

Collective Bargaining and Labour Disputes Resolution – Is SADC Meeting the Challenge?

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Fumane 'Malebona Khabo

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Table of Contents

Foreword	vii
1. Introduction	1
2. The Rationale Behind Collective Bargaining	4
3. Creating an Enabling Environment	7
3.1 The Duty to Bargain	7
3.2 Public Sector Bargaining and Disputes Resolution	8
3.3 Institutional Machinery for Labour Dispute Resolution	11
3.4 The Right To Strike	17
3.5 Levels of Bargaining – Enterprise Versus Sectoral (Centralised) Bargaining	19
4. Tripartism in Context	21
5. Challenges in Promoting Collective Bargaining	23
6. Conclusion	29
Bibliography	30

Foreword

The role of collective bargaining as an effective tool for industrial democracy and social justice has been recognized for many years. It is against this background that collective bargaining forms one of the most important gradients of the ILO Strategic Objective on promoting and strengthening social dialogue. Collective bargaining has the potential of reducing conflict through the resolution of labour disputes, and can promote workplace democracy and ensure the recognition and protection of the worker's rights.

This study looks at the challenges the SADC countries are facing in creating a conducive environment that will allow collective bargaining to meaningfully impact the workplace. Whilst most of the countries have legislation and even Constitutions that commit to collective bargaining, the levels of implementation are quite varied and seem to be determined by the levels of economic and political development of the different countries. The success and/or failure of the bargaining process, it has emerged, has been dependant on the level of maturity and strength of the workers' and employers' organizations or their representatives. And there are some employers who fail to accept trade unions as legal entities with the right to bargain on behalf of their members. Where the public service is concerned for most of the countries, the legislation has many grey areas that raise questions as to the governments' commitment and sincerity in extending bargaining and dispute settlement rights to public servants.

The fact that all the SADC countries are members of the ILO and therefore fall within the dictates of what is expected of its members, explains why most of them turn to the ILO for technical support in drafting legislation and for relevant training on labour and employment issues. Their compliance to international labour standards denotes keen interest in international developments and it is a matter of time before this is reflected in successful collective bargaining processes. It goes without mention that there is need for training to bring the bargaining partners, particularly trade unionists, to the same level of competence and confidence.

I would like to express my appreciation to Ms Khabo for bringing the status of collective bargaining and dispute resolution legislation and processes in SADC to the fore, as well as offering remedial actions.

Tayo Fashoyin
Director
ILO Sub-Regional Office for Southern Africa

1. Introduction

Promoting employment and fighting poverty is a major challenge facing the world today, and the Southern African Development Community (SADC) is no exception. The strong correlation between poverty and employment is unquestionable. The importance of employment in the context of poverty stems from the fact that the majority of people, particularly the poor, rely mainly on the use of their labour power to earn their livelihood. The Director General of the International Labour Organization (ILO) would not have captured the position any better in his exposition that:

*'...it is the world of work that holds the key to progressive and long lasting eradication of poverty, in that it is; i) through work that people are able to make choices to a better quality of life; ii) through work that wealth is created, distributed and accumulated; and (iii) through work that people find a dignified way out of poverty.'*¹

Policy makers are therefore enjoined to recognize that employment and the promotion of enterprises that create jobs is the most effective route to poverty eradication. They need to incorporate employment targets and decent work strategies in national development plans, particularly Poverty Reduction Strategy Programs (PRSPs).

The quest is however not only for more jobs but for decent and productive jobs for all 'in conditions of freedom, equity, security and human dignity'² as prescribed by the International Labour Organization under its Decent Work Agenda. The promotion and protection of collective bargaining has been identified by the ILO as one of the tools through which these conditions of decent work can be realized. Collective bargaining ensures that worker rights are genuinely recognized and protected. Again by its very nature it recognizes the desirability for joint decision making, joint problem solving and joint responsibility in conducting relations between employers and employees. It may therefore be viewed as an instrument by which democratic values are infused into the employment context.³

Collective bargaining has a great potential for minimizing conflict, and redressing confrontational attitudes and acrimony inherently associated with the employment relationship, thereby promoting industrial peace and ultimately economic growth. On its own, it can serve as a mechanism for labour dispute resolution by setting out procedures for resolution of labour disputes in collective bargaining agreements. One of the virtues of collective bargaining is that disputes are solved at source, a factor that does not leave the bitterness associated with such adversarial processes of dispute resolution as adjudication.

¹ Somavia J., 'Working Out of Poverty' a report presented to the 91st Session of the ILO Conference, 2003, also quoted in Mandoro L., 'The Use of Social Dialogue in the Preparation of Poverty Reduction Strategies', SRO Harare - Issue No.10, 2006/2.

² *Decent Work* - Report of the Director General, International Labour Conference, 87th Session, 1999.

