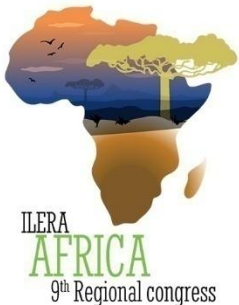
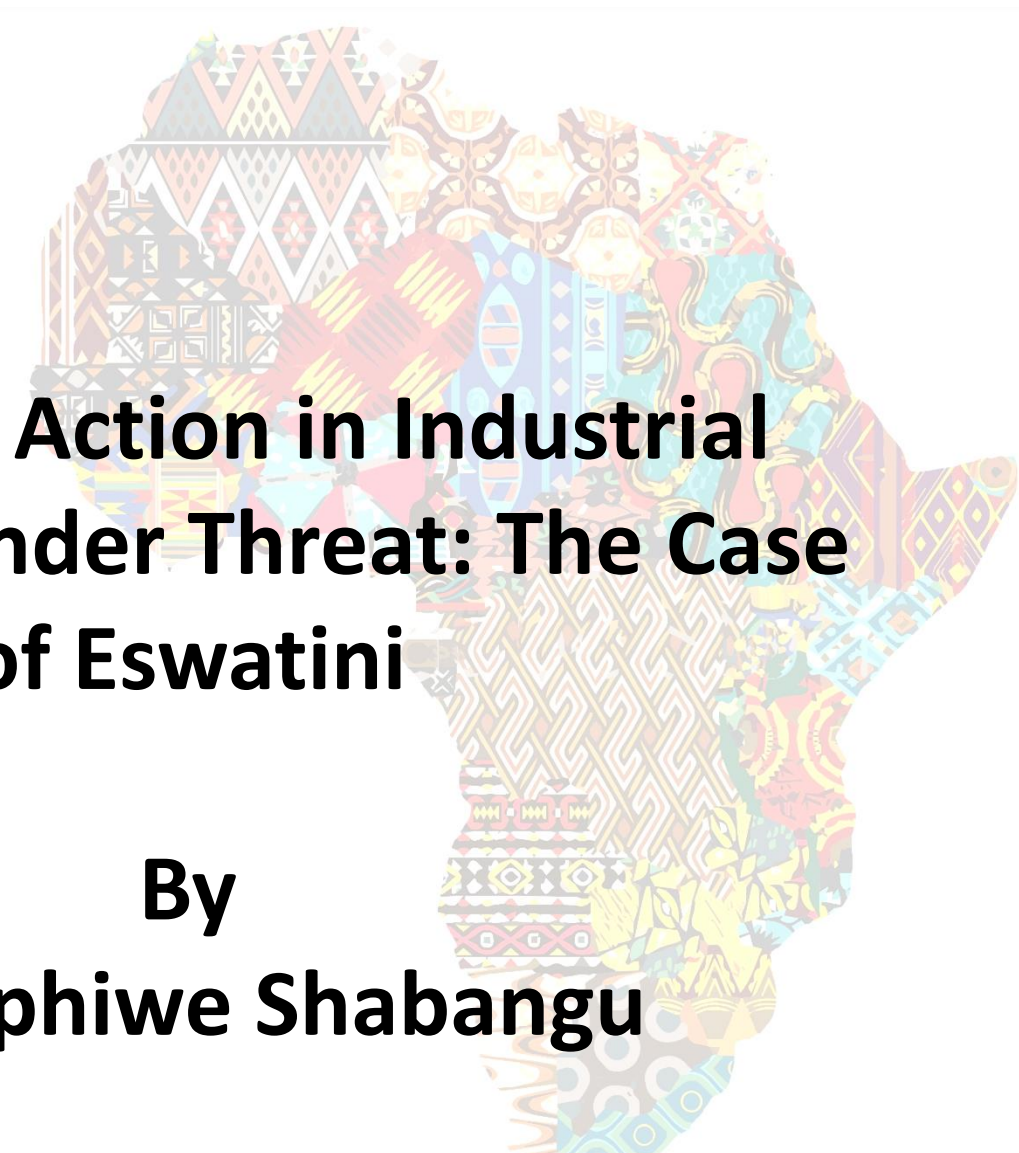




ILERA **AFRICA** 9th Regional Congress

26 - 29 September 2021





Collective Action in Industrial Relations Under Threat: The Case of Eswatini

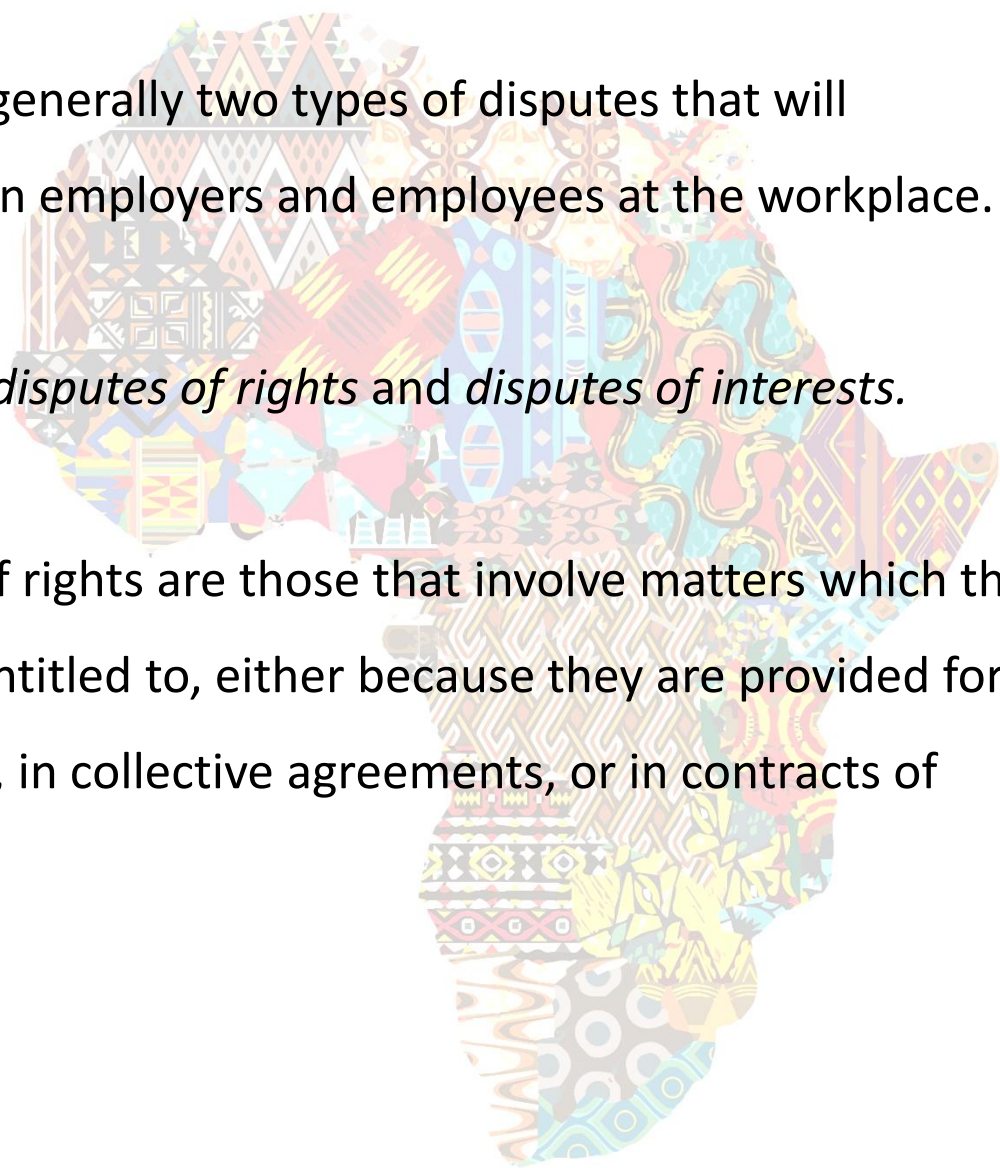
**By
N. Simphiwe Shabangu**



- ❖ Employers and employees have to relate to each other on a continuous basis .

- ❖ This relationship between employers and employees is characterised by conflict.

