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STRIKE ACTION AND ITS LIMITATIONS IN LABOUR LAW: A COMPARATIVE ANALYSIS OF SOUTH AFRICA AND ZIMBABWE

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A research report submitted to the Faculty of Commerce, Law and Management of the University of the Witwatersrand, in partial fulfillment of the requirements of the degree Master of Laws in Labour Law.

Declaration

I, Milton Nyamadzawo, declare that:

i. The research report in this dissertation, except where otherwise indicated, is my original work.

ii. This dissertation has not been submitted for any degree or examination at any other university.

iii. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

iv. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced have been quoted, then:

a. Their words have been re-written but the general information attributed to them has been referenced;

b. Where their exact words have been used, their writing has been placed inside quotation marks, and referenced,

Candidate:

_____ _____

Milton Nyamadzawo Date

Supervisor Signature Date

_____ _____

Words Count ----------

Acknowledgements

Firstly, I thank God for giving me the strength and perseverance to complete this research report to my satisfaction.

Secondly, I thank my parents and my family whose combined efforts, encouragement and moral support made me endure and accomplish this academic journey.

Thirdly, I sincerely thank my Supervisor, Dr Mohamed, Alli Chicktay, for his guidance and assistance throughout this dissertation. My gratitude's far exceeds my ability to convey the appreciation. You have been a pillar of academic support.

Finally, I thank all my friends, relatives and colleagues who have supported me, in any way, for the period of this dissertation, and who have played a role in enhancing the quality of this dissertation.

Better to starve fighting than to starve working.-- *A slogan of the Lawrence, Massachusetts "Bread and Roses" strike of 1912*

Abstract

The right to strike is entrenched in the Constitutions of both South Africa (the Constitution of the Republic of South Africa 1996,) and Zimbabwe (The Constitution of the Republic of Zimbabwe Act 20 of 2013 as amended). There has been some significant labour law reforms in Southern Africa particularly in Zimbabwe where the right to strike was constitutionally provided for in 2013. Despite the entrenchment of the right to strike in the Constitutions of South Africa and Zimbabwe, there are limitations to this right to strike.

It is submitted that workers have rights to strike within the limits of the law but the reality on the ground gives a different picture. While this thesis subscribes to the right of workers to strike, it also argues that the rights of other parties are as important as the rights of the striking workers.

In South Africa there is an entrenched culture of violence within industrial action in this constitutional dispensation era.[1] In Zimbabwe strike action is severely restricted through various mechanisms like the Public order and Security Act (POSA) 2007.[2] An application letter must be sent to the police so that they can grant clearance for the strike. The only notable strikes that were allowed with minimal police intervention was the National Railways of Zimbabwe strike where workers had not been paid their salaries for 15 months[3] and that of the Grain Marketing Board where workers had not been paid for more than 24 months.[4] There are significant similarities and disparities on how the Labour Relations Act South Africa and the Labour Act Zimbabwe regulate strike actions. It is also apparent that there are inadequacies in the two Acts and that will require some legislative reforms to remedy incidents of unprotected or unlawful strike action.

[1] Thembeka Ngcukaitobi *"Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana* "(2013) 34 *ILJ* 836 , 847

[2] Public order and Security Act (Chapter(11:17) as amended March 2007.Senior Police officers have the powers to control and disperse public gatherings and crowds whenever they deem it reasonable to do.

[3] Newsday daily newspaper Zimbabwe 12 April 2016, NRZ strike over long due salaries continues. accessed 9 October 2017.

[4] GMB workers' plight- a syndrome of Zimbabwe Government's rot, 26 February 2016. www.thezimbabwean.co.zw accessed 9 October 2017

List of Acronyms

AMCU	Association of Mineworkers and Construction Union
BAWU	Black Allied Workers Union
CCMA	Commission for Conciliation, Mediation and Arbitration
CEPPWAWU	Chemical Energy Paper Printing Wood and Allied Workers Union
ESC	Essential Services Committee
FAWU	Food and Allied Workers Union
FOSAWU	Future of South African Workers Union
GMB	Grain Marketing Board of Zimbabwe
I L O	I n t e r n a t i o n a l L a b o u r O r g a n i z a t i o n
IMATU	Independent Municipal and Allied Trade Union
LAC	Labour Appeal Court
LRA	Labour Relations Act South Africa 66/1995
LRA	Labour Relations Act Zimbabwe Chapter 28:01
NCBAWU	National Construction Building and Allied Workers Union
NEHAWU	National Education Health and Allied Workers Union
NUM	National Union of Mineworkers
NRZ	National Railways of Zimbabwe
NUMSA	National Union of Metalworkers of South Africa
POPCRU	Police and Prisons Civil Rights Union
POSA	Public Order and Security Act Zimbabwe

SACOSWU : South African Correctional Services Workers Union

SANDU	South African National Defence Union
SAPS	South African Police Service
SATAWU	South African Transport and Allied Workers' Union
SAMWU	South African Municipal Workers Union
SC	Supreme Court of Zimbabwe
TOWU	Transport and Omnibus Workers Union
UDF	United Democratic Front

Table of Contents

Declaration i

ACKNOWLEDGMENTS ii

ABSTRACT iii

LIST OF ACROYNMS iv

TABLE OF CONTENTS v

CHAPTER ONE 1

1.1 Introduction 1

1.2 Problem statement and significance of the study 2

1.3 Research questions 3

1.4 Research Methodology 3

1.5 Structure of the Dissertation 3

1.6 Conclusion 3

CHAPTER TWO –STRIKE ACTION DEFINED 4

2.1 Introduction 4

2.2 Constitutional right to strike 5

2.3 Purpose of LRA 6-8

2.4 Strikes and the legal framework 9-12

2.5 The ILO and Purpose of a Strike 13

2.6 Conclusion 14

CHAPTER THREE-LIMITATIONS TO STRIKE ACTION 15

3.1 Introduction 15

3.2 The Limitation Clause 15

3.3 Conciliation and Certificate of no settlement 16

3.4 Dispute of right and dispute of interest 17

3.5 Parties have agreed to refer a dispute to arbitration 18

3.6 Strike Ballot 19

3.7 Sending written notice to employer……19.
3.8 Existence of a Union Agreement……20
3.9 No Work No Pay……21
3.10 Essential Services……22
3.11 Conclusion……24
CHAPTER 4 CONSEQUENCES OF STRIKE ACTION……..25
4.1 Introduction……...25
4.2 Civil Liability consequences for the Trade Union……..25
4.3 Interdicts……25
4.4 Dismissals……..26
4.5 Compensation……27
4.6 Essential Services……29
4.7 Conclusion……30
CHAPTER FIVE CONCLUSION AND RECOMMENDATIONS 31
5.1 Conclusion 31
5.2 Recommendations.....32
5.3 Requirement to give 14 days' written notice……..33
5.4 Embarking on strike as soon as 14 days' notice period expires…….35
5.5 Requirement that Conciliation should be done first……36
5.6 Powers of the Labour Court……36
5.7 No Work No Pay……36
5.8 Strike protection loss…… 37
5.9 Interest Arbitration……..37
5.10 Balloting System……..38
5.11 Specialized Units within SAPS and ZRP……39
BIBLIOGRAPHY.....40-43

"Unions have been the only powerful and effective voice working people have ever had in the history of this country"- Bruce Springsteen

Chapter 1:

1.1 Introduction and Background

The employment relationship is a reciprocal one between the employer and the employee. The employer provides work and remuneration and the employee tenders service.[5]There is, however an unequal bargaining power between the employer and the employee. The one avenue through which employees can counter this power is through bargaining collectively through unions. The International Labour organization (hereafter (ILO) Conventions 87 and 98 of 1948 provide that employers and employees have the right to organize and bargain collectively.[6] Both South Africa and Zimbabwe are members of the ILO and ratified the said conventions.[7]

The right to strike is entrenched in both the Constitutions of South Africa and Zimbabwe. The right to strike is set out in s23 of the Constitution of South Africa[8], and in Zimbabwe it is in s 65 of the 2013, the amended Constitution of 2013.[9]

Section 65 (3) of the Constitution of Zimbabwe reads as:

> *"Except for members of the security services, every employee has the right to participate in collective action, including the right to strike, sit in, and 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."*

I submit that the above provision is not a model of clarity[10] probably for the reason that it is poorly drafted.[11] It is not clear whether the right to strike is an independent right or merely a form of exercise of another right.

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[5] JV Du Plessis,. & Marion Fouche, *.A Practical Guide to Labour Law* (2014) 8th *ed* Lexis Nexis pg 9 -10.

[6] ILO Convention 87 Freedom of association and protection of the right to organize – 1948 San Francisco https://www.africaefuture.org/files/synapostel/ilo%20core%20conventions.pdf (last accessed on 8 September 2018.

[7] Zimbabwe ratified CO87 on 9 April 2003 and CO98 on 27 August 1998. South Africa ratified CO87 on 19 February 1996, and CO98 also on 19 February 1996.

[8] The Constitution of the Republic of South Africa, 108 of 1996

[9] Act 20 of 2013 of the Zimbabwe Constitution- the amended Constitution of Zimbabwe

[10] The Kenyan Constitution in s41 (2) (d) provides a clear mandate that provides as follows – "every worker has the right to go on strike.

[11] Lovemore Madhuku, – *Labour Law in Zimbabwe* (2015) Weaver Press page 434

The South African constitutional provision on the right to strike is quite clear, and s23 provides as follows:

"every worker has the right –

(a) To form and join a trade union
(b) To participate in the activities and programs of a trade union
(c) To strike".

In both jurisdictions the right to strike is not absolute. Section 36 of the Constitution of South Africa[12] allows for the right to strike and be limited in terms of the law of general application.[13] Similarly s86 of the Zimbabwean Constitution[14] has the same provision and that such a limitation must be reasonable, justifiable in an open democratic society.

1.2 Problem statement and Significance of the Study

The purpose of this study is to examine strike actions and the limitations that are imposed on the right to strike in South African and Zimbabwean Labour Law and assess whether the limitations imposed are effective and to trace further why despite the limitations strike action continue unabated. The employment relationship is characterized by an unequal bargaining power between the employer and the employee. The only way for employees to have their voices heard is through acting collectively. To act collectively, they may resort to strike action. However this right to strike cannot be exercised without limitations or else the employment relationship would become ungovernable and affect collective bargaining. Therefore, the right to strike is not absolute.

A further objective of this study is to identify the consequences to strike actions.

The study also considers whether there is need for an improvement in the legal mechanisms, and provides some possible solutions that could assist in curbing the strikes.

[12] The Constitution of the Republic of South Africa, 108 of 1996.
[13] Section 36 of the Constitution of South Africa, 1996,
[14] Constitution of Zimbabwe Amendment Act 20 of 2013.

