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THEME: “CHALLENGES FACING THE FUTURE OF WORK: AFRICAN PERSPECTIVES AND EXPERIENCES”

SUB-THEME 1: TRENDS IN EMPLOYMENT AND EMPLOYMENT RELATIONS IN AFRICA

Non-alignment of labour laws with National constitutions, a trigger of tripartite industrial relations conflicts in Africa: The Zimbabwe experience

Abstract

The Constitution of Zimbabwe (2013) has lots of amendments on sticky issues of labour relations which have been of concern for time immemorial such as; no provision for the right to collective job action, poor governance, lack of transparency and victimisation of the aggrieved. The study accommodated all key stakeholders namely, trade unions, employers' federations, Ministry of labour, the attorney general's office and labour relations experts. The quota sampling technique and unstructured interviews were used. The study found out that despite the provisions of the National constitution to improve industrial and labour relations the major administrative laws namely, the Labour Amendment Act 2015 and the Public Service Act 2002, had to date not yet been aligned with it. The study recommended that there was need to align the labour laws with the national constitution in Zimbabwe and to comply with ILO Conventions since Zimbabwe is a bona fide member. **(149 words)**

Key terms: Collective bargaining, Collective job action, Conflict, Labour laws, National constitution, Tripartite industrial relations

Introduction

Tripartism or tripartite relations involve the three social partners namely; government (state), business (employers) and labour (workers or employees). The three are fundamental to the success of an economy and also bringing social order in any country the world over. These 3 social partners are supposed to work mutually on issues of national importance such as those pertaining to economy and employment (Sambureni and Mudyawabikwa, 2003).

The Republic of Zimbabwe is a unitary, democratic and sovereign republic and governed by the *New National Constitution Amendment No. 20 of 2013*. This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. 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, and must be fulfilled by them. Zimbabwe has a dual labour system. Workers in the private sector and state owned enterprises are covered under the Labour Act [*Chapter 28:01 currently No. 5 amended 2015*]. This Act provides for collective bargaining in the private sector as well as in state owned enterprises (SOEs), but the same rights are denied to civil servants. Government workers employed by mainstream ministries known as civil servants are covered by the Public Service Act (*Chapter 16:04*).

The *New National Constitution Amendment No. 20 of 2013* was crafted on the backdrop of a referendum which had lots of consultations involving citizens and the 3 social partners. Despite the new constitution having been in existence for almost four years up to now, 2017, there are some contentious issues as a result of its non-

alignment with the Labour Act [*Chapter 28:01 currently No. 5 amended 2015*] and the Public Service Act (*Chapter 16:04*). As a result, a lot of labour conflicts (disputes) continue to affect sound labour and industrial relations in Zimbabwe. However, in a country with unemployment hovering above 80% and where most employees take home about US\$250 per month on average, far less than the poverty datum line currently at US\$573, labour analysts say the lack of progress on laws review and synchronisation, will continue to affect tripartism in Zimbabwe as evidenced by the irreconcilable differences among the social partners under their coalition body, the Tripartite Negotiating Forum (TNF) as raised by Uzhenyu (2015).

Statement of the problem

The Labour Act [*Chapter 28:01 currently No. 5 amended 2015*] and the Public Service Act (*Chapter 16:04*) have not been aligned with the *New National Constitution Amendment No. 20 of 2013*. This has culminated in a lot different interpretations of labour laws as evidenced by a lot of heavy backlog of pending cases before the Labour courts threatening progressive collective efforts such as Social dialogue.

Research questions

The study was qualitative and used the following research questions (sub problems);

- (i) What are the sticking labour issues arising from different provisions of the New National Constitution Amendment (*No. 20 of 2013*), the Labour Act (*Chapter 28:01 currently No. 5 amended 2015*) and the Public Service Act (*Chapter 16:04*)?
- (ii) What are the reasons behind the delays to align the 3 laws?

- (iii) How can the social partners work towards the alignment of the 3 laws in order to reduce labour conflicts?

Literature review

The following major laws underpinning this study were reviewed covering key provisions that have brought inconsistencies and controversy.