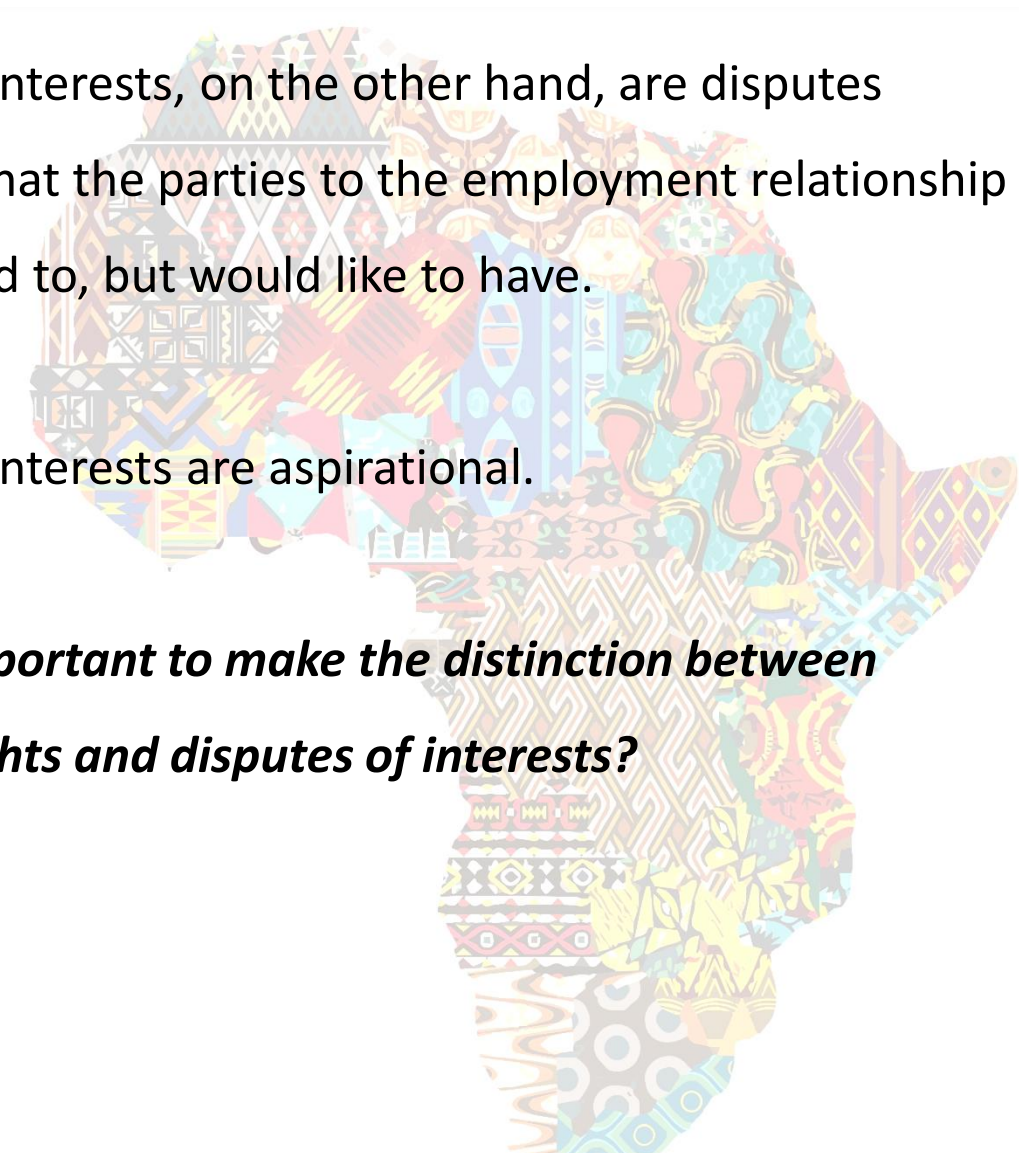
- ❖ The Government, through legislation, has created guidelines for the resolution of workplace disputes.



❖ There are generally two types of disputes that will arise between employers and employees at the workplace.

❖ These are *disputes of rights* and *disputes of interests*.

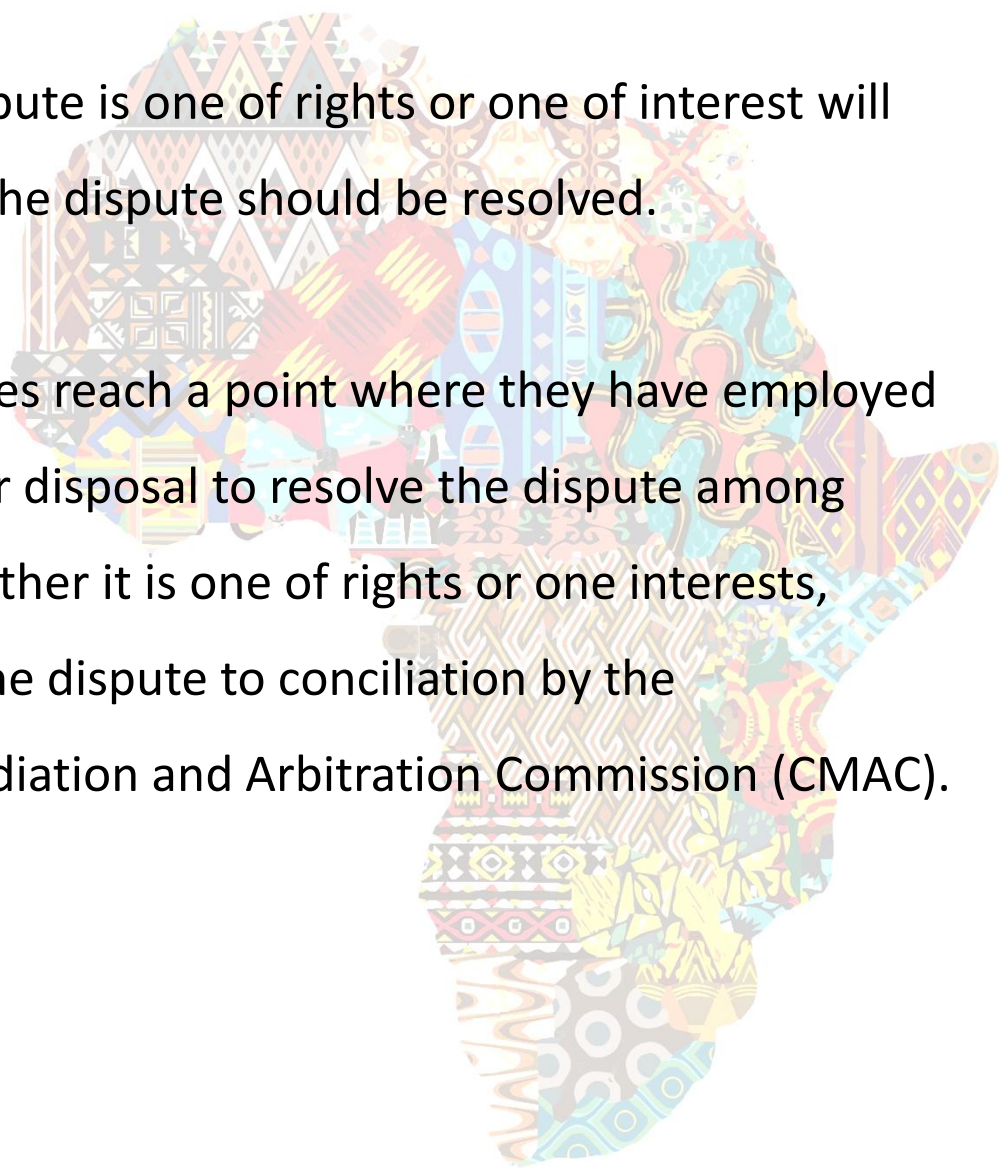
❖ Disputes of rights are those that involve matters which the parties are entitled to, either because they are provided for in legislation, in collective agreements, or in contracts of employment