1.3 Research Questions

This research report attempts to find answers to the following questions:

1. How is strike action defined in South Africa and Zimbabwe and what are the similarities and dissimilarities?

2. What are the limitations of the right to strike in the above jurisdictions?

3. How effective are these limitations and why do strikes continue despite the limitations?

4. What are the consequences to strike action and possible solutions?

1.4 Research methodology

This research report consists of desktop research, as opposed to empirical research. In an attempt to answer the research question, I will do a comparative analysis between the chosen jurisdictions, South Africa and Zimbabwe, of the right to strike and its limitations.

1.5 Structure of the dissertation

The Research Report is divided into Five Chapters.

Chapter one comprises of the introduction wherein the purpose and the research question will be presented.

Chapter two will focus on the definition of strike action, drawing comparisons between the two jurisdictions.

Chapter three discusses the limitations on the right to strike in both jurisdictions.

Chapter four explores the consequences for strike actions and in Chapter five conclusions will be drawn and recommendations are proffered.

1.6 Conclusion

Strike actions are constitutionally guaranteed in South Africa and Zimbabwe. Although strike action is constitutionally provided for in Zimbabwe, it is largely conflated with political strikes and thus severely restricted. The significant similarity of strike action lies in the definition wherein there has to be concerted effort and withdrawal of labour. Whilst South Africa provides for a protected or unprotected strike, the Zimbabwean equivalent is that of a lawful or unlawful strike. A striking similarity is that strike action although constitutionally provided for is not absolute.

"Poverty is not an accident, like slavery and apartheid; it is man-made and can be removed by the actions of human beings". - Nelson Mandela

Chapter 2 – Strike Action Defined

2.1 Introduction

This chapter will now look at the definition of strike action in more detail, and will consider the legal framework for strike actions.

A strike is defined in the South African Labour Relations Act[15] as the

> *"partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee".*[16]

Grogan summarises the definition of a strike given in s213 to result in the following criteria with which a strike must comply, namely that: (i) there must be stoppage of work; (ii) by more than one employee acting in concert; (iii) for the purpose of remedying a grievance or resolving a dispute; and that (iv) the issue in dispute must concern 'a matter of mutual interest between employer and employee.[17]

In *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd*[18] the court stated that the first requirement is that there must be a refusal to perform work, secondly, the refusal must be undertaken by employees[19] and lastly, such refusal of work must be purposed to resolve a matter of mutual interest as stated by the LRA.[20]

In Zimbabwe the right to strike is defined in the Labour Relations Act[21] and provides for the right to resort to industrial action in a manner wider than merely providing for a right to strike. Section 2 of the Labour Act [22] Zimbabwe Chapter 28:01 defines collective job action as

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[15] The Labour Relations Act 66 of 1995.

[16] In Zimbabwe strike action refers to the collective and concerted withdrawal of labour by workers in support of their interests- M Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under the Neo Colonial Capitalism*(2007) 344

[17] John Grogan, *Workplace Law* 11*ed* (2014) 430.

[18] *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC).

[19] *Khosa and others v Minister of Social Development and Others* 1999 (6) BCLR 615 (CC), *FGWU v The Minister of Safety & Security* [1999] 4 BLLR 332 (LC).

[20] *Chemical Workers Industrial Union v Plascon Decorative* (Inland) (Pty) Ltd (1999) 20 *ILJ* 321 (LAC)

[21] Labour Relations Act Zimbabwe Chapter 28:01

> *"means 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, lock-out, sit-in or sit -out, or other such concerted action".*

An analysis of the above definition of strike action brings certain aspects of this right to the fore. Firstly, for a strike to be regarded as such there must be in existence an employment relationship and one must be in a position to point out whom the parties to that relationship are. Secondly, a strike can only be resorted to by employees. In other words, it is one of the ways by which employees can effectively stand their ground in demand of their rights, which rights must be related to the employment relationship. One employee cannot embark on a strike. Further the right to strike must be for the purposes of resolving a dispute of interest.[23]

There is a striking similarity in the definitions with regards to concerted effort in both South Africa and Zimbabwe. However, the significant difference lies in the fact that whilst in South Africa, the definition embraces both current and ex-employees, in Zimbabwe, it can be inferred from the provision that the parties must be in an employment relationship and excludes ex-employees.

2.2 Constitutional right to Strike

The South African[24], and Zimbabwean[25] Constitutions provide for the right to strike. With regards to common law, an employer would be entitled to dismiss an employee who participates in strike action if he/she materially breached his/her contract of employment.[26] With reference to the matter of *S v Smith*,[27] the court held that, an employer has a right to dismiss an employee who refuses to carry out his contractual obligation regarding his work.[28] Thus legislation on strike law was implemented with a view to responding to these past events.[29]

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[22] The Labour Act Zimbabwe Chapter 28:01 as amended.
[23] Section 104(1) of the Labour Act Zimbabwe. See also section 104 (3)(a)(ii) of the Act.
[24] The Constitution of the Republic of South Africa, 1996.
[25] Act 20 of 2013 as amended – the Constitution of Zimbabwe.
[26] Antony Myburgh *"100 years of strike Law*" (2004) 24 *ILJ* 966
[27] *S v Smith* (1955) 1 SA 239 (K)
[28] *Ibid.*
[29] Darcy Du Toit , Bosch D, Woolfrey D, Cooper C , Giles G and Roussouw J *Labour Relations Law a comprehensive guide*- Lexis Nexis (2015) 333

In *South African National Defence Union v Minister of Defence and another,*[30] it was held that the Constitution of the Republic of South Africa, 1996 entrenches the right for trade unions to collectively bargain, as well as their members' right to strike in order to advance collective bargaining.

In at least two cases of the Constitutional Court of South Africa, namely *Re Certification of the Constitution of the Republic of South Africa*[31] *and National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour*[32] the importance of the right to strike was particularly emphasized. In both cases the Constitutional Court held that it is through industrial action that workers are able to assert their bargaining power in employment relationship. In *re Certification of the Constitution of the Republic of South Africa*[33] in particular the Constitutional Court understood the right to strike to be an essential component of collective bargaining.

In the Zimbabwean case of *Zimbabwe teachers Association and others v Minister of Education and culture*.[34] It was brought to bear by the (Supreme Court) SC that the right to collective job action was an essential component of the collective bargaining process.

2.3 THE PURPOSES OF THE LABOUR RELATIONS ACT WITH REGARDS TO THE RIGHT TO STRIKE IN SOUTH AFRICA.

The objectives of LRA[35] South Africa seeks to achieve are, namely; to promote economic growth, instill justice within society, create harmony in the once turbulent labour market and inculcate the concept of democracy within the workplace.[36]

Secondly, it has been enacted to give effect to the labour rights enshrined in the Constitution.[37] The objectives of the LRA are therefore synonymous with the objectives of the ILO and the

[30] *South African National Defence Union v Minister of Defence and another* 1999 (4) SA 469 (CC).
[31] *Re Certification of the Constitution of the Republic of South Africa* (1996)(4) SA 744 (CC)
[32] *National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour 2003* (2) BCLR 182 (CC)
[33] Re *Certification of the Constitution of the Republic of South Africa* (1996) (4) SA 744 (CC)
[34] (1990) (2) ZLR 48 (SC)
[35] The Labour Relations Act 66 of 1995 as amended.
[36] The LRA; s 1, Paul Benjamin, H Bhorat & H Cheadle 'The cost of "doing business" and labour regulation: The case of South Africa' (2010) 149(1) *International Labour Review* 74.
[37] The Constitution of the Republic of South Africa 108 of 1996

Constitution. Therefore, the interpretation of the LRA's objectives must be in conformity with international laws and the Constitution.[38]

This precedent was affirmed in the *Ceramic Industries Ltd t/a Betta Sanitary Ware & another v NCBAWU & others*[39]where the court stated that the objectives of the LRA[40] must be interpreted in conformity with international law and the Constitution.

The promulgation of the LRA was to revolutionise labour law and in doing so give effect to s 23 of the Constitution which enshrines labour rights for all employees.[41] Even more

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[38] Paul H Reyneke *Labour practices in South Africa and Korea: A comparative study against international labour organization standards* (unpublished MBA thesis, University of Johannesburg, (2009) 84.

[39] *Ceramic Industries Ltd t/a Betta Sanitary Ware & another v NCBAWU & others* [1997] 6 BLLR 697 (LAC).

[40] Purpose of the Labour Relations Act South Africa 66 of 1995 as amended. Chapter 1 of the Labour Relations Act South Africa

The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.

2 Section 27, which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights: (1) Every person shall have the right to fair labour practice

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lockout for the purpose of collective bargaining shall not be impaired, subject to subsection 33(l).

[41] M Olivier '*Fundamental rights and labour law: Some recent developments* (part 2)' (1996) 345 *De Rebus* 668.

significantly, the LRA seeks to enforce s 23(2) that endorses trade union rights and the right to strike. Therefore, the objectives as stated by the LRA and the constitutionalisation of labour rights further emphasises the mandate that should be carried out.

2.3 (1) THE PURPOSES OF THE LABOUR ACT WITH REGARDS TO THE RIGHT TO STRIKE IN ZIMBABWE

Section 2A[42] of the Labour Act[43] provides as its ultimate objective, the promotion of social justice and democracy in the workplace[44]. It aims to do this by, among other things,

Providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;[45]

Securing the just, effective and expeditious resolution of disputes and unfair labour practices.[46]

104 of the Labour Act Zimbabwe provides-Right to resort to collective job action

(1) Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest.

From the above Labour Acts, it is quite clear that the significant similarity lies in the promotion of justice and democracy at the workplace and the establishment of a legal framework within which employees and employers can bargain collectively for the improvement of conditions of

[42] Purpose of Act of The Labour Act Zimbabwe Chapter 28:01 as amended.

(1) The purpose of this Act is to advance social justice and democracy in the workplace by—

(a) giving effect to the fundamental rights of employees provided for under Part II;

(b) … *{Repealed]*;

(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;

(d) the promotion of fair labour standards;

(e) the promotion of the participation by employees in decisions affecting their interests in the work place;

(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.

(2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).

(3) This Act shall prevail over any other enactment inconsistent with it.

[43] The Labour Relations Act Zimbabwe Chapter 28:01 as amended.
[44] Section 2A (1) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[45] Section 2A (1) (c) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[46] Section 2A (1) (f) of the Labour Act

employment. Whilst strike actions are entrenched in Constitutions, South Africa and Zimbabwe, it does not mean the right to strike action is absolute. The Labour Acts provide both procedural and substantive limitations within which strike action can be undertaken.

2.4 Strikes and the legal framework

A strike is often described as the most effective weapon against an employer, having the potential to narrow the gap existing in the (unequal) bargaining power relationship between employer and employee.[47] In South Africa, if employees are going to embark on a strike, in order for the strike to be protected, the procedures provided for in the LRA[48] must be followed.[49] For example, in South Africa, with respect to a strike, s64 of the LRA provides that the right can be exercised under the following circumstances: (i) if the issue in dispute has been referred to a bargaining council or, if there is none, to the Commission for Conciliation Mediation and Arbitration(CCMA) and either a certificate stating that the dispute remains unresolved has been issued or a period of 30 days has lapsed since the referral;[50] and (ii) at least 48 hours' notice, in writing, of the commencement of the strike has been given to the employer. The only exceptions for the giving of notice are where the bargaining council or employers' organization, where applicable, have been duly notified.[51] Thus, if the strike complies with these legal requirements as specified in the LRA, that strike is termed a 'protected strike'. The antithesis of a protected strike is an 'unprotected strike', for the reason that it does not comply with statutory provisions.