³ Grogan J., *Workplace Law*, 7th ed., 2003, p. 271.

The promotion of economic growth through the creation of an industrial relations climate that will guarantee industrial peace and stability attracts investment that is conducive to employment creation. As aforementioned, the aspiration is not only for the increase in the number of jobs but for jobs that are decent, leading to an improved quality of life for all. It is in this context that the promotion of collective bargaining plays a critical role in poverty reduction.

Regulatory frameworks are sometimes perceived as *'costs'* as well as *'impediments'* to flexibility and competitiveness either in the eyes of the investor or of the authorities who wish to get investment, but a reasonable investor will be prepared to pay these *'costs'* if industrial peace is guaranteed. When people work in a conducive environment they become more productive and it reduces incidences of pilferage.

The challenge to SADC countries both at a regional and at the national level is the creation of an environment that is conducive to the sustenance of collective bargaining and the promotion of effective labour dispute resolution machineries consistent with ILO instruments and other international laws. Article 5(f) of the Collective Bargaining Convention, 1981 (No. 154) urges Member States to put in place measures to ensure that bodies and procedures for the settlement of labour disputes contribute to the promotion of collective bargaining.

Countries under examination⁴ are the nine sub-regional countries of Southern Africa. Closer integration between these States is inevitable as it is dictated by a number of factors common to them which include: a tendency to share common features, common interests and challenges such as problems of high levels of unemployment, under-development, drought, poverty, and the scourge of HIV and AIDS. Employment creation is key to solving these problems, and calls for coordinated efforts in tackling them if economic growth and decent work for all is to be attained. To fully realize their potential, strategies at realizing full and productive employment and decent work for all must *'be the fruit of intense global co-operation and national commitment'* otherwise they will not succeed.⁵

As part of their commitment to the promotion of collective bargaining some jurisdictions have the right to collective bargaining entrenched in their Constitutions. In Namibia, collective bargaining was recognized as *'the cornerstone of Namibia's system of labour relations'* (Wiehahn Report 1989, p. 96).⁶ Collective bargaining has indeed played a major role in regulating minimum wages in Namibia. Despite the existence of the Wages Commission wages are primarily determined by collective bargaining. In addition, the power of the Minister of Labour to extend the operation of collective agreements to non-parties that existed in the Employment Act, 1992 is still retained in Section 69 of the Employment Act, 2004.

ILO Member States are bound by the Conventions they have ratified. All SADC countries have ratified the two Conventions central to the promotion of collective bargaining, vis-a-vis, Freedom of Association and the Protection of the Right to Organize Convention, 1948 (No 87), and the Right to Organize and Collective

⁴ Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe.

⁵ Somavia J., 'Making the Global Goal of Decent Work for All a National Reality in *Full and Productive Employment and Decent Work – Dialogues at the Economic and Social Council*, 2006, p. 33.

⁶ Fenwick C., 'Labour Law Reform in Namibia: transplant or implant?', University of Cape Town, p. 430.

Bargaining Convention, 1949 (No.98). South Africa has in addition to these also ratified the Collective Bargaining Convention, 1981(No.154). These Conventions embrace the right of all employers and workers to form independent organizations and to engage in collective bargaining with a view to improving working conditions.

By virtue of their membership to the ILO, SADC countries are bound by principles enshrined in the ILO Declaration on Fundamental Principles and Rights at Work which embraces the eight ILO Conventions which are considered fundamental or 'core'.⁷ These conventions relate to (1) freedom of association and collective and the effective recognition of the right to organize and collective bargaining, (2) the elimination of all forms of forced or compulsory labour (3), the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.

Consistent with its global mandate, the ILO gives a lot of technical support to these SADC countries. Most of the labour legislation in the sub-region has been drafted through this technical support, and naturally reflects trends in the regulation of the labour market espoused by ILO Conventions and Recommendations which SADC countries must implement.

This paper seeks to ascertain steps the countries under examination have taken towards the promotion and protection of collective bargaining and ensuring the effective resolution of labour disputes. It would however be helpful at this stage to examine the spirit behind collective bargaining in order to set a framework within which these countries may be evaluated.

⁷ These Conventions are: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No.29); Equal Remuneration Convention, 1951 (No.100); Discrimination (Employment and Occupation) Convention, 1958 (No.111); Minimum Age Convention, 1973 (No.138); and Worst Forms of Child Labour Convention, 1999 (No. 182).

2. The Rationale Behind Collective Bargaining

Collective bargaining is a means of regulating relations between management and employees and for settling disputes between them. It is based upon the realization that employers enjoy greater social and economic power than individual workers. The contract of employment is by nature imbalanced due to the fact that its content is largely determined by the employer by virtue of him owning the means of production and this places him/her in a stronger bargaining position. As employees need work more than the employer needs the services of a particular employee, they tend to accept any terms and conditions offered to them, even if they turn out to be exploitative. This is especially true of employees who enter the labour market without special skills. The high unemployment rate facing most countries also leaves employees with very little choice but to accept whatever is on offer.