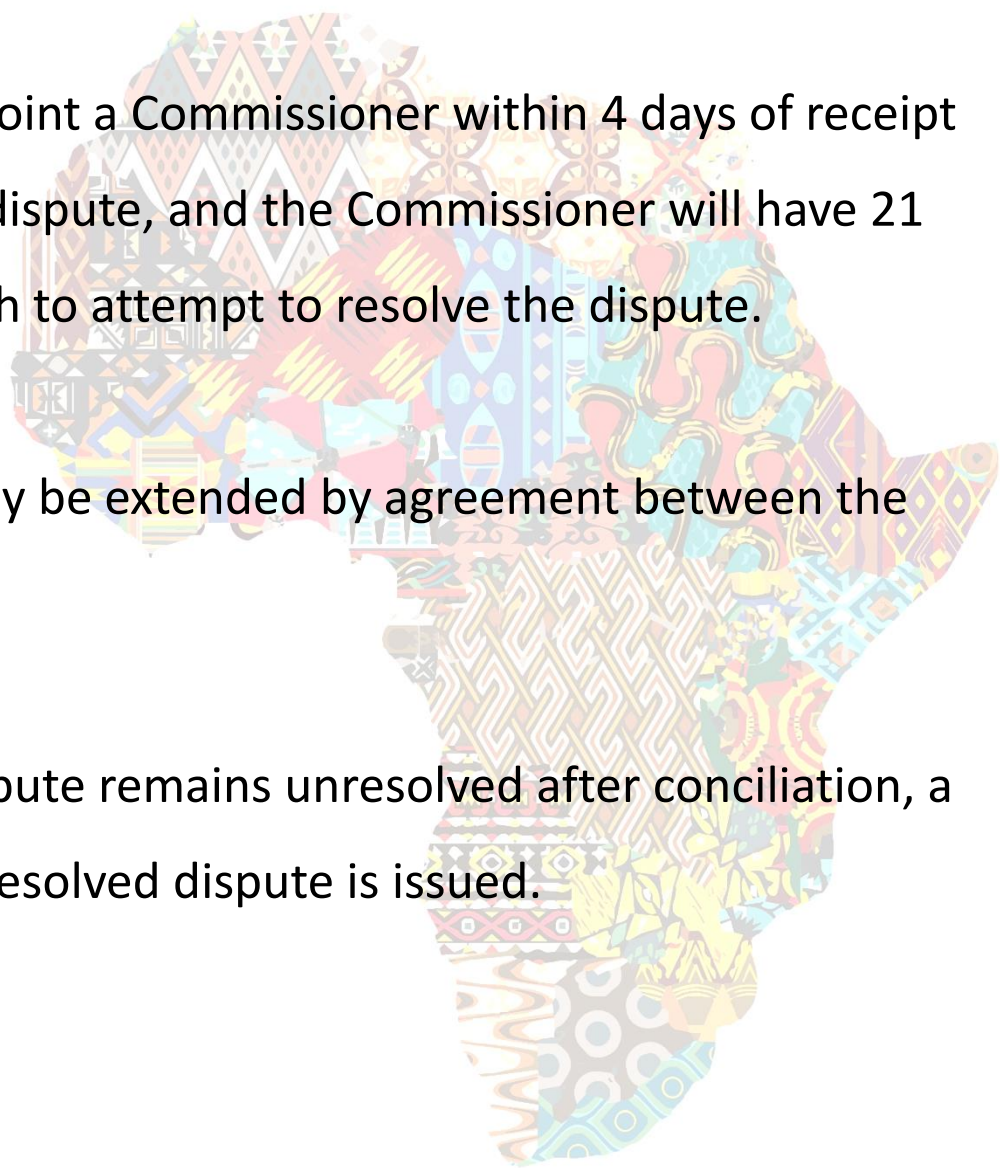


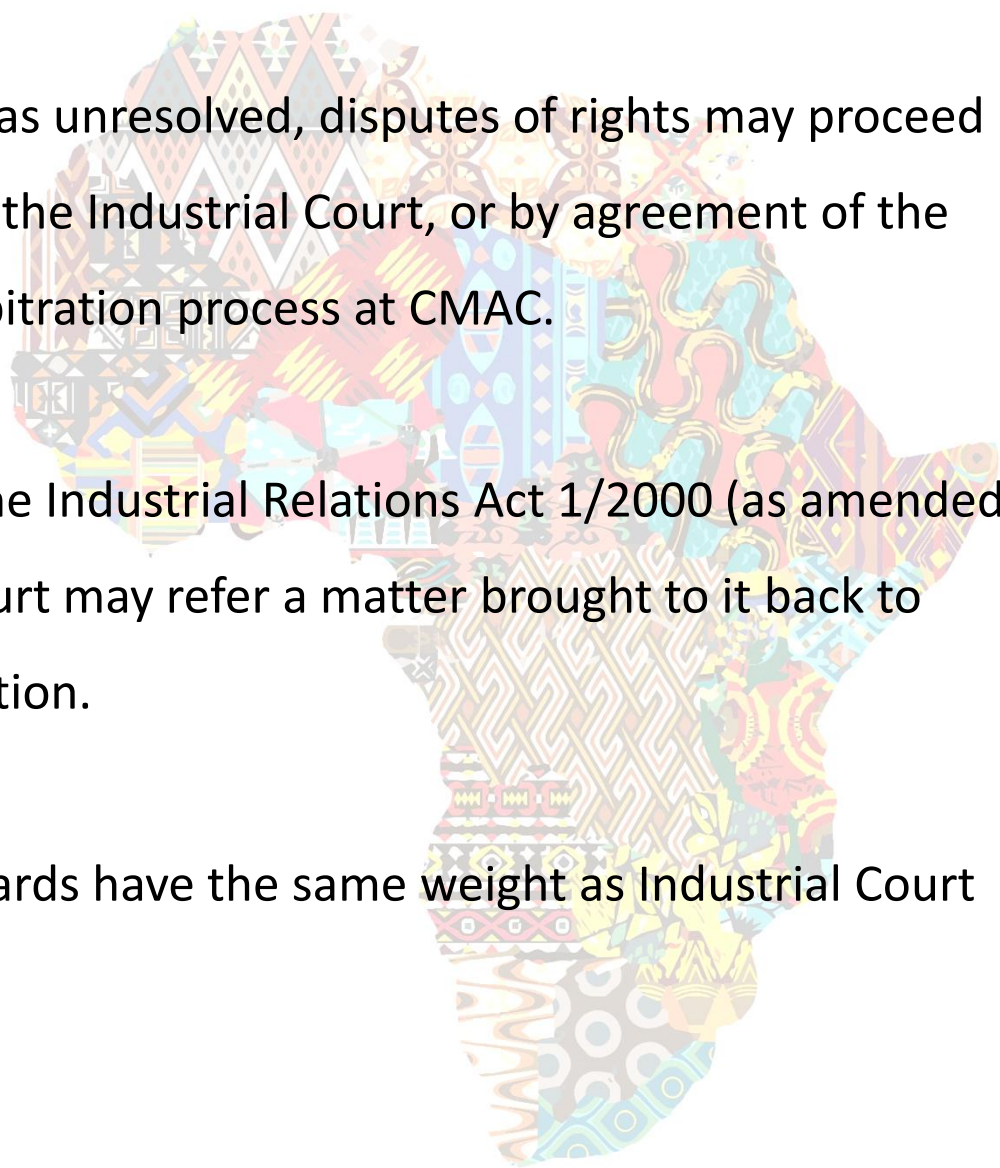
❖ Disputes of interests, on the other hand, are disputes over matters that the parties to the employment relationship are not entitled to, but would like to have.

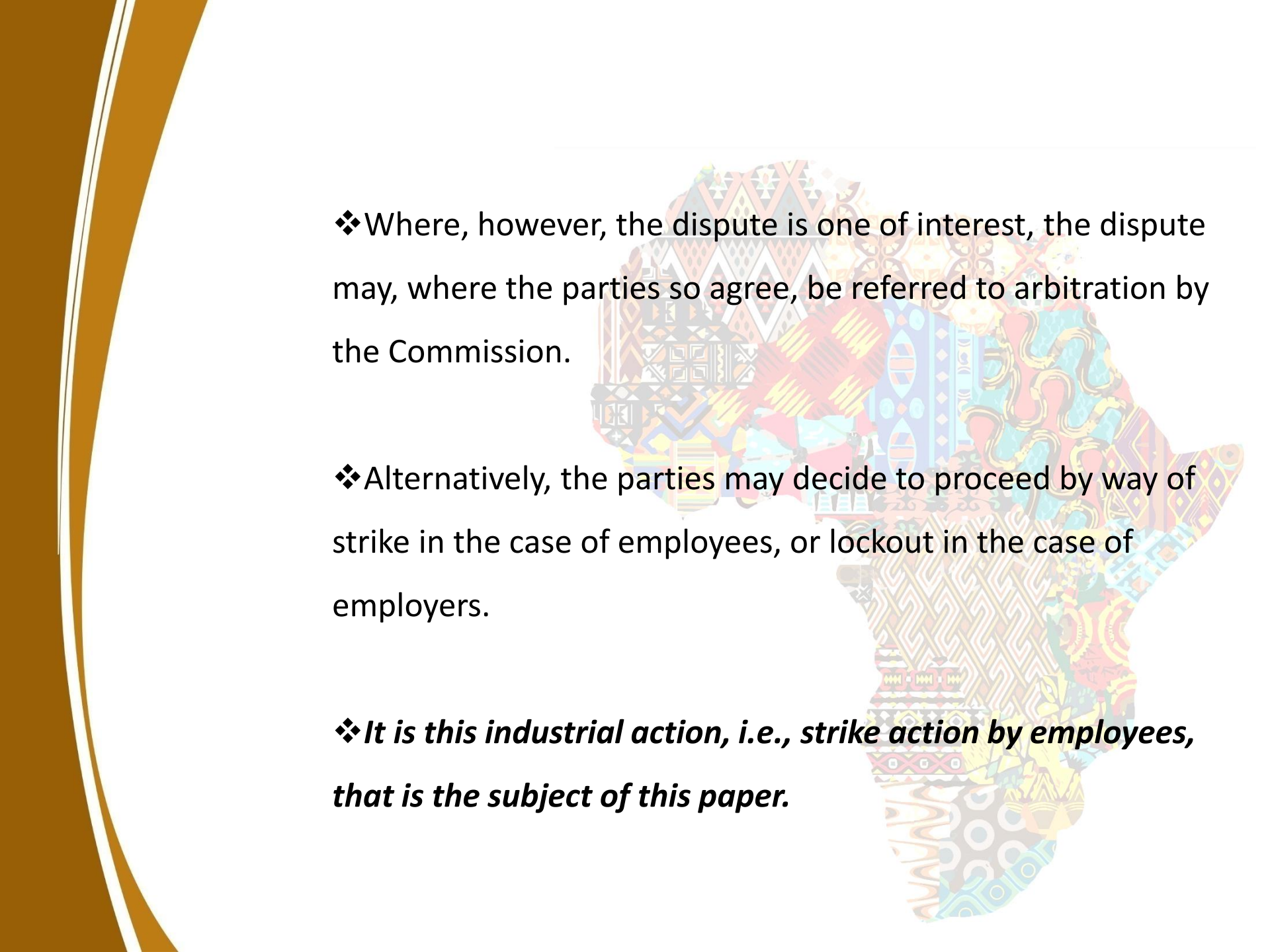
❖ Disputes of interests are aspirational.

❖ ***Why is it important to make the distinction between disputes of rights and disputes of interests?***

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- ❖ Whether a dispute is one of rights or one of interest will determine how the dispute should be resolved.
 - ❖ Once the parties reach a point where they have employed all means at their disposal to resolve the dispute among themselves, whether it is one of rights or one interests, they may refer the dispute to conciliation by the Conciliation, Mediation and Arbitration Commission (CMAC).

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- ❖CMAC will appoint a Commissioner within 4 days of receipt of the report of dispute, and the Commissioner will have 21 days within which to attempt to resolve the dispute.
 - ❖This period may be extended by agreement between the parties.
 - ❖Where the dispute remains unresolved after conciliation, a certificate of unresolved dispute is issued.