In terms of Zimbabwe's Labour Relations Act[52], employees have a right to resort to a "collective job action" within the confines of the Act.[53] No employees may resort to such action unless: (i) fourteen days' notice has been given to the employer, employment council, the relevant trade union and employers' organization;[54] and (ii) an attempt has been made to conciliate the dispute and a certificate of no settlement has been issued.[55]

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[47] Darcy du Toit & R Rommie, *" The necessary evolution of strike law*" (2012) *Acta Juridica* 195,196
[48] South African Labour Relations Act 66 of 1995
[49] Alli Chicktay (2012) "*Defining the right to strike: a comparative analysis of ILO standards and South African Law*. 260-277
[50] See s64(1) (a) of the LRA.
[51] See s64(1) (b) of the LRA.
[52] Labour Relations Act Zimbabwe Chapter 28:01 as amended.
[53] Labour Relations Act 28:01. See s104 entitled 'Right to resort to collective job action'.
[54] Ibid s104 (1) (a).
[55] Ibid s104 (1) (b).

In comparison, the two jurisdictions have similarities and slight variations. With regards to similarities, both jurisdictions require strikes to comply with statutory requirements laid down in the respective labour legislations. There might be some slight variations with respect to points of emphasis with respect to periods of notice (substantive requirements), but the procedural requirements appear to be the same. With respect to procedural requirements, both jurisdictions seem to similarly require that the first step should be to refer the dispute between employees and the employer for conciliation before resorting to industrial action. South Africa's LRA appears to prescribe a more logical order or more clearly laid down steps to be followed before employees or a trade union (organized labour) may resort to a strike. There should be conciliation through a bargaining council, or if absent, the CCMA.[56] A commissioner should either certify a stalemate or deadlock between employees and the employer, or thirty (30) days must have lapsed since referral of dispute,[57] whichever comes first.[58] The statutory requirements in South Africa is that, following the issuing of the said certificate by a commissioner or expiry of 30 days after referral, a notice period of 48 hours in writing, should be given to the employer to signal an intent to commence the strike.[59]

In Zimbabwe, the procedural requirements appear to be similar to the procedure followed in South Africa. Section 104 of the Labour Act[60] provides for notice requirements – that is 14 days written notice to employer, of intent by the employees to resort to 'collective job action'.[61] In s104 (2) (b), Zimbabwe's LRA does add the requirement that an attempt must have "been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section *ninety-three*". While the procedure does not appear to be as logically laid down in similar fashion to the clearer procedure in s64 of South Africa's LRA, there are similarities in practice. Zimbabwean labour law does permit a situation of dispute resolution through conciliation and arbitration, facilitated by state appointed labour officers.[62] When a labour dispute has been referred to the labour officer, the officer shall attempt to resolve it by conciliation or with the agreement of parties, by reference to arbitration.[63] A labour officer may issue a certificate of no settlement of the dispute if the dispute remains unresolved after thirty

[56] See s64 (1) (a) of the LRA.
[57] Ibid.
[58] John Grogan *Workplace Law* 3 ed 436.
[59] S 64 (1) (b) of the LRA.
[60] The Labour Relations Act Zimbabwe Chapter 28:01 as amended.
[61] See s104 (2) (a) of Zimbabwe's LRA.
[62] See s93 of Zimbabwe's LRA.
[63] Ibid, s93(1).

(30) days.[64] It appears that after a deadlock has been declared by a labour officer, a trade union is then required to give an employer fourteen (14) days' notice in writing, signalling the intent to resort to collective job action, in line with the statutory requirements.[65] If an employee union satisfies the statutory requirements as stated above, then the strike will be said to be a lawful strike.

The distinction between disputes of rights and disputes of interests has drawn some condemnation.Grogan[66] has indicated that this is the most extensive limitation on the right to strike created by the South African Labour Relations Act. Similarly, the Labour Act Zimbabwe adopts the same with regards to the distinction between disputes of rights and disputes of interests. It is therefore submitted that this distinction is not necessary given that it unduly restricts the effective exercise of the right to strike.

Gwisai[67] has also observed that the right to strike is accompanied by various prohibitive and repressive rules intended to emasculate precisely those aspects that make the right effective. Lloyd [68]seem to lay the blame on the Labour Act itself, arguing that it 'whittles away considerably the right to strike'. This is so because the right is exercised subject to the Act, which prescribes various procedural requirements that ought to be satisfied before the right can be lawfully exercised.

A matter of mutual interest in strike action[69] is an important consideration as it applies in both the South African and the Zimbabwean jurisdictions.

In *Rutunga & Others v Chiredzi Town Council*,[70] the employees staged a peaceful demonstration during working hours for a few hours demanding that a senior official be dismissed. Prior to the demonstration they had written to the employer in the following terms:

> *"Workers are requesting for the stepping down of the acting Chief Executive Officer (Chingoma) from his post, failure to that workers are to go on a peaceful demonstration on 29 May 2000".*

It was held that a peaceful demonstration was collective within the meaning of the term in the Labour Act[71] and also happened during working hours.

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[64] Ibid, s93(3).
[65] See s104 (2) (a) of Zimbabwe's LRA.
[66] John Grogan *Workplace Law 11 ed* 465 Juta
[67] Munyaradzi Gwisai, *Labour and Employment Law in Zimbabwe: Relations of Work under the Neo Colonial Capitalism* (2007) page 344.
[68] Patrick Lloyd, *Labour Legislation in Zimbabwe 2 ed* (2006), Legal Resources Foundation; page 126.
[69] *Simba (Pty) Ltd v FAWU* (1998) 19 *ILJ* 1593 (LC)
[70] 2003 (1) ZLR 197 (S) .

Similarly, in the South African case of *MITUSA v Transnet (Pty) Ltd*,[72] the court stated that the dispute resolution system distinguishes between rights which are resolved through arbitration and those which must be resolved through a display of power.[73] The distinction of disputes is pertinent as there are different mechanisms for resolving rights and interest disputes.[74]

In *Mzeku and others v Volkswagen SA (Pty) Ltd and others*,[75] the Union suspended its shop stewards who had disregarded an agreement between the union and the employer. The employees stopped working and demanded that the shop stewards be reinstated.[76] The Labour Appeal Court accepted the Labour Court's reasoning that the work stoppage was not a strike. This was because it was aimed at resolving an internal dispute between the employees and the union and at forcing the union to accede to a demand. The Labour Appeal Court (LAC) regarded the work stoppage as an unprotected strike and held that the employer could not comply with the demand.

In *Afrox Ltd v South African Chemical Workers Union (SACWU) and others*,[77] the employees embarked on a strike in order to pressurize the employer to abandon a staggered shift system. The employer abandoned the shift system and began retrenching some of the employees.[78]

The Labour Court (LC) held that when the cause of complaint is removed, the existing strike is dysfunctional and no longer has a purpose. The Court held further that the employees could not continue striking in response to the retrenchments.[79]

Even health and safety issues are considered as matters of mutual interest.[80]

This point was further confirmed in *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union & Others*,[81] where the court held that a demand over equity shareholding of 20% amounted to a dispute of mutual interest and is therefore a matter

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[71] Section 104(1) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[72] *MITUSA v Transnet (Pty) Ltd* (2009) 23 *ILJ* 2213 (LAC).
[73] Ibid at 106
[74] Ovunda V C Okene & C T Emejuru '*The disputes of rights versus disputes of interests' dichotomy in labour law*: The case of Nigerian labour law' (2015) 35 *Journal of Law, Policy and Globalization* 136.
[75] *Mzeku and others v Volkswagen SA (Pty) Ltd and others* (2001) 22 *ILJ* 1575 (LAC).
[76] Cohen, T Rycroft, A & Whither, B *Trade Unions and the Law in South Africa Durban*: Lexis Nexis, (2009)
[77] *Afrox Ltd v SACWU and others* [1997] 4 BLLR 382 (LC).
[78] Cohen, T Rycroft, A & Whither, B *Trade Unions and the Law in South Africa Durban*: Lexis Nexis, (2009)
[79] *Afrox Ltd v SACWU and others* [1997] 4 BLLR 382 (LC).
[80] *Pikitup (SOC) Ltd v SA Municpal Workers' Union on behalf of Members & others* (2014) 35 *ILJ* 983 (LAC).
[81] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union & others* (2009) 30 *ILJ* 1099 (LC).

over which employees may engage in industrial action.[82] The court arrived at its decision based on the fact that the right to strike can be used as an instrument to obtain fair conditions of employment as well as acquire new rights.

2.5 The ILO and Strike Action

The right to strike is an important component of collective bargaining as per Convention 98[83] of the ILO[84].A mere stoppage of work does not amount to a strike in labour law.[85] The ILO jurisprudence has also made it clear that the right to strike is not absolute and certain restrictions have been admitted.[86] The restrictions are with respect of the Public Service[87] and Essential services.[88]

Internationally, the right to strike is recognized as one of the important labour standards. Several international legal instruments of the United Nations and the International Labour Organization (ILO) regulate the right to strike. These instruments afford the right a universal character. Art 20 of the Universal Declaration of Human Rights (1948) indirectly provides for the right to strike.[89]

Both South Africa and Zimbabwe are members of ILO and have ratified some of the conventions which promote workplace democracy such as Convention no. 87 which describes a strike as a fundamental right to organize.

