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Research Paper

Evaluation of the Labour Court as an Instrument for Dispute Resolution in Zimbabwe

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ABSTRACT: *This article reviews the legal framework for labour dispute management in Zimbabwe. In evaluating the labour court, Trudeau's framework was adopted looking at the speed, accessibility and effectiveness of the labour court in Zimbabwe as an instrument for workplace dispute resolution. Results showed that in terms of speed, the labour court has been faced with a backlog of cases. In terms of access, the labour court is accessible to all parties and is effective in handling workplace cases.*

I. INTRODUCTION

The relationship between the employer and employee has been described as conflictual. Conflict arises as a result of divergent interests between the owners of the means of production and providers of labour. For this reason conflict is inevitable. The labour court is one of the instruments used to address disputes in the workplace and enhance workplace democracy. The purpose of this article is to review the labour court in Zimbabwe as an instrument for dispute resolution.

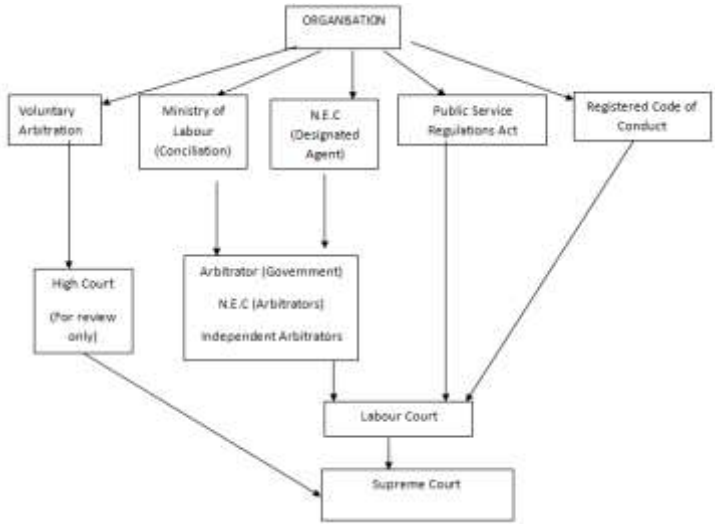

Figure 1. Summary of which the Labour Court can be approached

II. METHODOLOGY

Trudeau (2002) framework will be used to evaluate the labour court. The framework in determining effectiveness looks at speed, accessibility and effectiveness. When Trudeau developed the yardsticks to determine effectiveness, he was looking at arbitration system. The research will adopt the same framework since it was used in alternative dispute resolution, and Labour Court as another method of alternative dispute resolution can also be assessed using the same framework.

The speed with which a system operates in dispensing justice is a paramount feature of justice delivery and a key feature of effectiveness. According to Trudeau (2002), the system of dispute resolution should not be cumbersome. It should allow for expeditious handling of disputes by not lengthening the dispute resolution process. According to Brand et al (1997) the efficiency aspect of dispute resolution entails that parties should

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have easy access to the dispute resolution systems. They should know who to approach and how to involve the dispute resolution institutions in their dispute. This was complemented further by Trudeau (2002), who argued that arbitration is accessible if parties have full knowledge of how it works as well as how readily the facilities can be accessed. This includes the knowledge of the procedures and the system in general. Trudeau further notes that accessibility refers to the ease with which disputants can resort to the process without the complication of technical considerations and complex legal paper work.

III. RESULTS AND DISCUSSION

Accessibility

Gwisai (2006) observed that the Labour Court rules SI 59 of 2006 rule 12 subrule (1) and (2) affirm the informal and inflexible character of the Labour Court required under Section 90 (a) which states that the court "shall not be bound by the strict rules of evidence and the Court may ascertain any relevant fact by any means which the presiding officer thinks fit and which is not unfair or unjust to either party". Various decisions of the Labour Court have affirmed this informal and flexible character of the Labour Court. In *Kurwaisimba vs Windmill (Pvt) Ltd LC/H/42/06*, Musariri P held that the Court was not bound by the strict rule of evidence. Hove P aptly put it in *Guyo vs Trans Africa Timber Merchants LC/H/246/04* by stating "the Labour Court is an informal court, which is not restricted by the usual rules of evidence, as is the case in other courts. It is not concerned with technical issues but concerns itself with substantive issue of justice and fairness".