1. The New Constitution of Zimbabwe Amendment (No. 20) Act, 2013

- a. **Chapter 1** is on Founding provisions and Section 3 has the Founding values and Principles which on (c) emphasizes respect of fundamental human rights and freedoms and (h) good corporate governance that includes transparency, justice, accountability and responsiveness.
- b. **Chapter 4 is on Declaration of rights**, with Part 2 covering Fundamental human rights that has Section 58 allowing freedom of assembly and association as well as Section 59 allowing freedom to demonstrate and present petitions, albeit being peaceful.

Section 65 (3) states that *...except for members of the security services, everyone has the right to participate in a collective job action, including the right to strike, sit in, withdraw labour and to take other similar concerted action, but a law may restrict this right in order to maintain essential services.*

According to the ILO (2009) Commission of inquiry on Zimbabwe, the Commission observed that the right to strike was not fully guaranteed in law or practise. In particular, the Commission was concerned that the legislation included disproportionate sanctions for the exercise of the right to strike and an excessively large definition of **essential services**, and that in practice, the procedure for the declaration of strikes was problematic and that it appeared

that the security forces often intervened in strikes in Zimbabwe. The Commission wished to confirm that the right to strike was a fundamental right to organize protected by ILO Convention No. 87

Section 65 (5) covers labour rights such as; (a) right to engage in collective bargaining, (b) right to organise and (c) right to form and join federations of such unions and organisations.

2. The Labour Amendment Act 28:01 (No. 5 amended 2015)

2.1 New Section substituted for Section 12 is about retrenchment procedure and seeks to set a minimum retrenchment package. According to ZCTU (2015) comments;

- The amendment is bad in Clause (2) which sets out a minimum retrenchment package of one month's salary for employees who have served for two years and an equivalent lesser proportion for employees who served for a lesser period.
- The amendment is ambiguously worded to hide the clear intention that a retrenchment package is simply two weeks' salary for each year served.
- Considering that the average minimum wage in the country is US\$246-00 (Reserve Bank of Zimbabwe, 2015), 2 weeks' salary will translate to US\$123-00 for year, and that cannot be called a package?
- There is no consideration of other components of a retrenchment package like severance pay and relocation allowance.
- International Labour Standards (Termination of Employment Convention No. 158, 1982) require payment of adequate compensation.
- This compensation is very little and will empower employers to terminate a contract willy-nilly.

2.2 Amendment of Section 12D of Labour Act 28:01

This section deals with measures to avoid retrenchment. According to ZCTU comments the amendment has the following shortcoming;

- In clause (b) there is a deliberate ploy to remove the employment council so as to oust the trade union power in the negotiations for measures to avoid retrenchment. Allowing an employer to reach agreement with 'employees alone' without their trade union representative will lead to dictatorial tendencies by an employer taking into consideration the different power dynamics, between an employer and employee
- The amendment is also not good in Subsection 9 in as far as it seeks to have the agreement nullified if it is against 'public interest'. Public interest is a wide concept which may be abused by the Minister.
- In 9 (a) the Minister invites written submission from the employer without inviting submission from the employee or their representative which shows bias.'

2.3 Amendment of Section 79 Labour Act 28:01

The section deals with submission of collective bargaining agreement for approval or registration. According to ZCTU (2015) comments, the amendment seeks to insert sub clause (b) contrary to public interest as a ground that the Minister may refuse to register a collective bargaining agreement. The public policy interest is a wide concept that can be abused by the Minister to refuse to register an agreement.