A contract of employment assumes that parties bargain from a point of equal strength, which is a fallacy. As observed by some of the learned authors the contract of employment is:

in its inception ... an act of submission, in its operation ... a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment known as the 'contract of employment'.⁸

As individuals, workers are unable to counteract management's economic strength. Remarking on this position Mr. Justice Taft, former President of the United States of America pointed out that:

labour unions were organized out of necessities of the situation. A single employee is helpless in dealing with an employer. He is dependent ordinarily on his daily wage for the maintenance of himself and his family. If the employer refused to pay him his wages that he thought fair, he is nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Unions were essential to give labourers an opportunity to deal on equality with their employer.⁹

Intervention either in the form of statute or a collective bargaining agreement is necessary to act as a countervailing force against the powers of management. Collective bargaining has proved to be an effective tool in redressing the inherent power imbalance in the employment relationship, and placing restraint on managerial prerogative.

Experience has shown that where collective bargaining has taken root state intervention is not even necessary. To this end, Lord Wedderburn pointed out that:

[t]he State when moved by interests of reform, intervenes to assuage inequities of the economic market unless collective bargaining proves adequate.¹⁰

⁸ Davis P., & Freedland, *Kahn Freund's Labour and the Law*, 1983, Stevens & Sons, 3rd ed., p. 18.

⁹ A. Cox, 'Duty to Bargain in Good Faith', 1954, 71 *Harvard Law Review*, 1401, p. 1407.

¹⁰ Lord Wedderburn 'Collective Bargaining or Legal Enactment : The 1999 Act and Union Recognition', 2000, 2, *ILJ (UK)* 1, p. 2.

Legislation has limitations. Standing on its own, the law is not very effective in curtailing managerial prerogative. Legislation only prescribes minimum standards, whereas with collective bargaining, parties can bargain beyond statutory minimum standards to better their conditions of work. Legislation merely establishes 'a floor of rights'¹¹ which is just a foundation upon which trade unions and employers have to build more favourable terms and conditions of employment. For instance, the statutory minimum wage merely provides what one could consider a fair wage, and employers' organizations and trade unions have to bargain collectively for better wages. This floor of rights usually covers wages, hours of work, leave, protection of workers' freedom of association, facilitating collective bargaining between employers and workers, occupational safety and health.

States may have good laws in place, but more often than not encounter problems with implementation. This is particularly the case in developing countries where Labour Departments are faced with such resource constraints as manpower and transport to effectively carry out inspections in order to ensure compliance with prescribed minimum standards.

Collective bargaining ensures that economic development is not attained at the expense of human rights. The pursuit of export oriented strategies of industrialization such as the adoption of Export Processing Zones (EPZs) seems to be the trend in the SADC region, and it is sometimes through these strategies that countries attempt to attract investment by precluding the observance of minimum labour standards in these sectors. The absence of industrial peace will produce general unrest among workers and threaten world peace. This predicament was long observed by the ILO at its formation in 1919 when it declared that:

*conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled.*¹²

Improvement of these conditions has been and continues to be a priority to the ILO and has been translated into a number of policies over time, among them, the Decent Work Agenda.

In consonance with this ILO commitment, SADC countries have on their part undertaken to promote, preserve, and respect social rights through the SADC Social Charter (the Charter of Fundamental Social Rights) signed in Dar-es-Salaam, Tanzania in August 2003, by all the fourteen (14) Member States.¹³ Though non-binding, it is a noble commitment. Article 4 thereof covers freedom of association and collective bargaining. Member States have committed themselves to creating an enabling environment consistent with ILO Conventions and Recommendations on freedom of association, the right to organize and collective bargaining.

¹¹ Kahn Freund, *Supra*, p. 58 (Note 8).

¹² Preamble to the ILO Constitution.

¹³ Angola, Botswana, Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The ILO has long taken cognizance of the critical role collective bargaining can play in bringing about harmonious relations between employers and workers. Article 4 of the Right to Organize and Collective Bargaining Convention, 1949 (No.98) provides that:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of the machinery for voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.

International labour standards provide a benchmark and best practice on which Member States can rely for guidance in the formulation of their policies and legal frameworks. Trade unions and employer's organizations also rely on these standards in the drafting and negotiation of collective bargaining agreements.

It is important at this juncture to ascertain to what extent SADC countries are promoting the implementation of these international labour standards relating to the promotion of collective bargaining and the provision of effective dispute resolution systems.