Representation is also another issue of accessibility of the Court. According to the Labour Court rules, representation was defined as "means an official or employee of a registered trade union or employer's organisation representing a party who is a member of that trade union or employer's organisation". This is in line with Section 92(b) of the Act. In the case of *Bothwell Rutsvara vs Lucullus (Pvt) Ltd LC/H/38/08* it was held that consultants are not permitted to represent parties in the Labour Court. Gwisai (2006) argued that this archaic provision is designed to protect the monopoly of bosses and lawyers over legal services and has no place in modern legislation. The provision hits hardest ordinary employees who cannot afford the massively escalating fees of lawyers, which is at an hourly rate than an ordinary worker`s monthly wage. The researcher is persuaded by the thinking of Gwisai that due to economic meltdown, most employees do not afford to hire a lawyer, but it will be investigated in the study to establish if workers are hard done by the provision and that they clamour to be represented by whomever they deem fit or that relaxation in rules will reduce the court to a kangaroo court.

It was argued by Brand et al (1997) that it is almost axiomatic that the ideal labour dispute resolution system should be free, or, at the very least, inexpensive. The practice direction number 1 of 2014, require that a party who lodges an appeal or application before the Labour Court to deposit with the sheriff as security of service of all notices for set down of matters, if one does not pay the costs, the appeal or application will be deemed to have been abandoned and shall not be set down for hearing. The researcher seeks to find out from the stakeholders who approach the court if the issue of paying costs is making the court accessible or otherwise.

Speed

Madhuku (2012) claims that the Zimbabwean labour law does not impose a maximum time limit for the Labour Court to deliver judgments, he argued that this gap in the law accounts for some of the delays in resolving labour disputes. The researcher is of the view that any long delays in the court process creates barriers to justice, hence the old adage justice delayed is justice denied. Thus the research sought to establish the delays encountered in the matters before they are set down and after judgments have been reserved. Put simply, the research will show whether it is the process that delay matters or the period awaiting the outcome. Standards emerging from other countries provide a time limit within which a judgment must be made. Thus, Section 67(4) of the Malawi Labour Relations Act, 1996 says:

"Every decision, including any dissenting opinion, shall be issued to the parties within twenty-one days of the closing of the final sitting on the matter".

The Industrial and Labour Relations Act Chapter 269, Section 94 of Zambia says:

(1)"The Court shall deliver judgment within sixty days after the hearing of the case. Judgment of Court"

(2)"Failure to deliver judgment, within the period stipulated in subsection (1) shall amount to inability by the Chairman or Deputy Chairman to perform the functions of his office and the provisions of the Constitution shall apply. Cap. 1"

The issue of enforceability of judgments also affects the speed with which matters are determined. Judgments of the Labour Court are not automatically enforceable. Section 92B (3) provides the following:

"Any party to whom a decision, order or determination relates may submit for registration the copy of it furnished to him in terms of subsection (2) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or, if the decision, order or determination exceeds the jurisdiction of any magistrate court, the High Court".

Madhuku (2012) argued that the registration process is laborious and confusing. Many workers are unaware of this requirement and the lapse of time between obtaining the judgment and seeking registration for enforcement may make it impracticable to get an effective remedy. The courts refuse to register the judgments that are not quantified, as an order for reinstatement only that means the employees have to go back to the Labour Court again and make an application for quantification, further again waiting for that application to be determined.

Other countries in the region make these judgments automatically enforceable. For instance in South Africa, Section 163 of the Labour Relations Act, 1965 provides the following:

"Any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court"

In relation to orders of the Industrial Court, the Botswana legislation says in Section 25(2) that:

"A decision of the Court shall have the same force and effect as a judgment or order of the High Court, and shall be enforceable in like manner as such judgment or order".

Section 75 of the Malawi Labour Relations Act 1996 says:

"Any decision or order of the Industrial Court shall have the same force and effect as any other decisions or order of a competent court and shall be enforceable accordingly".

The examples from other countries are very insightful. In this research, the researcher will make reference to the above literature in examining the extent to which employees labour in their endeavour to register awards to other courts considering other courts have their backlog as well, and their processes which is different from those processes of the Labour Court. The study will establish if this route is long and tortuous to employees, or its a process that has to be followed and are comfortable with it.

Expertise

Efficiency and effectiveness in dispute resolution can only be achieved by human beings. In any system of dispute resolution as noted by Brand et al (1997) the people staffing the various institutions will play a decisive role in determining how efficiently and effectively that system works. For it is those very dispute resolvers that must strike the balance between countervailing considerations of practical and informal dispute resolution on the one hand and the maintenance of fairness, justice, impartiality and order on the other hand. Expertise means the competency of the principal actors in the dispute management process. It is critical that these are manned by specialised personnel who appreciate labour law jurisprudence and industrial relations. According to Bishop and Reed (1998), they should be disinterested and neutral parties. This was supported by Brand et al (1997) who notes that a dispute resolver should be fair, unbiased and independent. Not only will the personnel of the dispute resolution system determine, to a large extent, the efficiency and effectiveness of the system, but they will also determine the view and the attitude that the employers, employees, employers` organisations, trade unions and lawyers take of the dispute resolution system.