Parties to the ILO have for over 60 years, acknowledged that strike action is indeed a right and that there is an inextricable relationship between industrial action and the right to freedom of association.[90]

It is imperative to note that the ILO does not contain any express right to engage in strike action.[91]Although the ILO does not provide for an express right to strike, this should not lead to

[82] *Ibid* 1121E-H.
[83] Andre Van Nierkerk et al Labour *Law @ Work* (2015) 415.
[84] The International Labour Organization
[85] Mahomed.A. Chicktay '*Defining the Right to Strike: A Comparative Analysis of International Labour Organization Standards and South African Law'* (2012) 262.
[86] Freedom of Association Digest, para 362 and 363: ILO General Survey by the Committee of Experts. 1983 para 200.
[87] Public Servants are defined as "those acting in their capacity as agents of public authority and this should only cover top civil servants. Freedom of Association Digest, para 362.
[88] "Essential Services as those interruptions of which would endanger the life, personal safety or health of the whole or part of the population" Freedom of Association Digest, para 394.
[89] Art 20 (1) of the Universal Declaration of Human Rights provides that everyone has the freedom to peaceful assembly and association
[90] 'The right to strike: A comparative perspective. A study of national law in six EU states' available at *http://www.ier.org.uk*, accessed on 20 September 2018.

the assumption that the ILO discounts or refrains from creating a framework that seeks to protect and advance the right to strike.[92]

However, the right to strike can be construed from the pronouncements of the ILO's supervisory instruments, such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR),[93]

The right to strike can be inferred from the ILO's two foundational conventions, which are, the Freedom of Association and Protection of the right to Organize Convention No. 87 of 1948[94] and the Right to organize and Collective Bargaining Convention No. 96 of 1949.[95]

2.6 Conclusion

Both South Africa and Zimbabwe have entrenched right to strike in their respective constitutions. However this right to strike is not absolute and is limited with a law of general application namely s 36 of the South African Constitution and s 86 of the Zimbabwean Constitution. The strike action in both South Africa and Zimbabwe has to comply with both procedural and substantive limitations as set out in the Labour Relations Acts. The South African legislation makes provision for protected and unprotected strikes. Protected strikes are contained in section 67 of the LRA. These are strikes that comply with the procedural requirements in s64 of the LRA (including strike procedures contained in a collective agreement or the constitution of a bargaining council).[96] The most important consequence of a protected strike is that employees who embark on such a strike may not be dismissed by their employer.[97] Unprotected strikes are contained in s68 of the LRA. These are strikes that do not comply with the procedural requirements in s64 of the LRA.

The Zimbabwean jurisdiction makes provision for lawful and unlawful strike actions.[98]

The next chapter will now address the limitations of strike actions in both jurisdictions.

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[91] Breen Creighton '*The ILO and protection of freedom of association in the United Kingdom'* in K D Ewing, C a Gearty & B a Hepple (ed) *Human Rights and Labour Law: Essays for Paul O'Higgins* (1994) 3.

[92] Freedom of Association Digest paras 362 and 363 and ILO: Official Bulletin Vol.LXXVI, 1993 series B, No.1. 1620

[93] The CEAR was established by way of a resolution adopted at the International Labour Conference in 1926 to supervise and report on member states adherence to the ILO's policies

[94] The Freedom of Association Convention was opened for signature on 17 July 1948 and entered into force generally on 4 July 1950.

[95] The Right to Organize and Collective Bargaining Convention was opened for signature on 1 July 1949 and entered into generally on 18 July 1951.

[96] Tamara Cohen, A Rycroft & B Whither, *Trade Unions and the Law in South Africa Durban*: Lexis Nexis, (2009

[97] *ibid*

[98] Lovemore Madhuku – *Labour Law in Zimbabwe* (2015) Weaver Press page 457.

"The only thing workers have to bargain with is their skill or their labor. Denied the right to withhold it as a last resort, they become powerless. The strike is therefore not a breakdown of collective bargaining-it is the indispensable cornerstone of that process." — Paul Clark, 1989

Chapter 3 – Limitations to Strike Action

3.1 Introduction

The right to strike is enshrined in the Constitutions of both South Africa and Zimbabwe; it is not an absolute right and is subject to a number of limitations.[99] A society which lacks the right to strike cannot be regarded as a democratic one.[100]

The right to strike has been acknowledged as an essential right not only in South African and Zimbabwean law, but also within international law.[101]

However, the mere fact that the both the South African and Zimbabwean Labour Relations Act enshrines various limitations does not mean that they are adhered to.

To bring out a clearer comparison between the two jurisdictions, I shall summarize the similarities and the differences between South Africa and Zimbabwe and explain how each of the procedural and substantive aspects mentioned amounts to a limitation to strike action.

Limitations to Strike Action

3.2. The Limitation Clause

Although the right to strike is enshrined in the Constitution of both South Africa and Zimbabwe, it is not an absolute right. The right is subject to limitation clause s36[102] in South Africa and s86 in Zimbabwe.[103]

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[99] See Cheadle (2015) 75. "*Constitutionalizing the right to strike* in Hepple B Le Loux , R Sciarra S (editors) Laws against strike action.

[100] James MacFarlane *The Right to Strike London,* Penguin Books (1981) 12.

[101] Mahommed A Chicktay 'Defining the right to strike: A comparative analysis of international labour organizational standards and South African law' (2012) 33(2) 260

[102] Sec 36 of the Constitution of the Republic of South Africa 108/1996.The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

Except as provided for in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights

3.3 Conciliation and certificate of no settlement

In both South African and Zimbabwean jurisdiction, it is mandatory that a dispute be referred to conciliation[104] before contemplation of a strike action.[105] In the event that conciliation has failed then evidence of this must be tendered in the form of a certificate of no settlement. In South Africa, the issue in dispute must have been referred to the CCMA or the relevant bargaining council.[106] In Zimbabwe there is no provision for a CCMA and thus referrals are made to the Labour Relations Officers.[107] It is submitted that the issuance of a certificate of no settlement correctly reflects the intention and objectives of the Labour Relations Act, which is peaceful resolution of disputes. Attempts must be made for the resolution of a dispute before it escalates into strike action. The requirement that a dispute be clearly raised during negotiations has two purposes. Firstly, it allows that both parties obtain complete understanding as to what needs to be decided. This is important because only if one knows what a dispute is about can a resolution be found. Secondly and more pertinently, it furthers the objectives of the LRA by ensuring that there is an opportunity to engage in amicable deliberations regarding the dispute that would allow both parties equal participation in a way forward.

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[103] Declaration of Rights can be found in s86 of the Zimbabwe Constitution, headed 'Limitations of rights and freedoms'. Section 86(1) provides that the fundamental rights and freedoms set out in Chapter 4 must be exercised reasonably and with due regard for the rights and freedoms of other persons. Section 86(2) provides that the fundamental rights and freedoms may be limited only:
In terms of a law of general application. This means that the law may not single out particular individuals and deny them their rights 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:
The nature of the right or freedom
The purpose of the limitation, in particular whether it is necessary in the interest of defense, public safety, public order, public morality, public health, regional or town planning or the general public interest
The nature and extent of the limitation
The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others
The relation between the limitation and its purpose
Less restrictive means to achieve the purpose

[104] Conciliation is defined as a process in which a commissioner or bargaining council or a third party explains a legal position and encourages the parties to reach a settlement or agreement. It differs from arbitration in that the role or participation of the third party in arbitration is much active and that an arbitrator passed a binding judgement.

[105] Section 104 (2)(b) of the Labour Act Zimbabwe Chapter 28:01

[106] Section 64 (1) (a) of the Labour Relations Act 66 of 1995.

[107] Section 93(3) of the Labour Relations Act Zimbabwe Chapter 28:01 as amended.

3.4 Dispute of right versus dispute of interest

There is no right to strike in Zimbabwe if the dispute in issue is a dispute of right.[108] The same holds for South Africa, employees may only lawfully strike over disputes of interest.[109]

In a dispute concerning a right it follows that the right must exist, one which a party is legally entitled to[110], for example where parties seek to enforce a right in terms of a contract. Section 104 (3) (a) (ii) of the Labour Relations Act of Zimbabwe[111] provides that there is no right to strike if the issue in dispute is that of a dispute of right.[112] It is also not permissible in terms of the LRA to strike over a right and such disputes should be determined by the procedures prescribed in the LRA[113] and which may ultimately result in an arbitration or further litigation. This was confirmed in the decision of *Hospersa v Northern Cape Provincial Administration*.[114]

Section 104(1) of the Zimbabwe Labour Act states that:

"all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest". [115] It bears repetition to state that both in South Africa and Zimbabwe; strike action is only available on dispute of interests.

Thus there is no right to strike in both South Africa and Zimbabwe if the issue in dispute is that of a dispute of right.[116]

It can be argued that the above constitutes a technical distinction which requires due care and consideration, otherwise the employees could risk being accused of embarking on illegal strike. Commenting on this restriction**,** Grogan[117] asserted that this is the most extensive limitation on the right to strike created by the South African LRA and it extends to the Zimbabwean jurisdiction. No formal distinction is drawn between the conciliation of disputes of rights and disputes of interest. Given the major economic and social interests that may be at stake in

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[108] *Zimbabwe Graphical Workers' Union v Federation of Master Printers of Zimbabwe & Another* (2004) (2) ZLR 103 (S).

[109] J V Spielmans '*Labour disputes on rights and on interests'* (1939) 29(2) *The American Economic Review* page 301.

[110] John Grogan '*Workplace Law'* Chapter 21 'the bargaining process', 'Background' available online at http://jutastat.ukzn.ac.za.accessed on 2 November 2017.

[111] The Labour Act Zimbabwe Chapter 28:01

[112] *Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe and another* (2004) (2) ZLR 103 (S)

[113] Section 65(1)(c) of the Labour Relations Act

[114] *HOSPERSA v Northern Cape Provincial Administration (2000) 33 ILJ 1066 (LAC*)

[115] Section 104(1) of the Labour Act Zimbabwe Chapter 28:01 as amended.

[116] *Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe & another* 2004 (2) ZLR 103(S)

[117] Caleb Mucheche Labour Law in Zimbabwe; page 103 (2016) The author regarded this restriction as the "most remarkable substantive limitation on the right to strike''

disputes where industrial action is impending, it may be necessary to consider whether such a distinction ought to be drawn.[118]

3.5 Parties have agreed to refer a dispute to arbitration

In terms of the LRA[119] employees cannot lawfully go on strike if there is an agreement with the employer to refer a dispute to arbitration.[120] "Employees may not strike if they are bound by a collective agreement that: (a) has a peace clause that prohibits strike action over the issue in dispute;[121](b) regulates the issue in dispute; or (c) requires the issue in dispute to be arbitrated".[122] If employees embark on a strike where there is an agreement that states that the particular type of issue in dispute must be referred to arbitration, such a strike will be unprotected.[123]

Similarly in Zimbabwe, strikes are also outlawed in situations where a dispute has been referred to arbitration either voluntarily or compulsorily.[124] The case of *Chisvo and others v Aurex (Pvt) (Ltd) and another*[125] is an important one in so far as referrals to arbitration are concerned. The facts of the case were as follows: a number of workers at a company, including the chairman of the workers' committee, went on strike in defiance of a referral by a labour relations officer of the dispute to compulsory arbitration. The company obtained a show cause order in terms of s 106 of the Labour Relations Act [Chapter 28:01] which directed the workers' committee to show because why the action should not be disposed of in terms of s123 of the Labour Relations Act. Pending its determination, it ordered the termination of the strike. Despite the order, and despite the absence of cause shown, the workers' committee decided to continue the strike. A labour relations officer then addressed the workers and the disposal order was read out, declaring the strike to be illegal and requiring the workers to return to work by a specified time or be dismissed. When the workers failed to comply with this order to return to work, they were dismissed.[126]

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[118] Darcy du Toit & Ronnie, "*The necessary evolution of strike law*" (2012) *Acta Juridica* 195, 216

[119] The Labour Relations Act South Africa 66/1995

[120] The effect of a reference to compulsory arbitration on a collective job action is provided for in section 98 (11) of the Labour Act Zimbabwe which stipulates: "where the Labour Court or a Labour officer has referred a dispute to compulsory arbitration , no employee , workers committee trade union employer organization shall engage in collective action in respect of the dispute.