3. Creating an Enabling Environment

For a conducive environment for collective bargaining to develop the legal and political system must first and foremost tolerate the existence of trade unions by guaranteeing them freedom of association and the right to organize as envisaged by the relevant ILO instruments which include the Freedom of Association and the Protection of the Right to Organize Convention, 1948 (No.87), the Right to Organize and Collective Bargaining Convention, 1949 (No.98), and the Collective Bargaining Convention, 1981 (No.154). This enables trade unions to exercise their right to represent their members' interests by negotiating on their behalf and to carry out union activities without fear of reprisals or victimization. In order to keep abreast with modern industrial relations trends SADC countries have no alternative but to toe the line in ensuring that collective bargaining flourishes with a view to ultimately guaranteeing decent work. Approaches towards fostering collective bargaining and strengthening dispute resolution mechanisms vary from country to country.

To facilitate bargaining between trade unions and employers, SADC countries have equipped trade unions with an array of rights intended to boost their capacity to bargain effectively. These include: the duty to bargain (to assist them persuade employers to bargain), reasonable facilities to confer, the right to strike, protection against anti-union discrimination and non-victimization of employees for their trade union membership or activities.

As long as they are consistent with the law, collective bargaining agreements assume a superior position to the law. To this end, the Lesotho Labour Code¹⁴ provides that the standards contained therein are the minimum legal obligatory standards and are without prejudice to the right of workers individually or collectively to bargain for higher standards, which in turn become the legal standards legally applicable to those workers.

As it will emerge from the paper, the thrust of collective bargaining differs from country to country. According to Simitis¹⁵ *'juridification may come about for different reasons, at a different pace, involve different legal remedies and take very different forms'*. According to him, some of the conditions that bring about this differentiation are the pace and volume of industrialization, political and economic history, trade unions (history and political allegiance), and the structure and scope of collective bargaining. Juridification refers to intervention either by legislation, case law or collective bargaining with the aim of limiting the autonomy of individuals or groups in determining their own affairs.

3.1 The Duty to Bargain

Collective bargaining can only function effectively if it is conducted genuinely by all the parties to the bargaining process. It sometimes becomes necessary to regulate the bargaining process as some parties tend to undermine the negotiation process by

¹⁴ Section 4 (a) of the Labour Code Order, 1992.

¹⁵ Simitis S., 'Juridification of Labour Relations' *Comparative Labour Law* (1986) 7, p. 93.

resorting to such tactics as distortion, misrepresentation, bluff, deceit, secrecy, power play and emotionalism.¹⁶ Countries such as Lesotho and Mozambique have included in their statutory frameworks the concept of the duty to bargain through which employers are compelled to bargain with recognized trade unions. This concept is one of the measures aimed at bolstering collective bargaining. Lesotho has even gone further to legislate on the quality of the bargaining process by introducing *the duty to bargain in good faith*. Bad faith bargaining constitutes an unfair labour practice under the Labour Code.

Traditionally, collective bargaining is an entirely voluntary process, but depending on the level of maturity of trade unions in a particular country, it might be prudent for the State to compel parties to bargain in order to promote collective bargaining. Trade unions in Lesotho are for one generally very weak, hence the provision to compel employers to bargain. Again, there are some employers who are still hostile to trade unions. A legally enforceable duty to bargain enables unions to approach the courts to secure bargaining rights where it has not been possible to do so through persuasion.

In Swaziland, the statutory framework does not impose a duty on the part of employers to bargain with trade unions. An observation has been made that in practice parties find themselves bound to engage in collective bargaining once recognition has been given to a trade union.¹⁷

Likewise, the Labour Relations Act of South Africa does not provide for the duty to bargain. It has been left to the courts to determine it under the 'unfair labour practice' regime. The South African economy is relatively stable, and the majority of its unions such as the Congress of South African Trade Unions (COSATU) are mature and well resourced. These factors appear to have influenced the country's non-interventionist approach, true to Simitis' argument that the level of economic development of a particular country has a bearing on whether a country adopts an interventionist or a voluntarist approach. The Labour Relations Act of South Africa merely facilitates collective bargaining and leaves it to the parties to decide how their bargaining relationships are to be structured.¹⁸

Despite the absence of the duty to bargain in South Africa, the Labour Relations Act, 1995 imposes a duty on the employer to disclose to a representative trade union all the relevant information that will enable the union to engage effectively in collective bargaining.¹⁹ Disclosure of information being an essential element of good faith bargaining, the duty to bargain has indirectly found its way into the South African industrial relations arena.

3.2 Public Sector Bargaining and Disputes Resolution

In most of the SADC countries the public sector is the largest formal employer. In Namibia, for example, the public service employed about 80 000 workers in 2004, in Swaziland the figure stood at about 30 000 in 2006,²⁰ and in Lesotho at 39 065 for the

¹⁶ Brand J., and Cassim, 'The Duty to Disclose – A Pivotal Aspect of Collective Bargaining' (1980) 1, ILJ (SA) 249, p. 251.

¹⁷ Dlamini S. P., 'Swaziland's New Industrial Relations Act 2000, A Legal Response (2000) 21 ILJ, 2174, p. 2178.

