are required to give full effect to the rights and freedoms enshrined in the Declaration of Rights (including the right of employees to freedom of association) when interpreting it.[1176] Thus, Zimbabwean courts, just like their South African counterparts, have adopted a purposive interpretation of the Declaration of Rights. Furthermore, courts and other tribunals are required to adopt an interpretation that promotes the values and principles that underlie a democratic society.[1177] It became clear that such values and principles include the respect for fundamental rights and freedoms which include the right of employees to freedom of association.[1178] Significantly, courts and other tribunals are also required to consider international law, treaties and conventions to which Zimbabwe is a party.[1179] It justifies why international labour standards on freedom of association which are applicable to Zimbabwe were canvased in Chapter three of this thesis.

1174 Section 65(2) of the Zimbabwean Constitution.
1175 See section 45 of the Zimbabwean Constitution.
1176 Section 46(1) (a) of the Zimbabwean Constitution.
1177 Section 46(1) (b) of the Zimbabwean Constitution.
1178 Section 3 of the Zimbabwean Constitution.
1179 Section 46(1) (c) of the Zimbabwean Constitution.

Another important aspect on the interpretative guide in the Declaration of Rights is the consideration of foreign law.[1180] This is significant in the interpretation of the Declaration of Rights which includes the right of employees to freedom of association as it formed one of the main justifications for taking a comparative analysis with South African law, where Zimbabwean courts have sought guidance when interpreting similar provisions of the Zimbabwean Constitution. Limitations of the constitutional rights including the right of employees to freedom of association were also discussed. It was highlighted that these limitations which include a general limitation clause under section 56 of the Zimbabwean Constitution are meant to protect these rights by providing safeguards against their arbitrary interpretation and application.

Lastly, Chapter four discussed the work of the ZHRC in enforcing the constitutional right to freedom of association. It was noted that despite the clear constitutional mandate of the ZHRC, it faces challenges in real practice such as lack of adequate resources. This has a negative impact on its effectiveness. Similar challenges are also faced by the SAHRC in South Africa. The independence of these institutions is also questionable since the commissioners are appointed by the executive. This arrangement can affect their impartiality when they deal with issues that arise from the exercise by employees of their right to freedom of association.

In chapter five, the right of private sector employees to freedom of association in terms of the Labour Act was discussed. It was highlighted that the Labour Act is the piece of legislation that provides for substantive and procedural rules that governs the enjoyment of the constitutional right of employees to freedom of association in Zimbabwe. In South Africa, there is the Labour Relations Act. It became apparent that the Labour Act provides for the right of employees to form and join trade unions of their choice as long as they are able to meet the conditions of membership.[1181] It was argued that this is consistent with the right of

1180 Section 46(1) (e) of the Zimbabwean Constitution.
1181 Section 4 (2) of the Labour Relations Act.

employees to freedom of association. It was also observed that a similar right exists in South African law.[1182]

Most of the organisational rights are enjoyed by registered trade unions in both Zimbabwe and South Africa. It also became apparent that in South Africa, trade unions with the majority of members at the workplace enjoy more organisational rights than minority trade unions. The chapter also explored the employees' organisational rights at shop floor level. In Zimbabwe, there are workers' committees which are equivalent to workplace forums in South Africa. The antithesis of both the workers' committees in Zimbabwe and the workplace forums in South Arica is their preference on majoritarianism. In Zimbabwe, all members of the workers' committee must belong to the majority trade union at the workplace.[1183] It was argued that this is contrary to the employees' right to freedom of association as it takes away the right of employees to freely choose which trade union they intend to join or not.

There is also the works council that consists of equal number of representation between members who represent the employer and the employees.[1184] These institutions play a pivotal role in ensuring that all workers get effective representation at shop floor level. It was highlighted that the works council should be consulted on key issues that affect the employees. However, the position in South Africa is that workplace forums should not only be consulted but should also participate in joint decision making with the employer on certain issues that were highlighted in the research.