The right to engage in collective bargaining is protected by Section 65 (5) (a) of the New National Constitution of Zimbabwe Amendment (No. 20) Act, 2013 and limiting such is unconstitutional. In addition, the amendment is an additional violation of the ILO Convention on the Right to Organise and collective bargaining, 1948 (No.98). Accepting such amendment is total defiance of the commitment Zimbabwe

made to the ILO to align its legislation with the convention principles. According to ZCTU (2015), this amendment must be deleted together with section 79 (2)

2.4 Amendment of Section 104 Right to resort to collective job action

Civil servants are prohibited from initiating any form of labour unrest as outlined in PART XIII Section 104 (3) (a) (i). ZCTU (2015) also noted that the period of 14 days' notice before going on strike in Subsection (2) (a) was too long and proposed that it be reduced to 48hours as provided for by the South African Labour Relations Act. The issue of exempting those providing essential services was tantamount to be abused by the Minister and in violation of the ILO provisions such as No. 87, 98, 151 and 154 as well as those of the New National Constitution of 2013

3. The Public Service Act (Chapter 16:04)

3.1 Collective Bargaining in the public sector/service.

Section 20(1) of the Public Service Act, Chapter 16.04 passed in 1995 states that the Commission (this is the Civil Service Commission which is the employer representative of Government) shall be engaged in regular consultations with recognized associations in regard to the conditions of service of members of the Public Service who are represented by the recognized associations or organizations concerned. With regard to the actual determination of remuneration and conditions of service, the Act states in Section 19(1) that:

Subject to this Act and the Constitution, conditions of service, applicable to members of the Public Service (with the exception of the Army, Police, Prisons and Central Intelligence Organisations which have separate arrangements) including their remuneration, benefits, leave of absence, hours of work and discipline, shall be determined by the Commission in consultation with the Minister (responsible for Public Service), provided that, to the extent that such conditions may result in an increase in expenditure chargeable on the Consolidated Revenue Fund the concurrence of the Minister responsible for Minister shall be obtained.

In terms of the afore-mentioned Section, what is being addressed is **consultation not collective bargaining**. It can be concluded that in Zimbabwe there is no clear cut procedure on collective bargaining between the civil servants (represented by the Apex council, a coalition body of staff associations) and the employer, Government represented by the Civil service commission.

Methodology

The following is a synopsis of the methods used by this study in the process of data collection and actual results

1. A **Survey design** was used as it was the best to establish social implications of the problem or issue at hand from those with the relevant experience on the problem or subject matter (Leedy and Omrod, 2016)
2. The **Target population** was drawn from the Ministry of Labour, Public Service and Welfare, Public Service Commission, Major labour bodies namely; the Apex Council, Zimbabwe Congress of Trade Unions (ZCTU) and the Zimbabwe Federation of Trade Unions (ZFTU), Employers Confederation of Zimbabwe (EMCOZ).
3. The **Quota sampling technique** was used to choose participants based on this researcher's discretion but with the intention of accommodating all the key stakeholders as suggested by Kennedy (2009). The number of participants was determined by the use of data saturation technique (Kothari, 2014).
4. **Library analysis** (desk research) was used to a large extent for secondary data. Most of the information was obtained from different pieces of legislation affecting both the public and private sectors.

5. **Unstructured interviews** were held with selected officials from the target population mentioned on 2 above. These interviews enabled the researcher more room to probe the participants (key informants) because of the sensitivity of the problem that was being investigated.
6. **Results were analysed using the content analysis method** which involved the categorization of data, classification, summarization and showing narrative sentiments at times (Cresswell, 2003).

6 Findings

1. Major sticking issues or conflicting areas

(i) The Labour Amendment Act 28:01 (No. 5 of 2015), in its current form, makes **dismissals and retrenchments** a slow process as employees have to go through a number of hearings or appeal to the Retrenchment Board, yet the Supreme court made a landmark rule on 17 July 2015 which allowed the employer to terminate one's employment by giving 3 months' notice without need for justification or explanation based on common law. This resulted in employers effecting massive retrenchments in both the private sector and public enterprises like parastatals.

(ii) Government tried to make amendments by gazetting new requirements for retrenchment but that was ignored by many organisations including **payment of benefits in retrospect of two weeks' wages per each year served including a minimum retrenchment benefit** that should be paid (Section 12 C (2)). This is in contradiction to the provisions of the New National Constitution No. 20 of 2013 on Chapter 1, Section 3(h) on good corporate governance and ILO

Conventions on freedom of association and the right to organise and collective bargaining, Nos. 87 and 98. Zimbabwe is a bonafide member of ILO.