¹⁸ Grogan J., *Supra*, p. 274 (Note 3).

¹⁹ Section 16 (3).

²⁰ Fashoyin T., 'Management of Disputes in the Public Service in Southern Africa', p. 2.

quarter ending December 2006.²¹ These figures are relative to the population in the respective countries but generally reflect a high percentage.

Approach towards the regulation of the public sector differs, and a dual position emerges among SADC countries with some having the same legal framework regulating both the private and the public sector whilst others have adopted a separate framework regulating each sector. In Botswana, Malawi, Namibia, South Africa, Swaziland and Zambia, the same labour regulatory framework applies to both the public and the private sector.

In South Africa, the Public Service Labour Relations Act, 1994 and the Labour Relations Act, 1995 provide for collective bargaining in the public service. Conditions of employment and regulations pertaining to the public sector are negotiated at the central level through the Public Service Bargaining Council (PSBC) which is the largest bargaining structure covering more than one million workers. The Council comprises four designated sectors covering education, public health and social development, safety and security and the general public service sector. The council's key function is to create a platform for developing sound labour relations in the public service. Public employees have made use of the available rights to bargain collectively. For instance, South Africa witnessed the biggest strike in June 2007 involving about 800 000 public sector employees who were determined to put pressure on the government to give them a 12% salary increase across the board and the strike took about three weeks. Labour disputes are either settled by the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant bargaining council.

It was only through the amendment to the Trade Unions and Employer's Organization Act, 2003 that public officers in Botswana enjoyed for the first time, access to the right to bargain collectively through the inclusion of public officers in the definition of employee. Practically, however, collective bargaining in this sector is not happening as yet due to the fact that the Public Service Act was not amended accordingly to accommodate the change ushered in by the 2003 Act as at the time of writing this paper.

In Lesotho, public service employees are duly organized by the Lesotho Public Service Staff Association (LEPSSA), but collective bargaining in this sector has not taken off due to the fact that the Association has not yet met the 50% + threshold prescribed by Section 22(2) of the Public Service Act, 2005. Collective bargaining in this sector does not occur culminating in wages and conditions of employment still being determined unilaterally by the government.

In Lesotho and Mozambique the private and the public sector are regulated by two separate legal regimes. The Lesotho Public Service Act, 2005 explicitly removes public officers from the ambit of the Labour Code. Likewise, in Mozambique, the right of public officers to join unions is restricted under Labour Law No. 8 of 1998.

This naturally restricts public officers' right to strike, and effectively places the resolution of labour disputes in this sector under the employer's control,²² a prerogative trade unions were designed to curtail. Although ILO supervisory bodies have pointed out that

²¹ Central Bank of Lesotho, Quarterly Review, December 2006, p. 15.

²² Fashoyin T., *Supra*, p. 3 (Note 20).

the right to strike is not absolute, it has given only three exceptions where this right may be restricted. These concern the police and the armed forces; those public officers 'exercising authority in the name of the State'²³ and lastly, employees engaged in essential services.²⁴ The blanket exclusion of all public officers from the enjoyment of the right to strike regardless of the nature of their duties or level of seniority is therefore in breach of ILO standards.²⁵

The restriction also militates against the spirit of Article 9 of the Labour Relations (Public Service) Convention, 1978 (No. 151) which provides that:

'Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.'

The exclusion of public officers from the purview of the Labour Code in Lesotho further implies that public officers are not subject to the disputes resolution machineries established under the Code, the Labour Court inclusive. Grievances and disputes relating to public officers are regulated by the Public Service Act, 2005. Appeals from decisions of heads of departments lie with the Public Service Tribunal. Disputes of interest are to be conciliated by a Conciliation Board. The Public Service (Amendment), 2007, which was under debate in Parliament at the time of the writing of this paper is proposing that appeals from the Public Service Tribunal be taken to the Labour Court - amendment to Section 30 of the Public Service Act, 2005. Thus the Labour Court will handle public officers' cases only to the extent of appeals.

This move does not augur well in terms of the speedy resolution of labour disputes in that there will be too many levels of appeal as the Public Service Tribunal is itself an appellate body handling appeals from decisions of administrative structures. The decisions of the Tribunal could be made final and binding and perhaps only be subject to review and not appeal which implies getting into the merits of a case and takes longer to determine.

Initially, the Lesotho Labour Code Order, 1992 covered public officers as well. It was only in 1995 in terms of Section 32 of the Public Service Act, 1995 (now repealed) that public officers were prohibited from joining trade unions, and were only empowered to form associations, a position the current Public Service Act, 2005 (having commenced operation on 1st April 2005²⁶) has maintained. The Act expressly guarantees freedom of association in the public service²⁷ but restricts it to the establishment of an association.²⁸

In Lesotho, Swaziland and Zimbabwe public officers may only join staff associations and not trade unions. Although the right to bargain collectively is facilitated, it is limited by the denial of full organizational rights by the exclusion of trade unions. In Mozambique,

²³ ILO, 'Freedom of Association and Collective Bargaining,' Report of the Committee of Experts on the Application of Conventions and Recommendations, 1994, p. 69, para 158.