Section 85 of the Act states that:-

A person shall not be qualified for appointment as a President of the Labour Court unless he-

(a) Is a former judge of the Supreme Court or High Court, or

(b) Is qualified to be judge of the High Court, or

(c) Has been a magistrate in Zimbabwe for not less than seven years.

Madhuku (2012) observed that Zimbabwe`s Labour Act does not prescribe expertise in labour law as a pre-requisite for appointment as a judge of the Labour Court. Zimbabwe takes the view that any reasonably qualified lawyer is suitable for appointment. This is a fundamental misconception and is a major area of weakness as there is need at the issue of specialisation. Labour law has become a very specialised, complex and challenging area of the law. In Lesotho, Section 23(2) of the Labour Code says:

"The President and Deputy Presidents as may be prescribed shall be persons qualified in law with experience in labour relations".

In South Africa, Section 153 of the Labour Relations Act has the following relevant provisions:

"(2) The Judge President and the Deputy Judge President of the Labour Court must be judges of the Supreme Court; and must have knowledge, experience and expertise in labour law.

(6) A judge of the Labour Court must-

(a) (i) Be a judge of the High Court, or

(ii) Be a person who is a legal practitioner, and

(b) Have knowledge, experience and expertise in labour law".

Madhuku (2012); claims that most current judges of the Labour Court have no expertise in labour law. The majority of them are former magistrates who spent greater part of their legal career in criminal law. The researcher will investigate if the current Labour Court judges had other qualifications in labour law and experience in the field of labour upon appointment and also investigate if this has an adverse effect on the judgments they pass. It is true that the field of labour is evolving and such a special institution should be manned by qualified and experienced personnel, the study will show if the dispute resolvers are up to the task or the outcome of the judgments are compromised to an extend that no reasonable person applying his/her mind to the facts would arrive at such a decision.

Challenges

According to Kanyenze et al (2011), the Labour Relations Board`s and Tribunal`s lack of adequate resources created a huge backlog of cases. Kanyenze further observed that the cumbersome dispute procedures were amended to allow quick decision-making; the numbers of stages to be followed in dispute resolution were substantially reduced. Time limits were also set for handling cases at all stages, which was expected to quicken their resolution. However, in spite of this streamline, the backlog remained. The Tribunal had only two full time judges, who were easily overwhelmed by the number of cases awaiting resolution. It was also highly centralised, based only in Harare. Starting June 2006, Labour Courts were centralised to Gweru and Bulawayo, and up to now the geographical locations of the Court are covering Zimbabwe.

Khabo (2012) notes that the place Labour Court enjoy within the judicial hierarchy is also critical if they are to attract and retain human resource base of the right calibre. The general trend in the region is that the Labour Courts are relegated to the status of the subordinates' court, which is very unfair on the presiding officers considering the specialised nature of the cases they handle and the specialised skills they possess. At least in South Africa the Labour Court enjoys the same status as the High Court. In Botswana, Malawi, Lesotho, Zambia and Zimbabwe the Labour Court is subordinate to the High Court. This subordinate status also has implications in terms of resource allocations and benefits associated with positions. Labour Courts in the region receive a very small budgetary allocation and do not have accommodation of their own and the conditions leave a lot to be desired. In this study it will be highlighted if the Labour Court is subordinate to the High Court and establish if this has implications in resource allocation.

The study will highlight the challenges faced at the Labour Court that hinders its effectiveness in dispute resolution management. In looking at the challenges, the study will be guided by the concept of resource based view. The resource-based view of the organisation emphasizes the need for resources as being primary in the determination of policies and procedures. Addressing journalists, Chinamasa, the then Minister of Justice and legal affairs said "the challenge is that not everybody wants to become a judge as we don`t pay well. The issue of remuneration is still a challenge because we approached some lawyers and they declined to take the offer because of salaries", Newsday March 7, 2013. It will be highlighted in the study if the court has the resources at their disposal for effective resolution of disputes.