When coming to collective bargaining, it was highlighted that Zimbabwe expressly recognises two levels of collective bargaining, that is the workplace level collective bargaining and the industry level collective bargaining. This is in sharp contrast with the position in South Africa which favours orderly collective bargaining at sectoral level. The problem with the South African law is that it favours bigger

1182 Section 4 of the Labour Relations Act.
1183 Section 23 (1b) of the Labour Act.
1184 Section 25A (2) of the Labour Act.

trade unions. It was further observed that the Labour Act creates a duty to bargain in good faith which has been interpreted by courts to include a duty on the part of the employer to bargain with the employees or their representatives. This is inconsistent with the voluntary nature of collective bargaining as understood and applied in international law. In addition, the other problem is that a collective bargaining agreement in Zimbabwe can bind non-parties to it.[1185] This is inconsistent with the right of such non-parties to freedom of association.

The Ministerial interference with the registration and publication of collective bargaining agreements also poses a major threat to the right of employees to freedom of association as indicated in this research. There is no such interference by the Minister in South Africa.

On strikes, it was observed that the scope of strike law in Zimbabwe is limited as compared to South Africa. It was highlighted that the definition of a 'strike' is much broader in South Africa as compared to Zimbabwe. In addition, South Africa recognises secondary strikes and protest action. On the limitations to the right to strike, it was noted that they are recognised in terms of international labour law as long as they satisfy a defined criteria that does not take away the right to strike itself. The same applies to the methods that may be used to deal with unlawful strikes. Such methods should not be excessive such as the use of criminal law in Zimbabwe to deal with unlawful but peaceful strikes. It is contrary to the full enjoyment of the employees' right to freedom of association.

6.3 Recommendations

The research has highlighted many points of weaknesses and gaps in the Zimbabwean law which need to be addressed if private sector employees are to fully enjoy their right to freedom of association. This part suggests recommendations which may be considered by all the arms of government in order to improve the position of employees at the workplace.

[1185] Section 82 of the Labour Act.

6.3.1 Effective human rights enforcement mechanisms at international level

It is clear that the right to freedom of association is covered in all the important international human rights law and labour law instruments. However, most of the international bodies such as the ILO do not have coercive powers to deal with errant States. Sometimes it is difficult for the aggrieved employees to get adequate protection in their domestic courts or relevant tribunals. There must be effective enforcement mechanisms at international level which are binding on the concerned State.

6.3.2 Harmonisation of labour laws in Zimbabwe

It was highlighted in the research that Zimbabwe has a two-tier labour law system where private sector employees are governed by the Labour Act while public sector employees are governed by the Constitution and Public Service Act. This arrangement divides employees. All employees should fall under the Labour Act just like in South Africa where both public service and private sector employees fall under the Labour Relations Act. In that regard, employees are able to get similar protections. In addition, they are able to speak with one voice as far as their right to freedom of association is concerned.

6.3.3 Expansion of the jurisprudence on freedom of association by courts

Since the inception of the Zimbabwean Constitution in 2013, there are very few cases which have specifically and comprehensively dealt with the right of employees to freedom of association. The reason could be that very few cases have come before the courts. However, it is in the interest of justice that courts should take the opportunity to develop detailed jurisprudence on this subject whenever an opportunity presents itself. South African courts have managed to develop their own jurisprudence around their constitution since its introduction in 1996. One such example was the pronouncement by its Supreme Court of Appeal in the *SANDU (2006)* case that section 23(5) of the South African Constitution did not create a duty to bargain on the part of the employer. Zimbabwean courts

should follow suit and be proactive in the promotion of the right of employees to freedom of association.

6.3.4 Amendments to provisions on collection and payment of union fees

Sections 54 and 55 of the Labour Act should be amended to remove the power of the Minister to prohibit or modify agreements between employers regarding the payment and use of union fees. The Minister's powers are too excessive and they represent an unwarranted inference with the right of trade unions to regulate their own internal affairs. It should be left to any aggrieved party to approach an impartial tribunal or a court of law if a dispute on the payment or use of union fees arises.

In addition, section 54 of the Labour Act should also be amended so that an express authorisation of the individual employee is required before any deduction of union fees is effected. This is the position in South African law and it ensures that the individual employee's right to associate with a particular trade union is protected.