²⁴ ILO, 'Freedom of Association and Collective Bargaining' Report of the Committee of Experts on the Application of Conventions and Recommendations, 1983, p. 66, para 214. Also ILO, 1985, pp. 78-79, paras 394 and 400.

²⁵ Madhuku L., 'The Right to Strike in Southern Africa' International Labour Review, Vol. 136 (1997), p. 511.

²⁶ Legal Notice No. 31 of 2005 – Government Gazette No.30.

²⁷ Section 21.

²⁸ Section 22 (1).

even the establishment of staff associations is not catered for. This leads one to doubt the commitment of these governments in promoting collective bargaining and in genuine settlement of disputes in the public sector.

3.3 Institutional Machinery for Labour Dispute Resolution

Conflict is inevitable in employment relations. What is important is how it is managed. The ideal situation is for parties to bargain voluntarily without third party intervention. Negotiations however sometimes fail. Where negotiations on any terms and conditions of employment have failed, there must be in place mechanisms to which aggrieved parties can resort to. To this end, the Examination of Grievances Recommendation, 1967 (No. 130) guarantees workers the right to lodge grievances where the employer's actions are either contrary to agreed norms in the collective bargaining agreement, legislative provisions, the contract of employment or custom.

The success of collective bargaining rests on the availability of efficient dispute resolution systems. Article 5 (e) of the Collective Bargaining Convention, 1981 (No.154) provides that bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining. However, in order for such institutions to bring any meaningful contribution to the promotion of collective bargaining, they must be effective and their method of operation must be autonomous, accessible, informal, expeditious and consensual (be subject to tripartite consultation) so as to ensure the confidence of the parties to the dispute.

SADC countries have stood up to the challenge by aligning themselves with the internationally embraced concept of alternative dispute resolution (ADR) through the establishment of conciliation and arbitration forums. Adjudication specialist courts, either for recourse to appeals or reviews, have been established. It is critical that these are manned by specialized personnel who appreciate labour law jurisprudence and industrial relations.

To facilitate proper implementation of the legislative framework and to give users guidance on labour law, countries such as Lesotho Namibia and South Africa have promulgated Codes of Good Practice on a variety of labour related issues. The Lesotho Labour Code (Codes of Good Practice) Notice, 2003 even provides a model recognition agreement to guide employers' organizations and workers and trade unions on the process of collective bargaining and the likely issues to include. The Public Service Act, 2005 also makes provision for the promulgation of codes of good practice which include those relating to collective bargaining and disputes resolution.

Labour disputes mechanisms in the region are dogged by delays. In South Africa, in the CCMA, a dismissal dispute had to be referred within thirty days of the event, the conciliation held within a further 30 days, and the decision delivered within another 14 days, the entire process not taking longer than 10 weeks. This timing has proved to be largely unattainable.²⁹ This problem is not unique to ADR mechanisms courts in the region also have serious backlogs rendering it difficult to hear cases within a reasonable time. Sometimes litigants themselves contribute to this problem, for instance in Namibia,

²⁹ Tokiso Review 2005/06, p. 28.

it was observed that even small issues or sums of money are resolved by courts,³⁰ which is costly and time consuming. Under the Employment Act, 1992, rights disputes went to the Labour Court if the Labour Department had failed to conciliate or arbitrate a matter.

3.3.1 *Alternative Dispute Resolution (ADR) Mechanisms*

In the context of collective bargaining and labour disputes resolution, alternative disputes resolution (ADR) mechanisms contribute to the promotion of collective bargaining through the resolution of labour disputes within the framework of conciliation and/or arbitration processes in which parties to the collective bargaining agreement participate. This situation is envisaged by Article 6 of the Collective Bargaining Convention, 1981 (No. 154). Most of the SADC countries subject disputes related to collective bargaining agreements to conciliation and arbitration mechanisms.

The general trend is now to move towards the adoption of alternative dispute resolution mechanisms (ADR), which embrace the voluntary, informal, accessible and speedy resolution of labour disputes. This phenomenon is relatively new in the sub-region. SADC countries have responded enthusiastically to this new wave by reviewing their legislation to accommodate these ADR mechanisms. The structures which are in place in the various SADC countries are: in Lesotho, the Directorate of Dispute Prevention and Resolution (DDPR) established under the Labour Code (Amendment) Act 2000; in Swaziland, the Conciliation and Mediation Commission (CMAC) established under the Labour and Industrial Act, 2000; and in South Africa, the Commission for Conciliation, Mediation and Arbitration (CCMA) established under the Labour Relations Act, 1995. In Botswana and Namibia, conciliation, mediation and arbitration services are undertaken by the Department of Labour.