[121] Section 65 (1) (a) of the Labour Relations Act 66 of 1995.

[122] Section 65 (1) (b) of the Labour Relations Act 66 of 1995.

[123] Section 65 (1) (c) of the Labour Relations Act 66 of 1995.

[124] Section 104(3) (a) (iii) of the Act.

[125] 1999(2) ZLR 334 (S)

[126] Ibid at paras 56- 59

3.6 Strike Ballot

In Zimbabwe collective job action must be approved by the majority of the employees voting by secret ballot.[127] In the event that a strike has not been approved by the majority of employees voting by secret ballot then such strike is deemed unlawful.[128] The Labour Act does not define majority and the regulations governing the voting are not so clear and have the following provision:

> *"The result of the ballot shall be of those who actually cast their vote and not of the total membership of the trade union or employer's organization and those who do not vote shall forfeit their right to vote".*[129]

According to Gwisai[130] the requirements are vague and badly drafted meaning that they must be read robustly, the guiding principle being whether a substantially free ballot has been conducted. He noted that:

> "*The balloting requirement is modelled on colonial legislation and is meant to individualize workers and give bosses, the media, the state and such other ideological instruments of the employer class, full opportunity to intimidate the workers from going on strike"*[131]

There is currently no provision for strike ballot in South Africa, although the Labour Relations Amendment Bill of 2017 (B32 -2017) have now incorporated such a provision.

3.7 Sending written notice to the employer of the commencement date of the strike

In both South Africa and Zimbabwe the Union must notify the employer in writing as to when the strike will begin. In the case of a proposed strike in South Africa, the Union must give the employer at least 48 hours' notice of the commencement of the strike.[132] If the employer is the State, then the notice must be given to the State at least seven days before the strike begins.[133]

In *City of Matlosana v SA Local Government Bargaining Council,*[134] the court elaborated on the necessity of seven days' notice required when the employer is the state. The court highlighted that the State is responsible for supplying essential and basic needs to the general

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[127] Section 104(3) (e) of the Labour Act Zimbabwe Chapter 28:01

[128] What is perplexing is that there is no provision in the Labour Act that defines "majority". In terms of section 104 (3) (e) of the Act, no strike may be resorted to in the absence of an agreement by a majority of the employees voting by secret ballot.

[129] Section 8(9) of Statutory Instrument 217/2003 Zimbabwe.

[130] M Gwisai – *Labour and Employment Law in Zimbabwe: Relations of Work under the Neo Colonial Capitalism* (2007) 289

[131] *ibid*

[132] Section 64 (1) (b) of the Labour Relations Act 66 of 1995.

[133] Section 64 (1) (d) of the Labour Relations Act 66 of 1995

[134] *City of Matlosana v SA Local Government Bargaining Council* (2009) 30 *ILJ* 1293

public. These services are critical in dispensing services to provide for the needs of the public. It is for this reason that the employer being the State requires additional time to decrease any interruption that may occur as a result of the intended strike.

A strike notice need not indicate the exact number of employees that would be participating in the strike.[135]

In Zimbabwe, the LRA provides for 14 days written notice of intention to embark on a strike action.[136] And there are 4 procedural requirements for a notice of intention to strike.[137]

There are four requirements for the notice to be valid.

(i) Be in writing

(ii) Specify the grounds for the intended action:

(iii) Be served on the persons specified in the Act, that is the employer, the employment council and where relevant trade union: and

(iv) Give a space of at least 14 days before the intended action.

Significantly if the notice does not meet any one of these requirements then it is considered invalid at law.[138] In *Net One Cellular (Pty) Ltd v Communications and Allied Services Workers Union,*[139] the court reasoned that a notice that had been issued twelve days after expiry of the notice could not support a strike action. If a notice lapsed then a fresh notice need to be issued. The notice must also be served to the employer. In *Moyo and others v Central African Batteries (Pvt) Ltd,*[140] it was held by the court that if a purported notice is not addressed directly to the employer then it is invalid even if the employer would have heard about it through grapevine.[141]

3.8 Existence of a Union Agreement.

The existence of a Union Agreement is a limitation that applies in both South Africa and Zimbabwe. Employees are also prohibited to embark on strike where there is in existence a

[135] *SATAWU v Moloto* (2012) 12 BLLR 1193(CC)

[136] Section 104 (2) (a) of the Labour Act Zimbabwe Chapter 28:01

[137] Procedural requirements for notice of intention to strike in Zimbabwe

(i) Be in writing

(ii) Specify the grounds for the intended action;

(iii) Be served on the persons specified in the Act , that is the employer, the employment council and , where relevant, the relevant trade union

(iv) Give a space of at least 14 days before the intended action.

[138] Lovemore Madhuku – *Labour Law in Zimbabwe* (2015) Weaver Press page 449

[139] SC 89/05

[140] 2002 (1) ZLR 615 (S)

[141] *Moyo and others v Central African Batteries (Pty)* Ltd 2002(1) ZLR 615 (S)- To further compound the situation, the law in Zimbabwe requires that the strike be carried out immediately after the expiration of the fourteen days' notice, otherwise, undue delays after the expiration of the period concerned would render the notice invalid.

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 matter in dispute[142]. The prohibition could be hailed in so far as it seeks to protect the sanctity of the parties' agreement with respect to what they would have signed and agreed. It can also be argued too that such an agreement by the Unions would also bind non-members, this can be viewed as an unreasonable violation of their right to strike.[143]

Similarly in Zimbabwe, when there is a Union agreement in place, then no strike is permissible before compliance with all the relevant provisions of the agreement.[144]

3.9 No Work no Pay

There is a specific provision in the Labour Act Zimbabwe regarding the effect of a lawful strike action; participation in a lawful strike action does not amount to breach a contract of employment.[145] The Labour Act makes it clear that an employer is not obliged to remunerate an employee for services that the employee does not render during a lawful strike.[146] This endorses the principle of "no work, no pay".[147]

Similarly in South Africa participation in a protected strike does not constitute breach of contract and to counter the effects of the rather generous right to strike on the employer s67 (3)[148] provides that an employer does not have to remunerate an employee for services which he has not rendered. However, if such remuneration includes payment in kind for accommodation, food or other necessities of life the employer may not withhold such payment.

Even if the strike action is in the form of a "go slow", the no pay, no work principle applies as workers are not entitled to partial remuneration because partial performance is a breach of contract. [149]

The 'no work no pay' principle during strike action, is prevalent in both South Africa and Zimbabwe and the decision in *Ekurhuleni Metropolitan Municipality v South African*

[142] Section 104(3) (d) of the Labour Act, Zimbabwe

[143] *Association of Mine Workers and Construction Union and others v Chamber of Mines South Africa obo Harmony Gold Mining Company Ltd and others* (2014) 9 BLLR 895 (LC)
[144] Section 104(3)(d) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[145] Section 108(3) as read with s108 (2) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[146] Section 108(4) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[147] *National Railways of Zimbabwe v Zimbabwe Railways Artisans Union and others* (2005) (1) ZLR 314 (S).
[148] The Labour Relations Act South Africa 66 of 1995
[149] *3M SA (Pty) Ltd v SACCAWU & Ors* (2001)5 BLLR 483 (LAC).

Municipal Workers Union on behalf of members [150] endorses the view that employees can only be paid for work done and once they have embarked on a strike action that constitute withdrawal of labour and thus will not be paid.[151]

The effects of the no work no pay principle was felt in *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union and others*,[152] where the Supreme Court of Zimbabwe (SC) held as follows;

> "*At common law, the obligation of an employer to pay wages is dependent upon the performance by the servant of the work that he contracted to do… The point being made here is that striking employees are not entitled to remuneration even if where the strike is lawful.*"[153]

3.10 Essential Services

Strikes are not permissible in essential services. A question that immediately comes to mind is: what do essential services entail? What constitutes essential services has been a subject of international and regional debate.

The ILO considers that the right to strike may be limited with respect to essential services.[154] Section 213 of the Labour Relations Act 66 of 1995 (LRA) defines essential service as follows:

> *"Essential service" means (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Services."*

In terms of s76 of the LRA,[155] an employer is also prohibited from employing replacement labour to continue or maintain production during a protected strike if the service in question has

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[150] *Ekurhuleni Metropolitan Municipality v South African Municipality Workers Union (JA12/13) [2014] ZALAC* 61; [2015] 1 BLLR 34 (LAC); (2015) 36 *ILJ* 624 (LAC) (23 October 2014) http://www.saflii.org/za/cases/ZALAC/2014/61.html .accessed 17 September 2017.

[151] The Municipality employed three full time shop stewards, all of whom were members of the South African Municipal Workers Union (SAMWU).
SAMWU immediately applied to the Labour Court to interdict the Municipality from withholding the full time shop stewards pay, the matter went to the LAC and although the majority decision decided the appeal on the basis of a jurisdictional point, namely one pertaining to the application and interpretation of the main collective agreement. Waglay JP held in his minority decision that the salaries of the three full time shop stewards could be withheld during the strike. In any event the appointment of full-time shop stewards is based on the fiction that they perform the tasks they are employed to perform, and that a full time shop steward is entitled to be remunerated for as long as the duties that they are excused from performing are still capable of being performed.

[152] (2005) (1) ZLR 314 (S)

[153] *Ibid* 345-346 A

[154] Mahomed,A Chicktay (2014) "*Can teachers be declared essential services? A comparative analysis of South African legal position and International labour organization standards*" *SAJHR* 526-542

been designated as maintenance service or to fulfill the duties of employees who have been locked out – unless the lock out is in response to a strike.

In the case of *SAPS v POPCRU*[156], as noted by Calitz[157], some crucial questions regarding essential services were considered.[158] An application for a declaratory order was considered to the effect that not all employees within the SAPS constituted essential services employees. The Court agreed with *POPCRU's* argument in this regard. It was confirmed by the Constitutional Court in the *POPCRU* case, which upheld the judgment in the Labour Appeal Court that; "It is the service that is essential – not… the industry within which such services fall"[159]

In Zimbabwe strikes are also prohibited with respect to what are referred to as essential services.[160] Section 102 of the Act[161] defines

> '*an essential service 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 that is declared by notice in the Gazette made by the Minister, after consultation with the appropriate advisory council, if any, appointed in terms of section nineteen, to be an essential service*.'

The Minister through the Labour (Declaration of Essential Services) Regulations[162] has since declared essential services for purposes of s104 of the Labour Relations Act.