One participant representing employers (EMCOZ) had this to say

" We have taken the government to court as are complaining about the setting of a minimum mandatory retrenchment cost for every employer who retrenches one or more employees. The government is being inconsiderate and not sincere since there is no consideration on the ability of employers to pay, among other factors. The use of a pro-rata basis is unrealistic since firms are in different industries and trades and are therefore not homogenous".

In addition, he had this to say,

"I am prepared to go further to reveal that this limitation came about through an arbitrary process of legislating, a knee-jerk reaction by the state to what it perceived as a social ill. That the process of legislating, the Labour Amendment Act was reactionary, is evidenced in the lack of thinking, consultation and research required to guide government action and law-making procedures".

(iii) **Collective job action** still remains a nightmare to employees both in the private and public sectors to exercise such right. Despite the New National Constitution No. 20 of 2013 having provision for it, the situation on the ground made it difficult to do so. Issues of at least 50% majority consent preferably with signatures, issuing of show cause and disposal orders by the labour officer and minister as provided for in the Labour Act 28:01 (amended) as well as that of essential services as enshrined in the Labour Act 28:01 (amended) in addition to police clearance, made the process bureaucratic and tedious and almost impossible. The situation was made even worse by use of draconian laws such as the Public Order and Security act (POSA) and Access to Information of Private and Public Act (AIPPA) used by the police to disrupt any collective job action or strike not sanctioned by the police. One trade union official actually said

“In Zimbabwe you cannot freely strike or demonstrate as the matter may be considered political despite being a fundamental right issue pertaining to the employment contract. You end up being victimised and you lose your job without anybody to care or help your cause as the laws are not supportive but repressive especially when you go for a disciplinary hearing or even if you appeal”

- (iv) **Non participation in collective bargaining** by the civil servants remained a thorny and sensitive issue. Government made unilateral decisions e.g. on deciding pay dates, bonus dates, salary and benefits reviews since the Apex council was used mainly as a formality as it was clear that it was only consulted without being engaged in collective bargaining. A member of the Apex council had this to say

“Our employer is not consistent. The problem is the issue of who really is the employer. There is the line ministry, Public Service Commission (PSC), Ministry of Labour, Public service and Social welfare, the Ministry of Finance housing the influential Treasury and Salary Service Bureau (SSB) departments and the Reserve Bank of Zimbabwe (RBZ), the Cabinet and even the Presidium. At the end of the day the decision is based on who has more political muscle. There are no clear policies on conditions of service”

2. Major reasons behind the delays to align the 3 laws

The study revealed that the lack of a social dialogue culture among the three social partners, absence of a binding dialogue framework such as the Tripartite Negotiating Forum (TNF) Act, lack of political will, mistrust and bureaucratic tendencies by government were the major reasons for lack of progress.

Conclusion

The findings above are evident enough to conclude that industrial relations in Zimbabwe are at a loggerhead due to non-alignment of major laws governing labour matters. The situation was being exacerbated by lack of sound discourse among the social partners and this emanated in lack of trust and lack of cooperation.

Recommendations

The study recommended the following;

1. Urgent alignment or synchronisation of the New National Constitution No. 20 of 2013 with the major labour administrative pieces of legislation namely, the Labour Amendment Act (Chapter 28:01 No. 5 of 2015) and the Public Service Act (Chapter 16:04). This would avoid confusion currently being caused by conflicting provisions especially on matters of termination of employment or retrenchment procedure, collective job action (industrial action or strike) and collective bargaining in the public sector.
2. Promotion of social dialogue by resuscitating the almost 'defunct' Tripartite Negotiating Forum (TNF) which also calls for the urgent enactment of a TNF Act which has been a stumbling block, for effective engagement and dialogue since it has taken so long to be concluded.
3. Zimbabwe should also conform to ILO provisions (e.g. 87, 98, 151, 154) on those sticky matters so that she moves in line with global industrial relations best practices and avert labour conflicts (disputes).

4. There is need for political will by all the social partners so that these issues are taken seriously for national benefit and not for individual or sectorial gains. (2964 words)

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