The Namibian Employment Act, 2004 specifically mentions that it is intended to promote voluntary collective bargaining. Its central feature is to move away from reliance on Courts in favour of conciliation and arbitration.³¹ It was felt that this model would assist in developing and maintaining harmonious relations between employers and employees which is the essence of collective bargaining.

How countries have integrated ADR mechanisms within their dispute resolution systems differs from country to country. Lesotho and South Africa have adopted this model in their ADR structures. In some, every dispute has to be conciliated upon before it can be sent to either arbitration or adjudication if settlement has proved unsuccessful, whilst in others the legal framework has divided the jurisdiction according to the nature of the dispute between the conciliation forum and the Labour/Industrial Court.

Swaziland is a case in point regarding the former model. All disputes are to be conciliated by the Conciliation, Mediation and Arbitration Commission (CMAC) before resort is had to either adjudication or industrial action. Lesotho and South Africa have adopted the latter model. In Lesotho, the regulatory framework provides a clear line of demarcation between cases that are to be determined by the Directorate of Dispute Prevention and Resolution (DDPR) and the Labour Court. The DDPR is enjoined to conciliate every

³⁰ Fenwick C., *Supra*, p. 444 (Note 6).

³¹ Fenwick C., Hansohm D., Petersson J., 'Labour Market Regulation and Economic Development in Namibia', p. 23-24.

matter that it is seized with even if it does not fall within its jurisdiction. However, if conciliation fails in a matter that does not fall within its jurisdiction, the matter goes directly to the Labour Court, and such a matter cannot be arbitrated upon.

Legislation in most of the countries in the sub-region draws a distinction between disputes of rights and of interest. These include Lesotho, Malawi, Namibia, and Zambia. South Africa's legal framework does not explicitly make this distinction. Generally, interest disputes are resolved through mediation and conciliation, and are not subjected to adjudication. This principle has been adopted throughout the sub-region. The spirit behind this could be to facilitate the speedy resolution of collective disputes.

The Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92) encourages the prevention of industrial disputes and urges Member States where they have arisen, to resolve them expeditiously and free of charge. In keeping with this provision, services provided by the ADR mechanisms are free of charge and lack procedural technicalities. Although conciliation and arbitration institutions in the SADC jurisdictions are funded by the State, they are generally independent of it.

The majority of ADR structures in the region have won the confidence of their users because of their independence, accessibility and speedy resolution of labour disputes. The Lesotho Directorate of Dispute Prevention and Resolution (DDPR) has been very successful in achieving its objectives. Out of 1 264 disputes referred during 2006, 92.9% (1 174) were resolved. Over the past years, the DDPR has maintained the resolution level above 90% each year.³² There are pockets of problems here and there. For instance, in Swaziland, the Conciliation, Mediation and Arbitration Commission (CMAC) has been criticized for lack of independence given the political set up of the country.³³

3.3.2 Adjudication

Parties should have a right of recourse to either reviews or appeals if not satisfied by the decision of either the conciliation/arbitration forum or the Labour/Industrial Court, as the case may be. However, because of their adversarial nature Courts should be approached minimally in the industrial relations context. Voluntary processes such as collective bargaining are ideal as there are no losers, but a win win situation because parties often reach a compromise.

Labour Courts are specialized in nature and administer both law and equity jurisdiction. Because of this equity jurisdiction Labour Courts are by nature informal as they do not dwell on legal technicalities, and disputes are resolved with relative speed. To this end, the Labour Code in Lesotho stipulates that it shall be the chief function of the Court to do substantial justice between the parties before it.³⁴ South Africa has on the other hand established both the Labour Court and the Labour Appeal Court as courts of both law and equity.³⁵

Performance differs from country to country. A lot of jurisprudence on collective bargaining is coming out of South Africa. In Lesotho, the Labour Court has played a very

³² DDPR annual report for the year 2006.

³³ Dlamini S.P., *Supra*, p. 2183 (Note 17).

³⁴ Section 27(2).

³⁵ Section 151 (1) of the Labour Relations Act as amended by Section 11 and 167-183 of Act 127 of 1998.

active role in developing labour law in this sphere. For instance, the court ameliorated the common law right of an employer to dismiss a striking worker by resorting to its equitable jurisdiction where it considered a strike to have been called in reaction to hostile behavior on the part of the employer.³⁶ In other parts of the sub-region, very few cases that impinge on collective bargaining arise. These include cases relating to enforcement of collective bargaining agreements, strikes or lockouts.