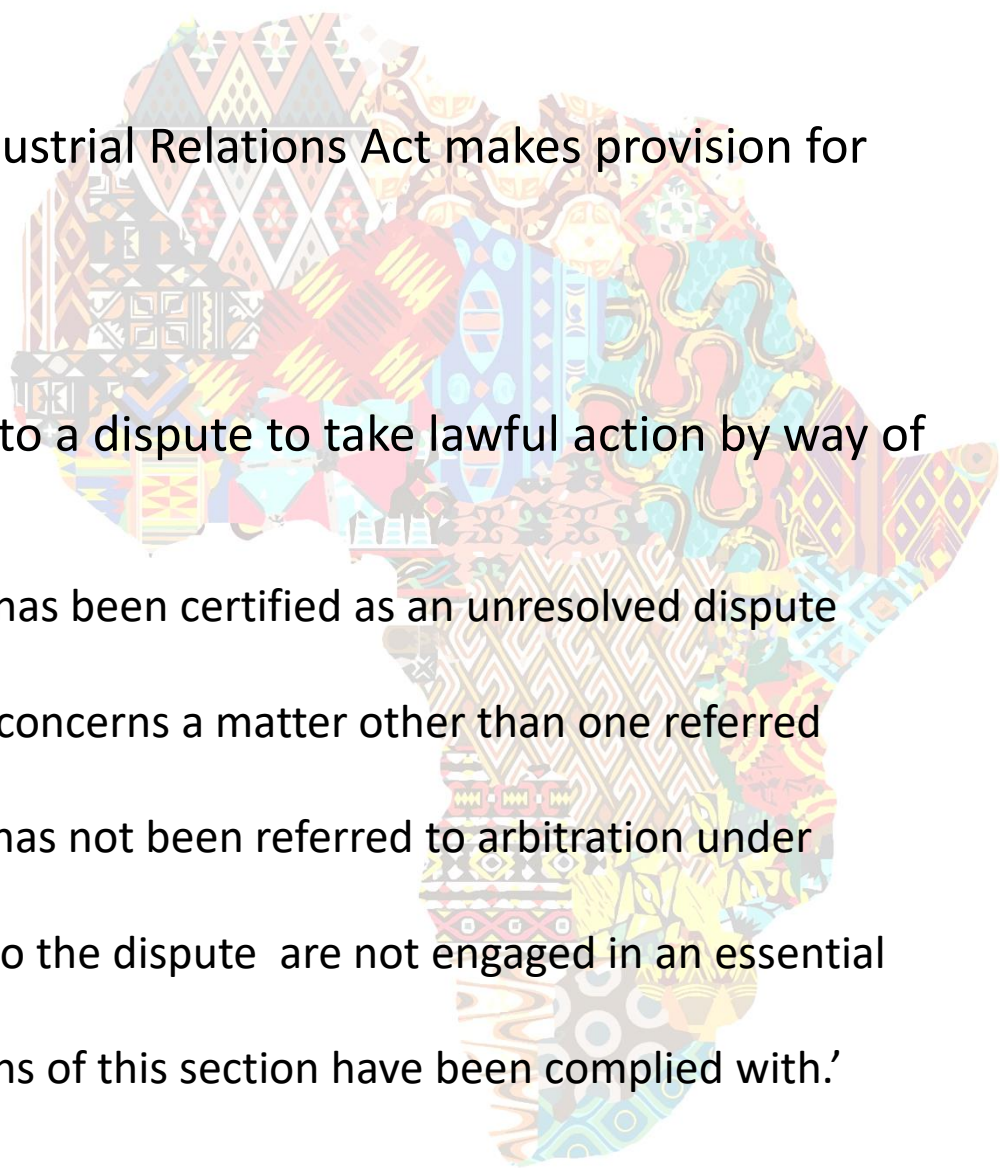
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- ❖ Once certified as unresolved, disputes of rights may proceed by application to the Industrial Court, or by agreement of the parties to the arbitration process at CMAC.
 - ❖ According to the Industrial Relations Act 1/2000 (as amended) the Industrial Court may refer a matter brought to it back to CMAC for arbitration.
 - ❖ Arbitration awards have the same weight as Industrial Court judgments.

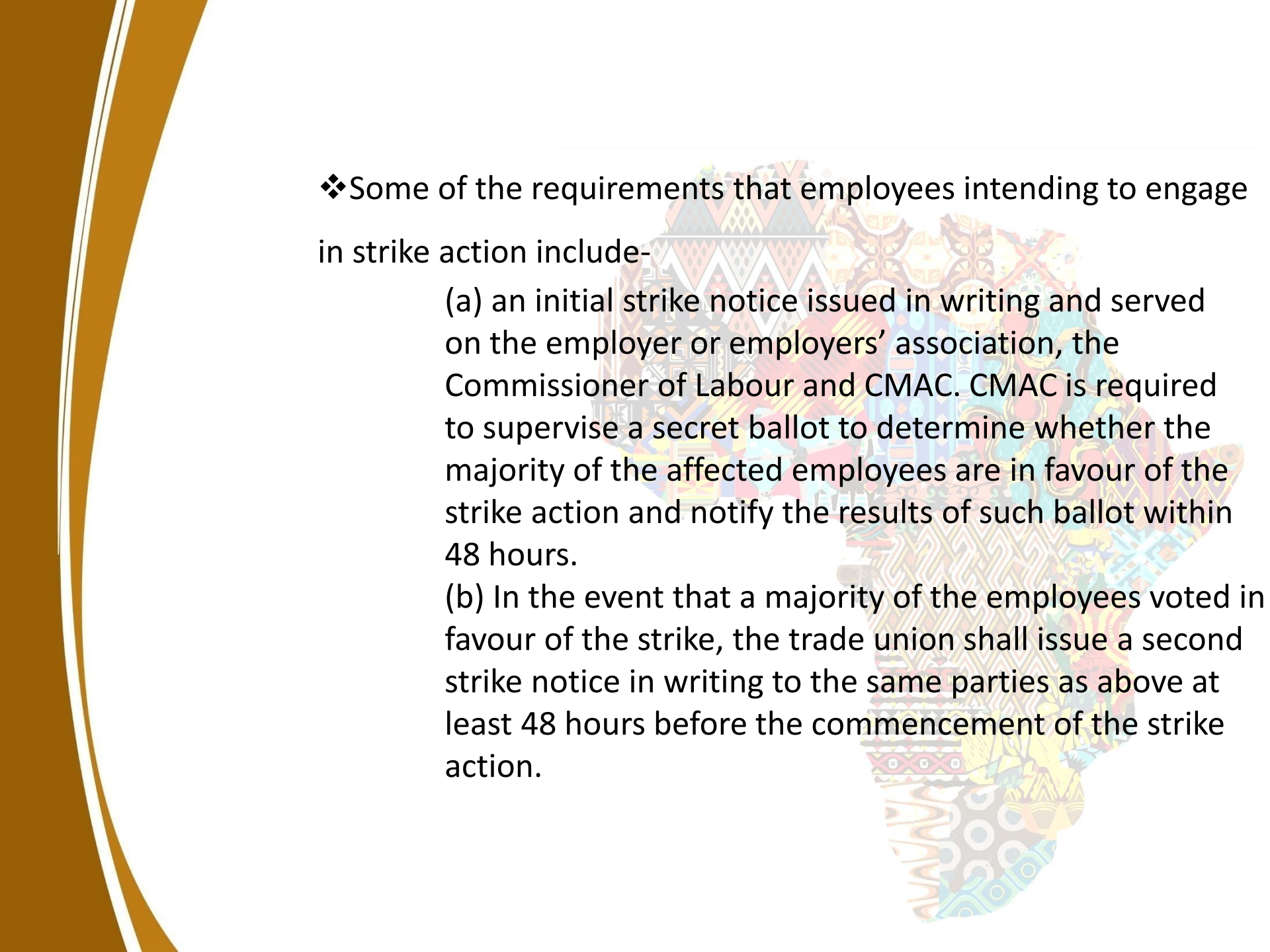


❖ Where, however, the dispute is one of interest, the dispute may, where the parties so agree, be referred to arbitration by the Commission.

❖ Alternatively, the parties may decide to proceed by way of strike in the case of employees, or lockout in the case of employers.