According to Boinstein and Thomas (1995), the Labour Court`s libraries are inadequately equipped with recent textbooks and journals. Thus the judges suffer malfunction of digest of labour law as international sources are alien to the courts. Ahmed and George (2002) posit that the judges lack the best support in resources (technical and human). The researcher will investigate to establish whether the Labour Court have a library in place and also to find out whether that library is well stocked with recent material in labour law. In terms of human capital that supports the judges, the researcher will establish whether the Labour Court judges, like other judges of superior courts (Supreme Court and High Court) have research assistants. Hence, research will demonstrate how resources are a vital cog in the justice delivery system.

Another challenge faced at the Labour Courts according to Ahmed and George (2002) is the perennial increase of workload for Labour Court judges which have an adverse effect on the expeditious resolution of matters. Vranken (2009) claimed that the Labour Courts are inundated with cases as both employers and employees have become more litigious. The research will find out if the workload for the judges have increased, and what effects it has on the effectiveness of the court in dispute resolution.

Bonstein and Thomas (1995) postulates that Labour Courts are limited by little competence such that there is little invocation of international standards to enhance judicious decisions. Judges and legal practitioners rarely receive formal training on international laws, such that countries Finland, Ghana, Tanzania and Zimbabwe posses a narrow field of competence as compared to USA (United States of America), UK (United Kingdom), France, Spain and Italy. However, knowledge about dispute management does not affect judges and lawyers alone. Bendeman (2002) claims that; most employers, unionists and employees do not possess and skills to operate effectively in the system. Fayoshin (2008) notes that the calibre of some of the trade union officials who represent their members before the Labour Court is disturbing. It is unfortunate that employee rights are compromised in the process.

Saharay (2011); notes that the Labour Courts have no supervisory jurisdiction that empowers them to act as both a custodian and guardian of employment law. The proceedings at the workplace are overseen by management, whilst those proceedings before the arbitrator are solely dictated by arbitrators; suffice to say that the Labour Court has no role to play. Madhuku (2012) also observed that the Labour Court has no supervisory oversight over the work of arbitrators other than through appeals against awards on a question of law. This in researcher`s view places the Labour Courts in the position akin to those of firefighters who only react upon the breakout of a fire. In the researcher`s view, this places the Labour Courts as mere spectators to industrial disputes. Thus if, in researcher`s view, the Labour Court becomes active participants and major players at industry level, most disputes will be nipped in the bud before they blossom.

Judiciousness

According to Machingambi (2006), the principle of finality to litigation is realised if justice is perceived by parties to have been administered fairly. The judiciousness of the decision determines whether parties accept it. It therefore goes without saying that the decision to appeal against a judgment by parties is directly related to their perception of its judiciousness. A decision which is perceived to be unjust and unfair is likely to be appealed against.

According to Gwisai (2006), a party aggrieved by the decision or order of the Labour Court may appeal to the Supreme Court but only on a question of law, according to Section 92F(1); (2) and rule 36 of the Labour Court. The application of leave to appeal to Supreme Court must be made to the President who made the decision within 30 days from the date of that decision. According to Gwisai, the object of these provisions is to attain expeditious and effective resolution of disputes by achieving finality to litigation. On appeal, the powers of the Supreme Court are wide and they include the power to confirm, vary, amend or set aside the judgment appealed against or remit the case to the court or tribunal of first instance for further hearing or take any other course which may lead to the just, speedy and inexpensive settlement of the case.

Gwisai (2006) argued that the integration of the Labour Court which are founded on a pluralist ideology, with the most conservative of the formal courts is a recipe for disaster. Furthermore, as argued by Gwisai, the Supreme Court is unlikely to fully realise the objects of social democracy in the workplace underpinning the Act. This was supported by Kanyenze et al (2011) who noted that in the case of Charles Ambali vs Bata Shoe Company, the judgment took away the right to reinstatement of a wrongfully dismissed worker. Justice McNally opined:

"...an employee, who considers whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could have reasonably has expected to find alternative employment."

Kanyenze argued that the judgment had the effect of rubbing salt into the injury, blaming the victim for his/her plight. Furthermore, as noted by Kanyenze, the judgment took away a right when it was needed most because the worker was asked to mitigate his loss by seeking alternative employment at a time the unemployment rate was high.

In South Africa, as stipulated by Grogan (2010), any party aggrieved by the Labour Court judgments will appeal to Labour Appeal Court. The Labour Appeal Court is a court of law and equity and it is the final court of appeal in respect of all judgments and orders made by the Labour Court. It is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction (Brand et al, 1997).

IV. CONCLUSION

This paper has looked at the effectiveness and efficiency of the Labour Court with particular emphasis on speed, accessibility and expertise, and lastly on challenges and judiciousness of disputes. The research notes that existing research carried out by various scholars has emphasis on the concept of speed, accessibility and expertise.

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