6.3.5 Broadening of the right of employees and their representatives to information

The current formulation of the Labour Act leaves the right of employees to information very limited in scope. Examples in the Labour Act include disclosure of names of employees and particulars of their wages in terms of section 29 of the Labour Act and disclosure of information for the purposes of collective bargaining in terms of sections 75 and 76 of the Labour Act. It is submitted that trade unions should be entitled to all the information that they request for the purpose of effectively representing their members unless such information cannot be legally disclosed. Zimbabwe should learn from South Africa where the scope of disclosure of information is broader as discussed in this research.

6.3.6 Amendments to provisions on workers' committees and works councils

It is proposed that section 23 of the Labour Act should be amended to remove the requirement that all members of a workers' committee should belong to the majority trade union at a given workplace. Employees at the workplace should be given an opportunity to choose if they intend to join a particular trade union or not in line with their right to freedom of association.

In addition, section 25A of the Labour Act should be amended to ensure that works' councils are not only consulted on certain matters but they also participate in joint decision making on other matters. Zimbabwe should take a leaf from the South African law that requires workplace forums to participate in joint decision making in certain matters apart from mere consultations. This position will ensure that private sector employees fully realise their right to freedom of association.

6.3.7 The introduction of trade union representatives at specified workplaces

Just like in South Africa, the Labour Act should make provision for the introduction of shop stewards in big workplaces. While workers' committees exist in Zimbabwe to represent the interests of all members at the workplace, there is still a need to have trade union representatives in large corporations and organisations where the workers' committees are less influential. This ensures that trade unions stay connected with their members on a day-to-day basis. If there are any grievances by the trade union members, they will be quickly attended to. This arrangement will ensure that the right of employees to freedom of association is fully protected and enhanced.

6.3.8 The interpretation of the duty to bargain in good faith by courts

Although section 8 (c) of the Labour Act provides that it is an unfair labour practice for the employer to refuse to negotiate in good faith with a workers' committee or trade union that represents employees, it should not be interpreted to mean that a duty to bargain is created. When courts are faced with such cases, they should not order an employer to bargain with the employees. This is in line with the voluntarist

nature of collective bargaining that is promoted in international law and has been followed in South Africa.

6.3.9 Amendments to the provisions on collective bargaining agreements

Firstly, section 82 of the Labour Act should be amended so that it does not extend the binding effect of collective bargaining agreements to non-parties. This is in line with the right of employees to freedom of association that requires that employees should voluntarily choose a trade union they want to join. Therefore, they should not be affected by decisions of a trade union that they are not members of.

Furthermore, sections 79 and 80 of the Labour Act should be amended to remove the powers of the Minister in the registration of collective bargaining agreements. The wide powers of the Minister take away the voluntarist nature of collective bargaining. In South Africa, the Minister only comes in when a bargaining council requests him or her to extend a collective agreement to non-parties in terms of section 32 of the Labour Relations Act.

6.3.10 Amendment to the definition of 'collective job action'

The definition of 'collective job action' under section 104 of the Labour Act should be extended to cover former employees. This is the position under section 213 of the Labour Relations Act in South Africa. It ensures that those employees who are unfairly dismissed due to resorting to a strike get the necessary legal protection as employees. This accords well with the full enjoyment of their right to freedom of association.

6.3.11 The introduction of secondary strikes and protest actions in Zimbabwe

Employees are powerful when they speak with one voice. Thus, there is a justification in introducing secondary strikes in Zimbabwe just like in South Africa where they exist. In addition, Zimbabwean history shows that labour movements have attempted to take action to address socio-economic conditions in Zimbabwe but to no avail. This is because there is no provision in the Labour Act for protest

action in Zimbabwe. Therefore, the Labour Act should make such provision to ensure that employees fully enjoy a broader right to strike which is an essential component of their right to freedom of association. Section 77 of the Labour Relations Act expressly provides for the right to protest action in South Africa.