❖ ***It is this industrial action, i.e., strike action by employees, that is the subject of this paper.***

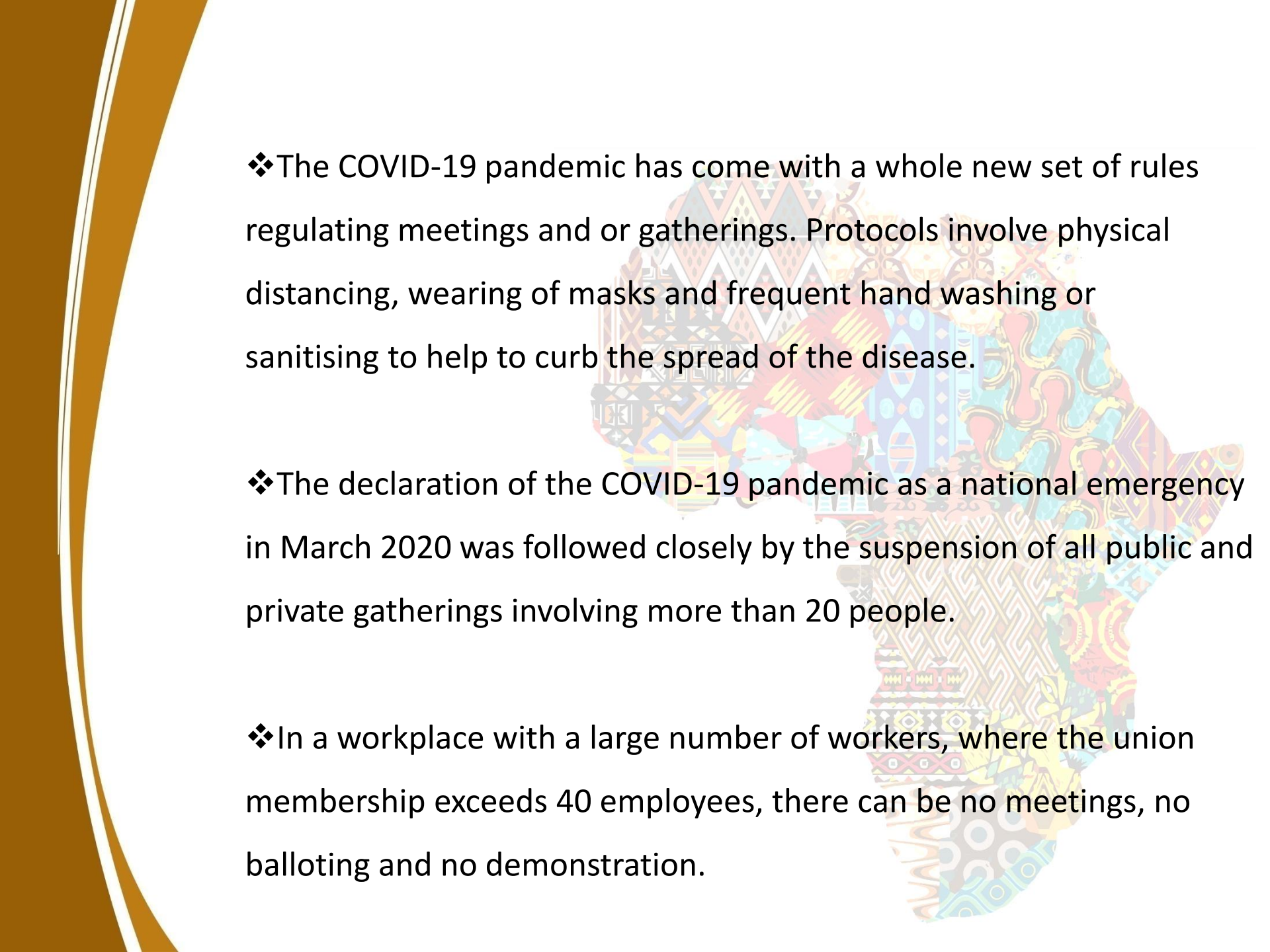
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- ❖ Section 86 of the Industrial Relations Act makes provision for strike procedure.
 - ❖ It entitles 'any party to a dispute to take lawful action by way of a lockout or a strike if-
 - (a) the dispute has been certified as an unresolved dispute under s81(5);
 - (b) the dispute concerns a matter other than one referred to in s85(2);
 - (c) the dispute has not been referred to arbitration under s85(3);
 - (d) the parties to the dispute are not engaged in an essential service; and
 - (e) the provisions of this section have been complied with.'



❖ Some of the requirements that employees intending to engage in strike action include-

(a) an initial strike notice issued in writing and served on the employer or employers' association, the Commissioner of Labour and CMAC. CMAC is required to supervise a secret ballot to determine whether the majority of the affected employees are in favour of the strike action and notify the results of such ballot within 48 hours.

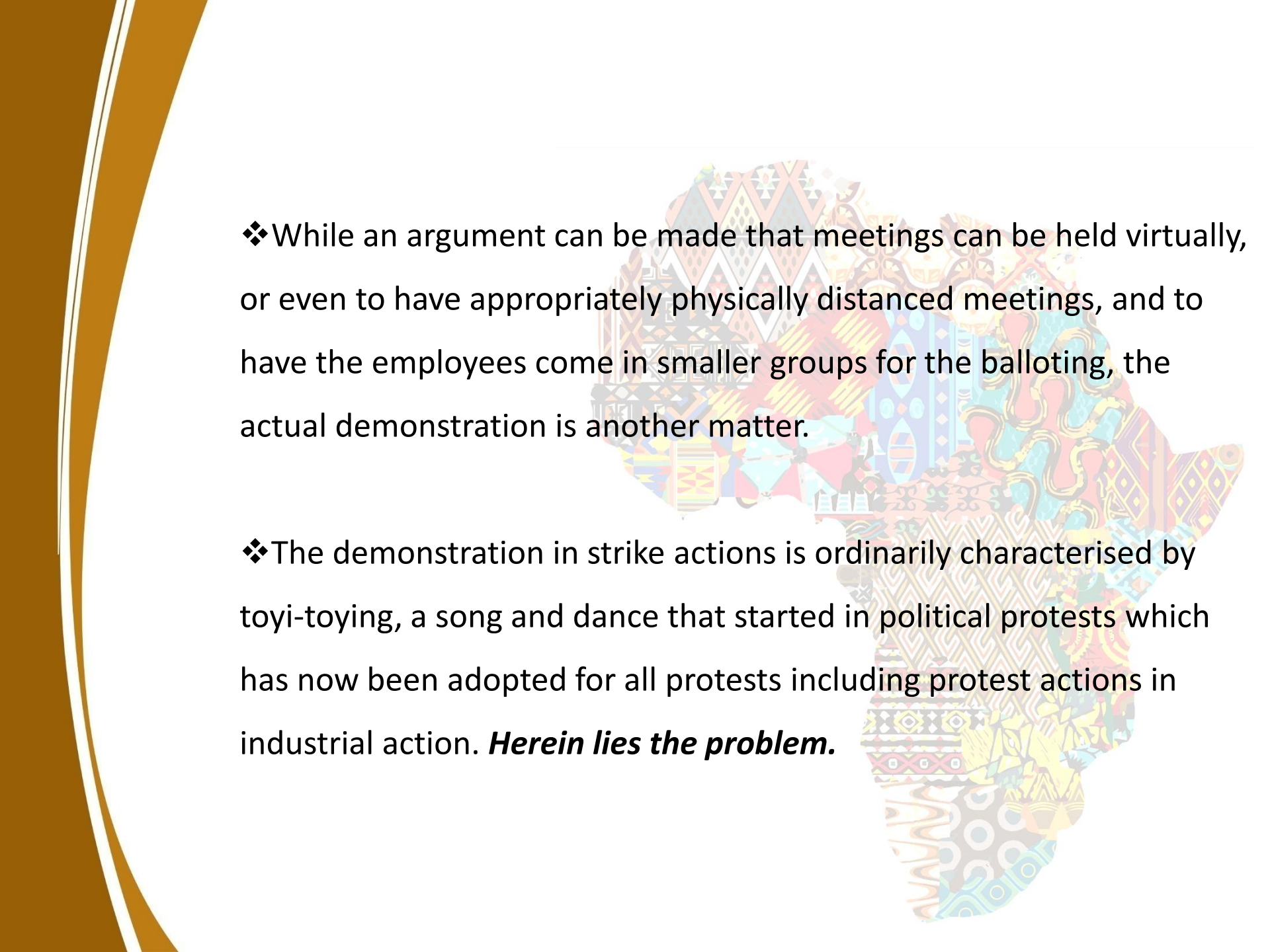
(b) In the event that a majority of the employees voted in favour of the strike, the trade union shall issue a second strike notice in writing to the same parties as above at least 48 hours before the commencement of the strike action.



❖ The COVID-19 pandemic has come with a whole new set of rules regulating meetings and or gatherings. Protocols involve physical distancing, wearing of masks and frequent hand washing or sanitising to help to curb the spread of the disease.