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[155] The Labour Relations Act South Africa 66/1995 as amended

[156] *South African Police Service v Police and Prisons Civil Rights Union* 2011 (6) SA 1 (CC)

[157] Karin Calitz, R Conradie 'Should teachers have the right to strike? The expedience of declaring the education sector an essential service' 2013 Stellenbosch Law Review Volume 24, Issue 1, Pages 124-145

[158] The issues arose out of the public service strike of 2007 where employees sought to secure wage demands. The question considered by the LAC was whether the designation in section 71(10) of the LRA of the SA Police Service as an 'essential service' prohibited all SA Police Service personnel from participating in a strike or whether it only applied to members deemed to be members of the SAPS as defined in the SAPS Act.[158] Essentially the SAPS had 160 000 staff, 130 000 of which were appointed under the South African Police Services Act ("SAPS Act") and the balance of 30 000 under the Public Service Act[158] ("PSA"). In this matter, which first came before the Labour Court.

[159] See -Karin Calitz, R Conradie '*Should teachers have the right to strike? The expedience of declaring the education sector an essential service*' 2013 Stellenbosch Law Review Volume 24, Issue 1, Pages 124-145

[160] Section 103(3) (a) (1) of the Labour Relations Act Zimbabwe

[161] The Labour Relations Act Zimbabwe Chapter 28:01

[162] Statutory Instrument No. 137 of 2003 defines an essential service 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 that is declared by notice in the Gazette made by the Minister. It is interesting to note that the Minister of Health Zimbabwe – David Parirenyatwa on 12 April 2016 declared that all Health Services workers were essential services.

While the South African LRA[163] provides for the limitation of the right to strike in respect of essential services, it makes no specific distinction between private and public sector employees. Nonetheless, the practical impact of the limitation remains most visible in the public sector except for the parliamentary service and the South African Police Service,[164] the Act does not follow a "list" approach; instead, the designation of a service as essential is determined exclusively by an Essential Services Committee (ESC).

There is a striking similarity in the definition of essential services in the jurisdictions of South Africa and Zimbabwe. The major difference noted is that there is existence of an ESC in South Africa and maintenance services whereas in Zimbabwe, the Minister of Labour has the powers to declare what type of categories are essential service.

3.11Conclusion

Both South Africa and Zimbabwe have limitation clause and that implies that strike action is not absolute. The significant difference lies in the fact that South Africa has no strike ballot system and in Zimbabwe there is a balloting system that is too restrictive. Both South Africa and Zimbabwe have provisions for essential services. South Africa has the provision for an ESC and in Zimbabwe; there is a glaring absence of the ESC which means that the Minister of Labour and Social Welfare has enormous powers to declare which types of employees to be essential service.

In Zimbabwe the list employees who work in the essential services appears so wide as to include all employees. [165] Although the Minister of Labour acting in terms of s102 (b) of the Labour Act has declared a long list of essential services, [166] not all employees in the declared services are regarded as essential. Services in the fire brigade have been declared essential.[167] Employees regarded as essential services are drivers, control attendants, station officers, fire officers and supervisors of fire officers. All those outside the specified categories are thus not engaged in essential services.[168]

[163] The Labour Relations Act 66 of 1995 South Africa

[164] Section 71 of Labour Relations Act South Africa. The SAPS consists of members and support personnel appointed under different legislation. In *SA Police Service v Police and Prisons Civil Rights Union 2011 32 ILJ 1603 (CC*), the Constitutional Court, relying purely on legislative interpretation, concluded that support personnel were not members of SAPS and are therefore free to strike

[165] Section 104(3) (a)(i) of the Labour Act Zimbabwe chapter 28:01

[166] Labour Declaration of Essential Services Notice, 2003 (SI 137/2003).

[167] Section 2(a) of SI 137/2003 Zimbabwe

[168] Section 2(b) of SI 137/2003 Zimbabwe

It is impossible for capitalists and laborers to have common interests.—Samuel Gompers

Chapter 4 Consequences of Strike Actions

4.1 Introduction

Both the South African and the Zimbabwean Labour Acts do offer protection for employees who participates in lawful or protected strikes.[169]

In South Africa, an unprotected strike may not draw criminal or administrative sanctions.[170] Civil litigation is therefore the only means whereby one could litigate against an unprotected striker.[171] In South Africa with regards to unprotected strike action or where misconduct has taken place, an employer may do one of the following:

(a) Obtain an interdict order to prevent the strike action from taking place[172]
(b) Claim damages and compensation
(c) Contend that the strike action amounted to misconduct and possibly dismiss the strikers[173]

In *Ram Transport (Pty) Ltd v SATAWU* (2011) 32 *ILJ* 1722 (LAC) para [9]. Van Niekerk J sounded a note of warning:

"This court is always open to those who seek the protection of the right to strike. But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose."

In Zimbabwe, the Labour Act imposes heavy criminal penalties on workers committees and trade unions involved in unlawful collective action.[174]

4.2 Civil Liability consequences for the trade Union

The LRA Zimbabwe imposes civil liability on both organisers of and participants in an unlawful collective job action. The Civil liability imposed by s 109(6) of the Zimbabwe labour relations Act includes , liability for the death of a person covers loss of support by the

[169] Section 64 of the LRA of South Africa, Andre Van Nierkerk et al , *Labour Law @Work* (2015) 433.
[170] Tamara Cohen *et al* (2015) 152, Grogan (2015) 460.
[171] Ibid
[172] Section 68 (1) of the South African Labour Relations Act 66 of 1995
[173] Section 68 (1) of the South African Labour Relations Act 66 of 1995 read in conjunction with item 6(1) of the Code of Good Conduct Dismissals.
[174] Section 109 (1) of the Labour Act Zimbabwe Chapter 28:01

dependents of the deceased while the concept of economic loss extends to what has been termed "pure economic loss" in the law of delict. [175]

The LRA[176] Zimbabwe imposes heavy civil liability on both organizers of, participants in an unlawful collective action. The Trade Union and every employee who participates are jointly and severally liable for injury to or death of a person, loss or damage of property or other economic loss.[177]In the South African case of *Mangaung Local Municipality v SA Municipal Workers Union* [178], the court held that a Union will be liable for its failure to take active steps to end a strike action by its members. The court reasoned that the Union was responsible for the loss incurred by the employer because the strike was unprotected.

4.3 Interdicts

Interdicts are specifically intended to protect applicants from suffering irreparable harm which can be caused by wrongful activities.[179] Though the interdicts have been issued by the courts, the effectiveness of such orders remains a moot point. An interdict can only be effective if the court order is respected by the union and its members.[180]

Contempt of LC interdicts has the implications that the rule of law is undermined by the employees or unions. This was confirmed in the case of *Modise v Spar Blackheath* wherein the court reasoned that "obedience to a court order is foundational to a state based on the rule of law. If a court order is disobeyed there would be a society of chaos and lawlessness.[181]

Whilst in South Africa, the LRA[182] makes provision for the issuance of interdicts; the situation in Zimbabwe is slightly different. In Zimbabwe a strike or proposed strike may only be lawfully interfered with through a show cause order.[183] A show cause order is an order that calls upon the responsible parties to appear before the Labour Court and give reasons why the unlawful collective job action should not be terminated, suspended through a disposal order.[184] A disposal order is an order given by the Labour Court directing the termination, suspension of an

[175] Section 109(6) of the Labour Act Zimbabwe Chapter 28:01
[176] The Labour Relations Act Zimbabwe Chapter 28:01 as amended.
[177] Section 109 (1) and 109(6) of the Labour Relations Act Zimbabwe Chapter 28:01
[178] (2003) 24 *ILJ* 405 (LC)
[179] Alan Rycroft (2013) 2499
[180] Tamara Cohen et al (2015) 153 notes that in Britain a contempt of court order application can also be applied for in order to reinforce the interdict order.
[181] *Modise v Steve's Spar Blackheath* (2000) 5 BLLR 496 (LAC)
[182] The Labour Relations Act South Africa 66 of 1995 as amended.
[183] Section 106 of the Labour Act Zimbabwe Chapter 28:01
[184] Section 106(2) of the Labour Act Zimbabwe Chapter 28:01

unlawful collective job action.[185] Whilst a disposal order can only be issued by the LC, a show cause order can only be issued by the Minister of Labour and this was enunciated in the case of *Cargo Carriers (Pty) Ltd v Zambezi and others*.[186]

4.4 Dismissals

An employer in South Africa shall not dismiss employees who embark on a protected strike – s 67(4, 5) of the LR ,however in the event that an employee is involved in gross misconduct such as damage to property then he /she can be dismissed pursuant to fair procedure. In South Africa, dismissal of unprotected strikers must be both procedurally and substantively fair. To be procedurally fair, unprotected strikers must be given a hearing and an ultimatum.[187]

However, in the event that the strike action is protected, s67 of the LRA[188] provides that an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike. If an employer were to dismiss such employees then it would amount to an automatically unfair dismissal. However, an employer is not precluded from fairly dismissing the employee over reasons related to conduct during the strike action or for operational requirements.

In the South African case of *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others*[1993] ZASCA 201; (1994) (2) SA 204, it was held that participation in an unprotected strike constitutes serious and unacceptable misconduct by workers. Similarly in South Africa, if employees participate in an unprotected strike action, any dismissal must still be substantively and procedurally fair and conform to (item 6(1) of the code of good practice.[189]

In *SACTWU v Berg River Textiles* (2012) 33 *ILJ* 972 (LC) it was noted that an assessment of the "seriousness of the contravention" takes into consideration "the duration of the strike, attempts made by the union and employer respectively to resolve the dispute as well as the

[185] Section 107(2) of the Labour Act Zimbabwe Chapter 28:01
[186] 1996 (1) ZLR 613 (S).
[187] *Modise and others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC)
[188] The Labour Relations Act South Africa 66 /1995 as amended.
[189] Item 6(1) of the code of good practice South Africa: Dismissals and industrial action.—(1) Participation in a strike that does not comply with the provisions of chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including—
(a) the seriousness of the contravention of this Act;
(b) attempts made to comply with this Act; and
(c) whether or not the strike was in response to unjustified conduct by the employer.

extent of the disruption to the business of the employer". The court needs to determine whether the relationship has irretrievably broken down and whether dismissal is appropriate.[190]

Similarly in Zimbabwe, participation in an unlawful strike action is deemed as serious misconduct but such dismissal has to abide to the procedures of s12B (1).[191] In the Zimbabwean case of *Zimpost (Pvt) Ltd v Communications and Allied Workers Union*[192] , a group of employees embarked on an unlawful strike and the employer took disciplinary action and dismissed all of them. Each employee was found guilty and dismissed. The Union challenged the dismissal as an unfair labour practice; the SC of Zimbabwe held that such dismissals were fair.