6.3.12 Amendments to provisions that deal with unlawful strikes

Firstly, the power of the Minister under section 106(1) of the Labour Act to issue a "show cause order" must be removed. The Labour Court should have the exclusive jurisdiction to deal with unlawful strikes just like in South Africa. This arrangement ensures that the right of employees to freedom of association is protected. Employees should only be subjected to an impartial court where they are given the right to be heard before a decision is made. Secondly, section 109(3) in the Labour Act should be amended to remove the power of the Minister to suspend the payment of union fees to a trade union for a certain period on the basis that it has authorised an unlawful strike. Such a punishment is contrary to the right of employees to freedom of association as it can be used for ulterior motives.

Thirdly, section 109(1) of the Labour Act should be amended to de-criminalise unlawful but peaceful strikes. Criminal law should only be reserved for acts of criminality during the strike itself. This is in line with international best practice and the position that is practised in South Africa. It is possible for employees to engage in an unlawful strike without knowing that the strike is unlawful. They should not be punished by criminal law if they remain peaceful. This position promotes the right of employees to freedom of association.

Lastly, section 109(6) of the Labour Act should be amended in order to limit civil liability so that it does not dissuade employees from striking. Any award of compensation should be just and equitable. It should not amount to penalising the employees for resorting to a strike even if it is unlawful. All the relevant factors must be considered. In that regard, Zimbabwe should also follow the South African model of awarding damages as enshrined in section 68 of the Labour Relations

Act. The factors which are taken into account in South Africa ensure that the employees' right to strike is preserved.

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Annexures

Annexure 1: UNISA Ethical Clearance Letter

UNISA university of south africa

UNISA 2021 ETHICS REVIEW COMMITTEE

Date: 2021:05:27

ERC Reference No. : ST48-2021

Name : N Maringe

Dear Noah Maringe

Decision: Ethics Approval from 2021:05:27 to 2024:05:27

Researcher: Noah Maringe

Supervisor: Prof Prof M Budeli-Nemakonde

A COMPARATIVE ANALYSIS OF FREEDOM OF ASSOCIATION FOR PRIVATE SECTOR EMPLOYEES IN ZIMBABWE

Qualification: LLD

Thank you for the application for research ethics clearance by the Unisa 2021 Ethics Review Committee for the above mentioned research. Ethics approval is granted for 3 years.

*The **Negligible risk application** was **reviewed** by the CLAW Ethics Review Committee on 27 May 2021 in compliance with the Unisa Policy on Research Ethics and the Standard Operating Procedure on Research Ethics Risk Assessment.*

The proposed research may now commence with the provisions that:

1. **The researcher will ensure that the research project adheres to the relevant guidelines set out in the Unisa Covid-19 position statement on research ethics attached. Provisional authorisation is granted.**
2. The researcher(s) will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics.

Open Rubric

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3. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the CLAW Committee.
4. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.
5. Any changes that can affect the study-related risks for the research participants, particularly in terms of assurances made with regards to the protection of participants' privacy and the confidentiality of the data, should be reported to the Committee in writing, accompanied by a progress report.
6. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study. Adherence to the following South African legislation is important, if applicable: Protection of Personal Information Act, no 4 of 2013; Children's act no 38 of 2005 and the National Health Act, no 61 of 2003.
7. Only de-identified research data may be used for secondary research purposes in future on condition that the research objectives are similar to those of the original research. Secondary use of identifiable human research data require additional ethics clearance.
8. No field work activities may continue after the expiry date **2024:05:27.** Submission of a completed research ethics progress report will constitute an application for renewal of Ethics Research Committee approval.

Note:

The reference number ST 48-2021 should be clearly indicated on all forms of communication with the intended research participants, as well as with the Committee.

Yours sincerely,

Prof T Budhram
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E-mail: budhrt@unisa.ac.za
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Annexure 2: Turnitin Digital Receipt

turnitin

Digital Receipt

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FREEDOM OF ASSOCIATION FOR PRIVATE SECTOR EMPLOYEES IN ZIMBABWE: A COMPARATIVE ANALYSIS

DOCTOR OF LAWS

UNIVERSITY OF SOUTH AFRICA