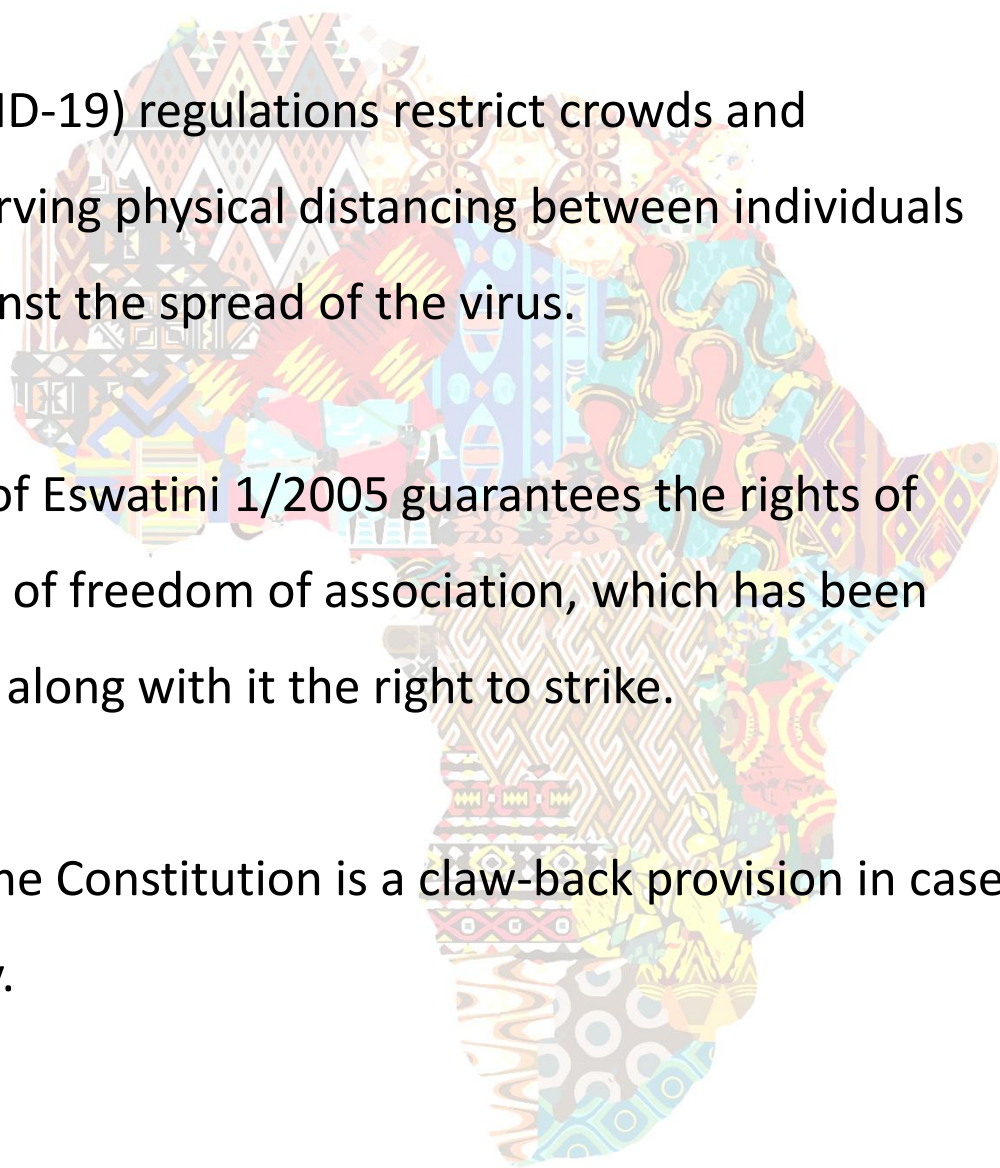
❖ The declaration of the COVID-19 pandemic as a national emergency in March 2020 was followed closely by the suspension of all public and private gatherings involving more than 20 people.

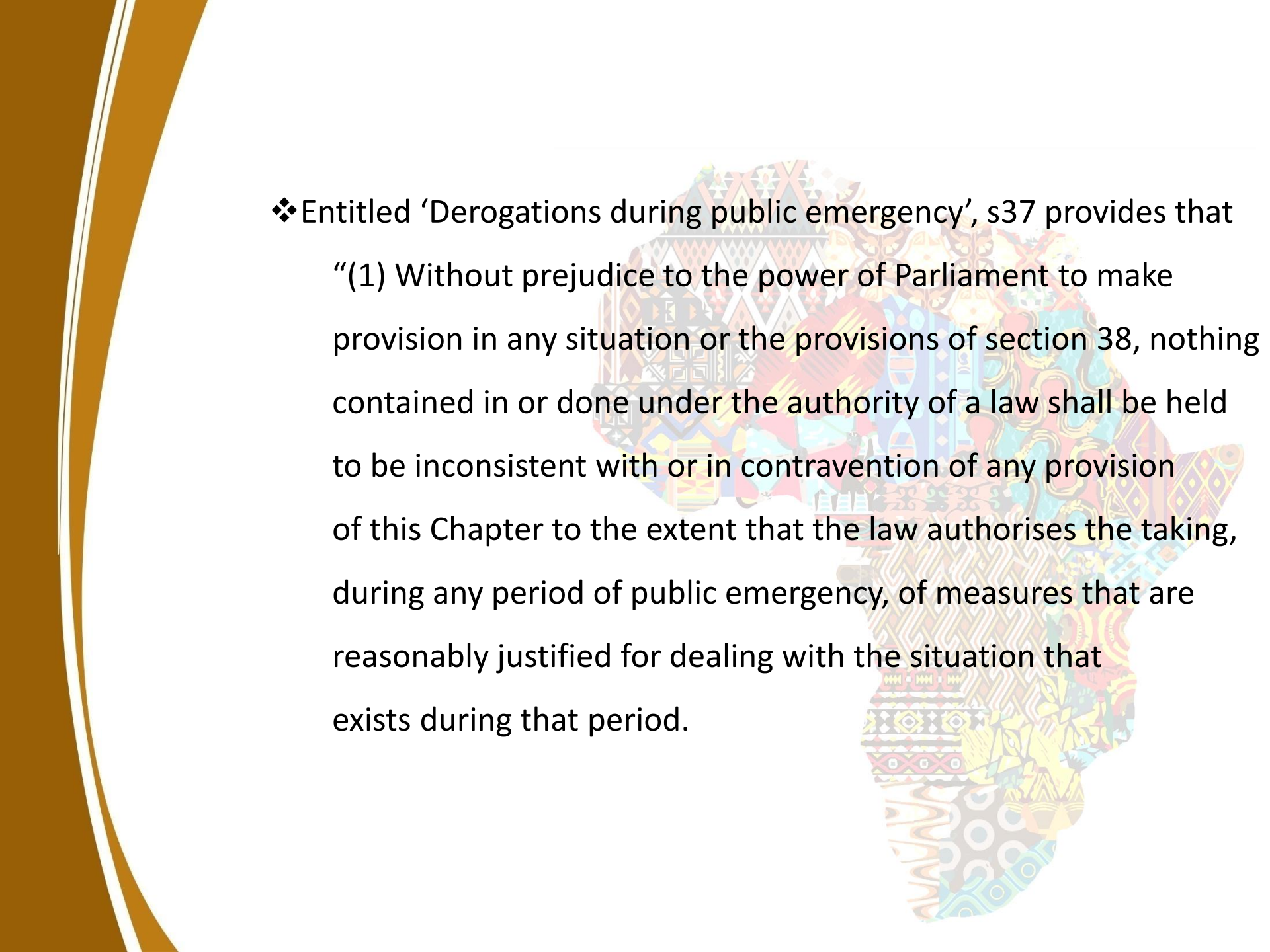
❖ In a workplace with a large number of workers, where the union membership exceeds 40 employees, there can be no meetings, no balloting and no demonstration.

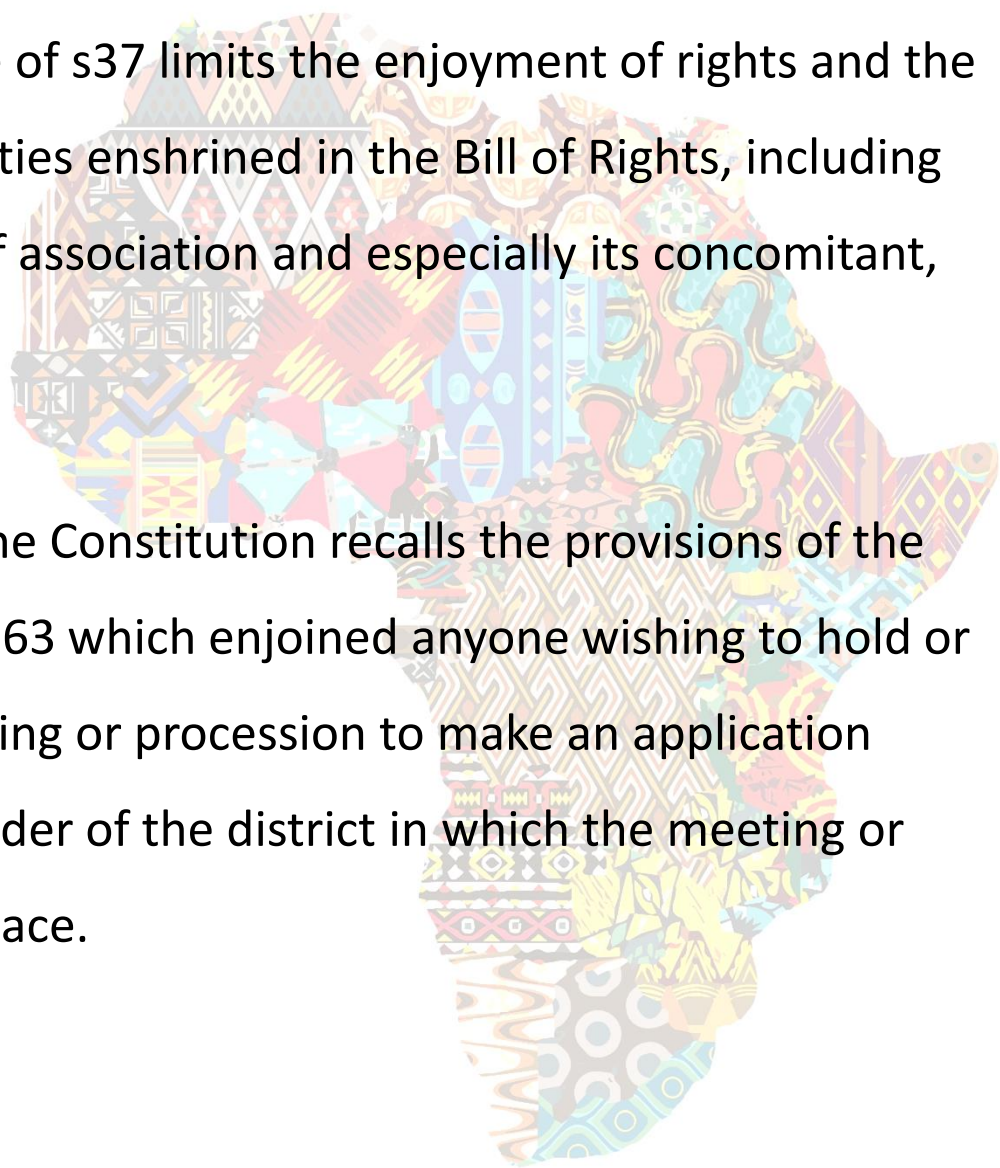


❖ While an argument can be made that meetings can be held virtually, or even to have appropriately physically distanced meetings, and to have the employees come in smaller groups for the balloting, the actual demonstration is another matter.