In *Zimbabwe Iron and Steel Company Ltd v Dube and others*[193] the employees participated in an industrial action which was unlawful. The Code of Conduct for the Zimbabwe Iron and Steel Company specifically provided that engaging in unlawful collective job action constituted misconduct. The employer instituted disciplinary proceedings in terms of the Code of Conduct and dismissed the employees. The Court held that disciplinary proceedings in terms of the Code of Conduct for participating in the unlawful collective job action were competent and confirmed the dismissal of the employees. Even though an employee has participated in an unlawful collective job action, it does not mean that dismissal is automatic, he or she is still covered by the protection of s12B (1)[194] which provides as follows:

> *"Every employee has the right not to be unfairly dismissed. This means that every contemplated dismissal must comply with the provisions of s12B (1)."*

4.5 Compensation

Section 68 (1) (b) of the LRA South Africa does allow the Labour Court jurisdiction to grant payment of just and equitable compensation for any loss suffered as a result of the unprotected

[190] *SACTWU v Berg River Textiles* (2012) 33 *ILJ* 972 (LC) paras 25- 29
[191] Section 12B (1) of the Labour Relations Act Zimbabwe, every employee has a right not be unfairly dismissed.
[192] *Zimpost (Pvt) Ltd v Communications and Allied Workers Union 2009(1) ZLR 334 (S)*
[193] 1997 (2) SA 172 (ZS)
[194] Section 12B(1) of the Labour Relations Act Zimbabwe as amended.

strikes.[195] There is a growing list of decisions in which the court has indicated that it will hold Unions accountable for unlawful acts by their members.[196]

In *Coin Security Group (Pty) Ltd v Adams*[197], employees participated in a strike which they believed to be protected. The strikers were warned of the fact that their *bona fide* belief in the legality of the strike was incorrect and as such unprotected in terms of s 65(1)(c) of the LRA. The strike took place over alleged discrimination and/or the enforcement of a collective agreement. The Union decided that a strike would be the better choice, as arbitration or adjudication would be "too slow".[198] The Union's shop stewards did not attempt to stop the illegal blockade at the premises by their members, nor did they disapprove of the members' obstruction of vehicles to the premises which prevented the continuation of business.[199]

The court held that "the strikers must bear the risk that their Union is wrong and their employer was right".[200]

In the Zimbabwean labour landscape, the Labour Act creates two avenues for the affected party to recover compensation. A party may sue for damages[201] in a civil court[202] or a party may institute criminal proceedings.[203]

4.6 Essential Services

The Labour Relations Act South Africa has an option to employers confronted with protected strikes to apply to ESC to be declared an essential service.[204] The apparent flexibility of the definition of essential service makes it possible for a service to be declared as essential on an ad hoc basis.[205] Similarly, in Zimbabwe the Minister of Labour has wide powers to declare a service as essential upon application.[206]

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[195] Section 68 (1) (b) of the LRA 66 of 1995, Cohen et al (2015) 156 note that ILO has frowned upon the practice of granting damages against the Unions.
[196] *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & Others (2015) 36 ILJ 2292 (LC)*[196]
[197] *Coin Security Group (Pty) Ltd v Adams [2000] 4 BLLR 371 (LAC) 372*
[198] *ibid*
[199] *Ibid*
[200] *Ibid*
[201] *Zimbabwe Electricity Supply Authority v Zimbabwe Electricity Supply Authority Employees* ((08/03) [2005] ZWSC 104 (13 February 2005)
[202] Section 109(6) of the Labour Relations Act Zimbabwe Chapter 28:01 as amended
[203] Section 109 (1) of the Labour Relations Act Zimbabwe.
[204] Section 65 (1) (d) of the Labour Relations Act South Africa 66 of 1995 as amended.
[205] Section 70 of the Labour Relations Act South Africa 66 of 1995. The provisions for application for designation of a service as essential are set out in s 71 of the LRA.
[206] Section 102(b) of the Labour Act Zimbabwe Chapter 28:01 as amended.

4.7 Conclusion

The right to strike is guaranteed to every employee, but like other rights entrenched in the Constitution of the Republic of South Africa and Zimbabwe, it is not an absolute right and is subject to certain limitations. There are a number of consequences to strike action both from a protected strike action to unprotected strike action and lawful or unlawful strike action as is the case in Zimbabwe.

In South Africa as in Zimbabwe, no dismissals may be effected to employees for participating in protected strike action/lawful collective job action. However, this does not preclude the employer from disciplining employees for conduct during the strike action. In the event for dismissals that are effected for participating in an unprotected or unlawful strike, then such dismissals must be procedurally and substantively fair and in Zimbabwe such dismissals must comply with s12B(1) of the Labour Act.[207] In South Africa interdicts may be issued to restrain any person from participating in strike action whereas in Zimbabwe a show cause and disposal order has to be issued.

[207] Section 12B(1) of the Labour Relations Act Zimbabwe Chapter 28:01 as amended.

"The most potent weapon in the hands of the oppressor is the mind of the oppressed."— Steven Biko

Chapter 5 – Conclusion and Recommendations

Introduction

Both South Africa and Zimbabwe have constitutionally entrenched the right to strike. There is a high incidence of strike action is South Africa and in 2013 there was a total of 1847 006 working days lost, of which 52% were unprotected strikes.[208] Strike violence is prevalent and 'alarming disregard' for rule of law and orderly collective bargaining. This is in sharp contrast to Zimbabwe where the incidents of strike action have been sporadic and in most cases stifled by the State security machinery. The key research questions were – what is strike action and its limitations in both South Africa and Zimbabwe. It was revealed in this paper that strike action is primarily premised on concerted action and withdrawal of labour. The significant limitations identified were both procedural and substantive limitations.

The Labour Relations Act in both South Africa and Zimbabwe provides a regulatory framework which outlines the procedures for collective bargaining and effective dispute resolution. Additionally, it provides a list of workers who may not engage in strike action, and if such workers do engage in strikes then such action will be unprotected or unlawful. However, the mere fact that numerous strikes have been characterised by brutality and are unprotected or unlawful, illustrates that there is a discrepancy between what policy strives to achieve and the veracity of industrial action. Although both South Africa and Zimbabwe has legislative mechanisms that regulate strike action. It is apparent that there are some inadequacies in the legislation for governing strike action. I shall therefore proffer some recommendations on how legislation may be improved to govern strike action.

5.1 Conclusion

Strike action is considered as an economic sanction used by employees to force the employer to accede to a particular demand of mutual interest.[209]

In South Africa, a strike would always remain unprotected if it takes place under the following circumstances: ¬ employees bound by a collective agreement which in the main prohibits them

[208] https://www.lexisnexis.co.za/pdf/Breakaway-2-3-Liability-sanctions-and-other-consequences-os-strike-action-Prof-Tamara-Cohen.pdf: accessed 23 October 2017.
[209] Harry W Arthurs et *al Labour Law and Industrial Relations in Canada* 3 rd *ed* (K Deventer (1988) 251

from taking part in any strike action especially when a dispute itself requires arbitration; [210] any situation wherein the issue in dispute can be referred for arbitration or even to the Labour Court; [211] when employees are signatories of a binding arbitration award, collective agreement or Ministerial determination of Basic Conditions of Employment Act which determines the regulation on the dispute at issue; [212] engagement of employees in essential or maintenance services; [213]and when employees engage in work stoppages which are not covered in any way by the definition of a strike. [214]

In Zimbabwe, there is provision for a lawful or unlawful strike action. The procedural steps that have to be followed in a lawful strike action are as per the Labour Relations Act[215] and interestingly a strike action would be deemed unlawful if a situation can be referred to arbitration or Labour Court, where employees are signatories to a binding arbitration award, or employees are engaged in essential services.

5.2 Recommendations

It is submitted that, that the current legislative framework in South Africa and Zimbabwe relating to strike does not succeed in finding a proper balance between the respective interests of all the parties concerned.

The Act lays down the specific procedures which must be followed by employees in order to enjoy the right to strike[216], a distinction is drawn between a protected and unprotected strike. Protected strikes are generally those strikes which are undertaken in compliance with the provisions of the Act.[217]

On the other hand, unprotected strikes are those which do not comply with the procedural requirements of the Act. In Zimbabwe the Labour Act provides for a lawful or unlawful strike action.[218]

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[210] See section 65 (1) (a) and (b) of the Labour Relations Act South Africa.
[211] See section 65 (1) (c) of the Labour Relations Act South Africa.
[212] See sections 44 and 65 (3) (a) (i) of the Labour Relations Act South Africa.
[213] Section 65 (1) (d) (i) and (ii) of the Labour Relations Act South Africa.
[214] J Grogan , *Collective Labour Law* 10th *ed* Juta
[215] Section 104(4) of the Labour Relations Act Zimbabwe
[216] Section 64 of the Labour Relations Act
[217] Section 67(1) of the Labour Relations Act. See *SA Chemical Workers Union and others v Sentrachem Ltd* (1998) 9 *ILJ* 410 (IC), where the Industrial Court sought to draw a distinction between legitimate and illegitimate strikes
[218] Section 104 (3) Labour Act Zimbabwe Chapter 28:01 as amended "lawful collective job action" means collective job action which is not prohibited in terms of subsection (3) of section one hundred and four;

The limitation of the right to strike contained in section 65(1) of the Labour Relations Act[219] and/or the powers given to the Labour Court in terms of section 68(1) of the Labour Relations Act[220] are, in my view inadequate if regard is had to huge impact of industrial action on the socio-economic interests of the parties involved. Arguably, section 65 of the Act does not address the broader issues relevant to industrial relationship and the extent to which strike action should be limited.

An amendment to the Labour Relations Act should be considered to confer more powers on the Labour Court to adjudicate industrial disputes with much flexibility than it does in terms of the current legislative framework. A specific provision should therefore be introduced into the Labour Relations Act to extend the powers of the Labour Court to include the jurisdiction to adjudicate on fairness of industrial demands.

There has to be a provision in the Labour Act that once a strike action has turned violent then such strike action if it was a protected or lawful strike then it must lose its status. This must apply to both jurisdictions.

It is also suggested that the employment of replacement or scab labour must be outlawed completely for the simple reason that once an employer replaces striking employees with scab labour that may have the effect of disincentivising the employer and the employees from reaching an expeditious resolution to the dispute.

Both in South Africa and Zimbabwe, essential services are disallowed from strike action. In South Africa, the Minister has powers to declare on *ad hoc basis* such types of employees who may be designated essential services. Similarly in Zimbabwe, the Minister of Labour through s102 of the Labour Act has powers to further designate essential services.

In terms of the LRA,[221] healthcare workers are not permitted to engage in protected strikes unless a minimum services agreement is concluded which would provide that only minimum services be regarded as essential.[222]

[219] Section 65(1) of the Labour Relations Act provides: (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act; (d) that person is engaged in – (i) essential service; or (ii) maintenance service

[220] Labour Relations Act South Africa 66 of 1995.

[221] Paulus Zulu *A Nation in Crisis: An Appeal for Morality* (2013) 210.