❖ The demonstration in strike actions is ordinarily characterised by toyi-toying, a song and dance that started in political protests which has now been adopted for all protests including protest actions in industrial action. ***Herein lies the problem.***

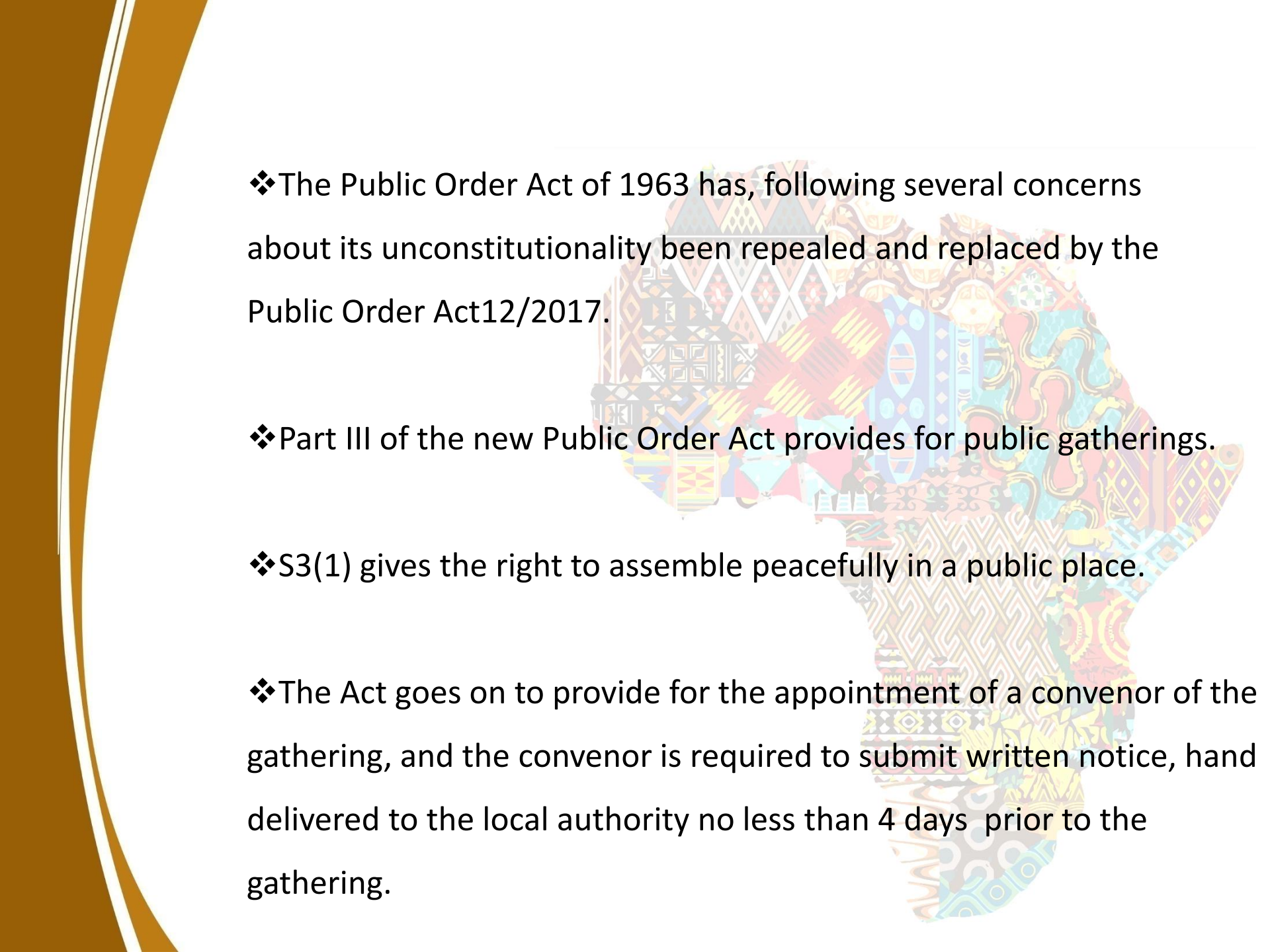
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- ❖ Coronavirus (COVID-19) regulations restrict crowds and gatherings not observing physical distancing between individuals as a precaution against the spread of the virus.
 - ❖ The Constitution of Eswatini 1/2005 guarantees the rights of Workers to the right of freedom of association, which has been understood to carry along with it the right to strike.
 - ❖ However, s37 of the Constitution is a claw-back provision in cases of public emergency.

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- ❖ Entitled ‘Derogations during public emergency’, s37 provides that
“(1) Without prejudice to the power of Parliament to make provision in any situation or the provisions of section 38, nothing contained in or done under the authority of a law shall be held to be inconsistent with or in contravention of any provision of this Chapter to the extent that the law authorises the taking, during any period of public emergency, of measures that are reasonably justified for dealing with the situation that exists during that period.



❖ The clawback nature of s37 limits the enjoyment of rights and the protection of civil liberties enshrined in the Bill of Rights, including the right to freedom of association and especially its concomitant, the right to strike.

❖ In its effect, s37 of the Constitution recalls the provisions of the Public Order Act 17/1963 which enjoined anyone wishing to hold or organise a public meeting or procession to make an application to the station commander of the district in which the meeting or procession may take place.

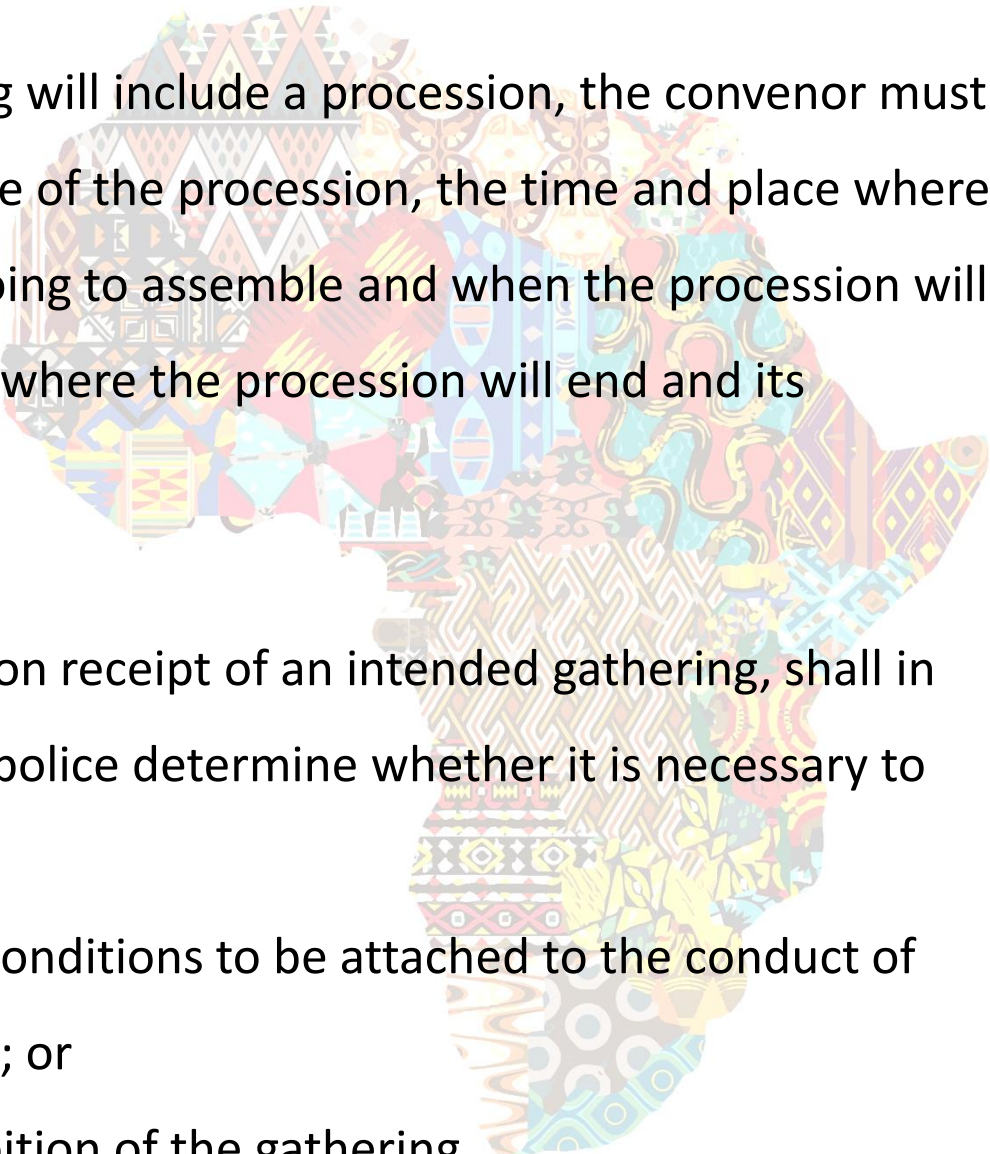


❖ The Public Order Act of 1963 has, following several concerns about its unconstitutionality been repealed and replaced by the Public Order Act 12/2017.

❖ Part III of the new Public Order Act provides for public gatherings.

❖ S3(1) gives the right to assemble peacefully in a public place.

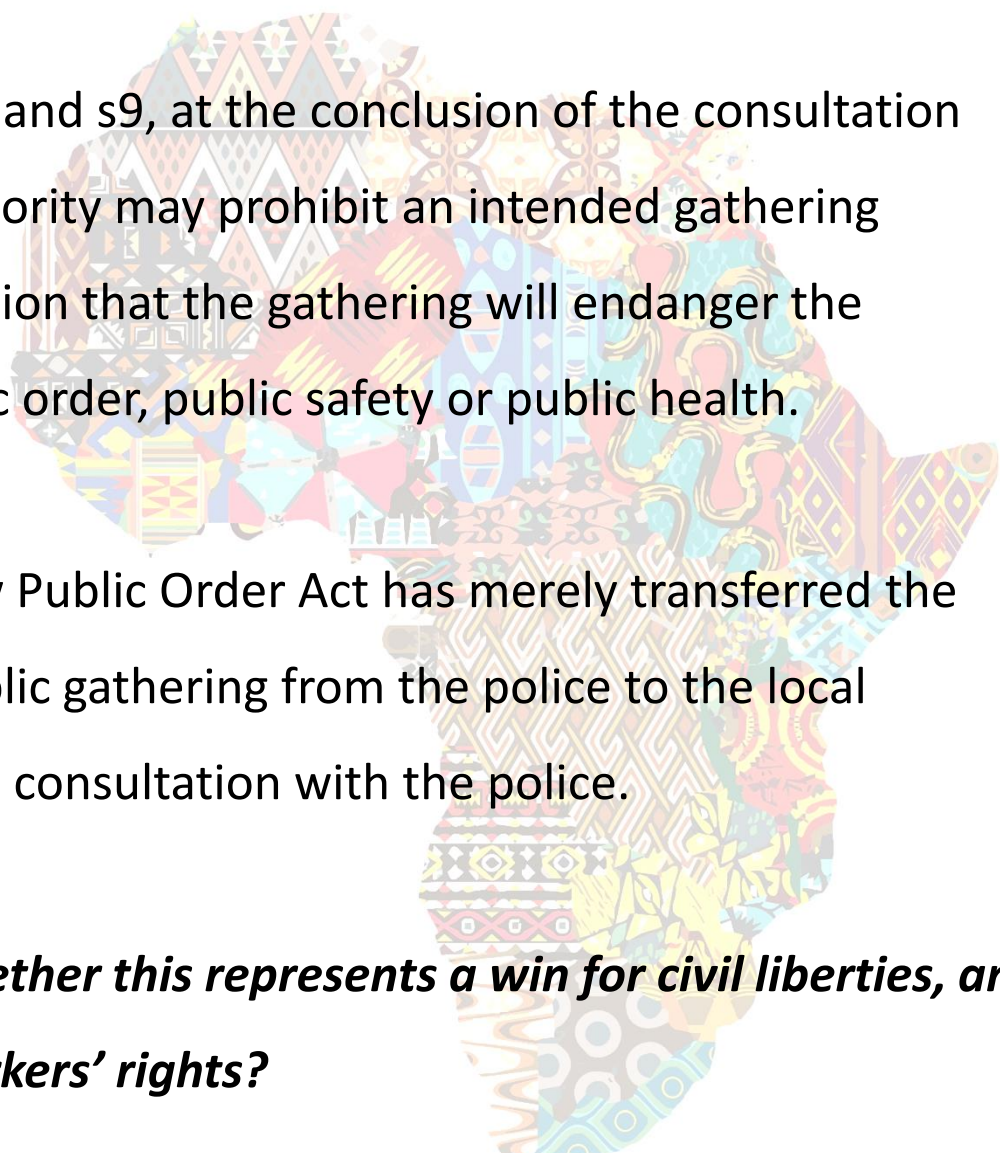
❖ The Act goes on to provide for the appointment of a convenor of the gathering, and the convenor is required to submit written notice, hand delivered to the local authority no less than 4 days prior to the gathering.



❖ Where the gathering will include a procession, the convenor must give the time and route of the procession, the time and place where the participants are going to assemble and when the procession will commence, as well as where the procession will end and its participants disperse.

❖ The local authority, on receipt of an intended gathering, shall in consultation with the police determine whether it is necessary to consult on...

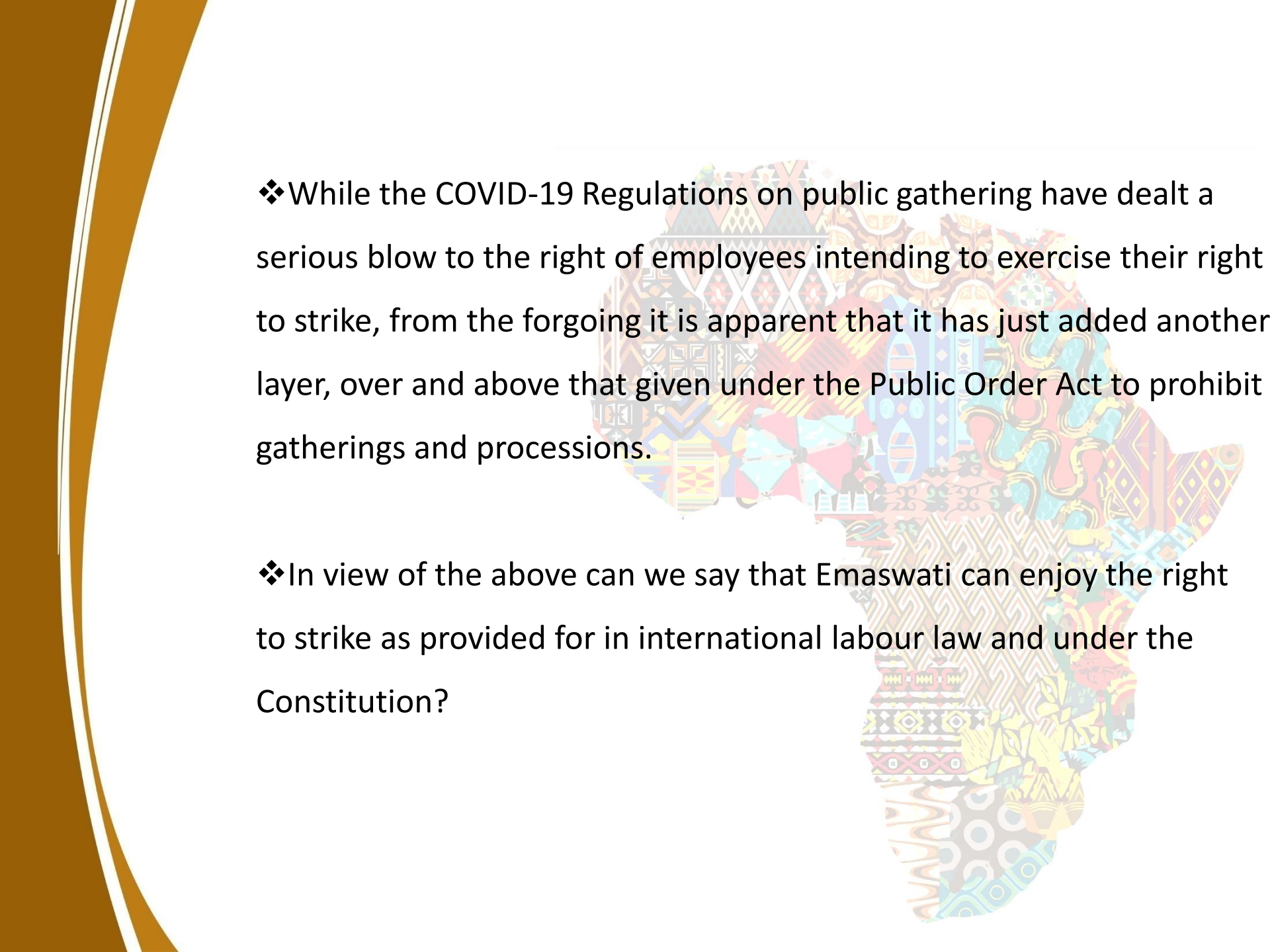
- s8(1)(b) any conditions to be attached to the conduct of the gathering; or
- (c) the prohibition of the gathering.



❖ In terms of s8(7)(b) and s9, at the conclusion of the consultation process the local authority may prohibit an intended gathering where it is of the opinion that the gathering will endanger the maintenance of public order, public safety or public health.

❖ In my view, the new Public Order Act has merely transferred the power to prohibit public gathering from the police to the local authorities working in consultation with the police.

❖ The question is whether this represents a win for civil liberties, and for our purposes, workers' rights?



❖ While the COVID-19 Regulations on public gathering have dealt a serious blow to the right of employees intending to exercise their right to strike, from the forgoing it is apparent that it has just added another layer, over and above that given under the Public Order Act to prohibit gatherings and processions.

❖ In view of the above can we say that Eswatini can enjoy the right to strike as provided for in international labour law and under the Constitution?

Thank you.....