Similarly in Zimbabwe, There is a blanket prohibition against resorting to strike action for employees engaged in essential services.[223] The Minister of Labour in Zimbabwe has powers in terms of s102 (b)[224] to declare a long list of essential services.[225] Disputes in essential services can only be referred to compulsory arbitration.[226]

Notwithstanding the blanket prohition against strike action in essential services, in April 2018, 16,000 nurses were fired by the Zimbabwean government following a multi-day walkout that began on April 16 over unpaid wages. The strike took place just one day after a month-long walkout by junior doctors ended.[227] The Vice President Constantino Chiwenga described the nurses' strike as "politically motivated. The nurses were dismissed and requested to apply for their jobs. [228]

The decision to dismiss the nurses was endorsed by the President Emmerson Dambudzo Mnangagwa in a statement wherein he indicated that: "Government has done everything to comply with the demands of the striking nurses and the striking nurses have done everything to defy the directive by Government. This leaves us with no option, but to dismiss them".[229]

The LRA[230] does not specifically stipulate any procedures for enforcing discipline on healthcare workers who engage in strikes as this is regulated by the respective regulations healthcare workers are required to adhere to. The National Council of Nurses compels all nurses to comply with a code of conduct and stipulates the punishment on nurses who do not comply.[231]

The Health Professional Council of South Africa (HPCSA) stipulates in its ethical code that strike action is deemed unethical.[232] This is not reflected in the Labour Relations Act.

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[222] Nina Veenstra … et al '*Unplanned antiretroviral treatment interruptions in Southern Africa: how should we be managing these*?' (2010) 6(4) *Globalisation and Health* 2.
[223] Section 104(3) (a) (i) of the Labour Act Zimbabwe Chapter 28:01 as amended.
[224] The Labour Act Zimbabwe Chapter 28:01 as amended.
[225] Declaration of Essential Services Notice, 2003 (SI 137/2003).
[226] Section 93(5)(a) of the Labour Act Zimbabwe Chapter 28:01 as amended
[227] Zimbabwe's nurses go on strike over allowances. The Herald 16 April 2018
[228] https://www.cnbc.com/2018/05/01/Zimbabwe-mass-strikes-trouble-president-mnangagwa-ahead-of-election.html 1 May 2018.
[229] The Government fires all striking nurses; The Herald Zimbabwe 18 April 2018.
[230] Act 66 of 1995 South Africa.
[231] Marie Muller '*Strike action by nurses in South Africa: A value clarification'* 2001 *Curations* 42-43.
[232] Gboyega A Ogunbanje & D van Knapp '*Doctors and strike action: Can this be morally justifiable*?' (2009) 51 *Fam Pract* 307

Civil servants in the health sector in Zimbabwe are regulated by the Health Services Act,[233] (HSA) which recognises their rights to form associations but does not recognise the right to strike.

The strike that has gone down in South African history as the most gruesome and bloodiest in South African history is that which has been branded the 'Marikana Massacre.[234] The strike action took place despite all the limitations that are placed on strike action, and this brings to the fore whether legislation is effective in governing strike action. I submit that there are inadequacies both in South Africa and in Zimbabwe.

There also needs to be an analysis on how effective interdicts have been in controlling unlawful behavior.[235]

5.3 The requirement to give 14 days' written notice before embarking on strike action in Zimbabwe.

The 14 days to embark on a strike action in Zimbabwe appear to be a plausible in that it gives both parties an opportunity to engage with a view to resolving the dispute. In South Africa legislation provides for equivalence of either 48hours or 7 days if the employer is the State must be adopted. It is recommended that South Africa may adopt the 14 days' notice as provided for in Zimbabwe.

5.4 The fact that employees should embark on strike action as soon as the fourteen day period expires.

The Court in Zimbabwe should adopt the stance that as long as the employer has been adequately notified, in writing or otherwise, employees should be allowed to proceed with a strike action. It should not be an issue that they did not do so as soon as the 14 days' period expires. This should be the case especially in those cases where the dispute is based on grievances that would have been articulated in an earlier notice. The legislature needs to define what will be reasonable time that employees should engage on strike action after the 14 days expiry.

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[233] Health Services Act 28 of 2004 (Chapter 15:16).

[234] Sandile Lukhele '*The Marikana massacre: where the new South Africa lost its innocence: South Africa-issue* in focus' 2015 *Africa Conflict Monitor* 69.

[235] C O'Regan '*Interdicts restraining strike action- Implications of the Labour Relations Amendment* Act 83 of 1988 (1988) 9 *ILJ* 959 at 959.

5.5 Requirement that conciliation should be resorted to first before embarking on strike action.

Despite imposing this requirement, the Labour Act[236] Zimbabwe does not prescribe the formalities or procedures to be adopted in the conciliation process. It is recommended that the clear procedures and formalities should be put in place so that there are no delays in the conciliation process. More so, it has been highlighted that currently, we do not have an independent panel of conciliators whom employees can trust to effectively resolve their disputes. Thus, a panel of independent conciliators who are not subject to the control of the government must be established. For instance, employers and employees representatives in different sectors should be allowed to nominate individuals who will act as conciliators as and when disputes arise.

5.6 Powers of the Labour Court

A specific provision should therefore be introduced into the LRA[237] to extend the powers of the Labour Court to include the jurisdiction to adjudicate on fairness of industrial demands. The courts in both South Africa and Zimbabwe do not have automatic rights to adjudicate on or stop an industrial action or any matter unless an affected person approaches or makes an application to a court.[238]

5.7 No work no pay

In both South Africa and Zimbabwe during a strike the principle of "no work, no pay" rule applies.[239] This rule affects employees as they are not offering their services, yet the employer does not feel any harm as it is able to proceed with production through the employment of replacement workers. In both South Africa and Zimbabwe, employers may recruit replacement labour and continue with production. The only significant difference is in South Africa where replacement labour may not be procured if it's a maintenance service. In terms of s76 of the

[236] The Labour Relations Act Zimbabwe Chapter 28:01 as amended.
[237] *ibid*
[238] Section 38 of the Constitution provides that: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are-
(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members".
[239] Section 67(3) of the Labour Relations Act provides that 'an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or protected lock-out'.

LRA,[240] an employer is also prohibited from employing replacement labour to continue or maintain production during a protected strike if the service in question has been designated as maintenance service or to fulfill the duties of employees who have been locked out – unless the lock out is in response to a strike. It is recommended that whilst the no work no pay principle must be retained since an employment relationship is a reciprocal one, however the issue of replacement labour must be revisited.

5.8 Strike protection lost as a result of violence and the functionality requirement

There is no provision in the LRA which expressly provides for a strike to lose its protected status. An application would have to be made by the employer to the court, probably on an urgent basis, for a declaratory order in terms of s158(1)(a)(iv) of the LRA to declare the strike 'unprotected', due to misconduct taking place.[241] Practical difficulties would clearly arise from having to answer the following questions, how much violence or misconduct would have to have occurred before the court would intervene.

5.9 Interest Arbitration

The popularization of interest based arbitration[242] is a key consideration in South Africa. Clauses must be inserted in the LRA[243] that will compel trade unions and employers to end a strike that is having a negative impact on the economy or the social welfare of the public.[244] Interest arbitration can be an effective substitute to industrial action short of the costs associated with strikes and lock-outs.[245]

It is recommended that Zimbabwe should also adopt the interest arbitration process.

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[240] The Labour Relations Act South Africa 66/1995 as amended

[241] Allan Rycroft, *'Can a Protected Strike Lose its Status'* (2012) 33 *ILJ* 821, 826

[242] Interest arbitration involves the establishment of the terms and conditions of a collective-bargaining agreement. In Canada, interest arbitration is an entrenched feature of the bargaining landscape. It applies, mostly, in first agreement or first contract situations when it is considered that a union (immediately after obtaining recognition) is most vulnerable to delaying tactics by an employer who might frustrate the making of a collective agreement . Christopher Alberty, 'Interest Arbitration: Its use in broader public sector disputes in Ontario' (2013) 34 *ILJ* 1675

[243] Act 66 of 1995 South Africa

[244] In his State of the Nation address, President Jacob Zuma said "social partners had to meet and deliberate on the violent nature and duration of strikes, given the effect of the untenable labour relation environment and the economy", Business Day "Long strikes could be held in check with plan for interest arbitration" 21 July 2014 at pages 1-2. The Minister of Labour has said: "South Africa has been hit by an increase in strikes over the past four years with stoppages rising from 51 in 2009 to 114 in 2013" according to the Department of Labor's Annual Industrial-Action Report, Business Times of the Sunday Times: 17 August 2014, at 5.

[245] Christopher Alberty, *'Interest Arbitration: Its use in broader public sector disputes* in Ontario' (2013) 34 *ILJ* 1675

5.10 Balloting System

To address the issue of strikes, it is suggested that the members of a trade union proposing a strike should be balloted.[246] It is submitted that that the aim of a ballot by members before a strike takes place is to prevent industrial action that has little or no support. Violence is likely to occur during industrial action that enjoys little support. The ballot must be a secret one and that promotes the privacy and it will serve to avoid pressure by union leaders on employees to vote in favour of a strike. Then such a strike action may only commence once the majority of the members have voted in favour of the strike.[247] In that regard a failure to conduct such a ballot by the Union will render the strike action unprocedural.[248] The requirement is viewed as a limitation on the power of trade unions, and generally, a hindrance to workers' constitutionally entrenched right to strike.[249]On the other hand, a different assertion argues that the absence of a ballot requirement prior to strike action fails to democratize industrial relations in South Africa.[250] It has been proposed by the government of South Africa that the introduction of compulsory ballots prior to a protected strike would largely decrease violence and intimidation against non-striking employees.[251]

Furthermore a large number of strikes in South Africa are to lobby employers to either increase wages or improve the working conditions.[252]

The balloting process in Zimbabwe needs to be simplified and made clear. Collective job action must be approved by the majority of the employees voting by secret ballot.[253]

The Act does not define majority and also avoids specifying whether or not all employees in the industry or undertaking are entitled to participate in the ballot.[254]

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[246] A ballot by members means that all members of the union who are eligible to vote must vote either in favour of or against a proposed strike. After a ballot has been conducted, a certificate issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a council to the effect that it has been properly conducted will be proof that a union has complied with the provisions relating to ballots

[247] See the Memorandum of objects on Labour Relations Amendment Bill 2012.

[248] Mpfariseni Budeli "*The Impact of the amendments on unions and collective bargaining"* Paper presented at the 27th Annual Labour Law Conference in Sandton Convention Centre (Johannesburg) on the 5-7 August 2014.

[249] Thembeka Ngcukaitobi '*Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana'* (2013) 34
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[250] Mulungisi Tenza '*An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions'* (2015) *19 Law Democracy & Development* at 214

[251] Mike Malefane 'Proposals 'an attack on unions'' *Sowetan* 8 December 2011 at 4.

[252] Genius Murwirapachena and K Sibanda 'Exploring The Incidents Of Strikes In Post-Apartheid South Africa' (2014) 13 *International Business & Economics Research Journal* 3, 554

[253] Section 104(3) (e) of the Labour Relations Act Zimbabwe Chapter 28:01 as amended.

5.11Specialized Units within SAPS and ZRP

Both the SAPS and ZRP should have specialized units trained to handle strike action. This will assist in the intervention processes required when dealing with strike action.

[254] Statutory Instrument 217 /2003 Zimbabwe.

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