Courts in the sub-region appear to be relatively independent of their governments' political influence or control. This environment is conducive for the promotion of collective bargaining enabling trade unions to fight any anti-union tendencies on the part of the governments. However, despite this conducive environment, and the active role of courts in developing labour law jurisprudence there are limitations. These limitations can be attributed to the unions themselves who resort to collective bargaining minimally. Naturally, disputes relating to this area will be limited, denying courts the opportunity to develop jurisprudence in it.

In Zambia, the Industrial Court itself has been blamed for the poor performance of trade unions in their strife to promote collective bargaining. The Industrial Relations Court has been found to have generally played a very marginal role in developing the labour law jurisprudence.³⁷

(1) Labour/Industrial Courts

With regard to adjudication of labour disputes, most of the countries in the sub -region have established specialized courts dealing with labour matters. There is the Labour Court in Lesotho and South Africa; the Industrial Court for Botswana and Swaziland; and the Industrial Relations Court in Malawi and Zambia. In Namibia, the High Court sits as a Labour Court if it has to determine a labour related issue. This, however, tends to compromise labour issues as they require specialization.

The Lesotho Labour Court is established under the Labour Code Order, 1992 and has a distinct jurisdiction from that of the Directorate for Dispute Prevention and Resolution (DDPR). It also has powers to review DDPR awards in terms of the Labour Code (Amendment) Act, 2006. Prior to this amendment, reviews went directly from the DDPR to the Labour Appeal Court, a rather absurd situation in that the Labour Court was empowered to enforce DDPR awards, but lacked powers to examine them. This amendment redressed this absurdity. It is worth noting that DDPR awards can only be reviewed and no appeal can be made against them. The situation of South Africa is similar to that of Lesotho where the Labour Court has jurisdiction over specified matters, and sits as a court of review of decisions of the Commission for Conciliation, Mediation and Arbitration (CCMA).

The place Labour Courts enjoy within the judicial hierarchy is also critical if they are to attract and retain a human resource base of the right calibre. The general trend in the sub-region is for Labour Courts to be relegated to the status of Subordinate Courts, which is very unfair on the presiding officers considering the specialized nature of the cases they handle and the specialized skills they possess. At least in South Africa the Labour Court

³⁶ Lesotho Haps v Employees of Lesotho Haps and Another LC 52/95 (Unreported).

³⁷ Kalula E., 'Beyond Borrowing and Bending : Labour Market Regulation and the Future of Labour Law in Southern Africa' in Barnard C., et al., *The Future of Labour Law* (London: Hart, 2004), p. 284.

enjoys the same status as the High Court, and in Namibia, as aforesaid, the High Court sits as a Labour Court if presented with a labour matter. In Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe the Labour Court is subordinate to the High Court. This subordinate status also has implications in terms of resource allocation and benefits associated with the positions. Labour Courts in the sub- region, as is the case with the Departments of Labour, receive a very small budgetary allocation, and do not have accommodation of their own, and if they have, the conditions leave a lot to be desired.

As aforementioned, public officers in Lesotho are not subject to the jurisdiction of the Labour Court. They were at the inception of the Labour Code covered by it, and only excluded from its purview by virtue of Legal Notice No. 22 of 1995 (Labour Code (Exemption) Order, 1995). In exercising this power, the Minister had invoked his powers under Section 2(2)(b) of the Code which empowers him to exclude any category or class of public officers from the application of the Code.

This blanket removal by the Minister of all public officers from the application of the Code has been highly criticized as going beyond his powers (*ultra vires*) because he is only empowered to exclude only a 'class or category of public officers'. This has however never come under direct judicial scrutiny. The Labour Appeal Court did examine this Section, albeit in a different context in *Bokang Vincent Lelimo v The President of the Labour Court, the Teaching Service Commission & 5 Others LAC/A/04/05* (unreported). This is a matter in which the Labour Court had declined jurisdiction on the basis of the Legal Notice that removed public officers from the application of the Code, and by implication, exclusion from the Labour Court's jurisdiction. The applicant appealed the decision. The Labour Appeal Court held that the Labour Court had misdirected itself in that the Legislature never intended the word 'public officer' to include teachers because, among others, the Education Act, 1995 could have been amended to exclude teachers from the jurisdiction of the Labour Court as it was done with the Public Service Act, 1995. The Labour Appeal Court being a final arbiter in the resolution of labour disputes, the current position is that teachers cannot be categorized as 'public officers' and are therefore not subject to the Labour Court's jurisdiction.

The Lesotho Constitution defines 'public office' as 'any office of emolument in the public service'. The Labour Court's stance had always been that it had no powers to entertain disputes relating to teachers as it regarded them as public officers by virtue of their being remunerated by government. Section 3 (c) The Labour Code (Amendment) Bill, 2006 proposes including teachers, whether paid by government or not, under the Code.

Zambia has a similar provision where the Minister of Labour is empowered to exempt or exclude certain categories of employees from the ambit of the Employment Act but this provision has apparently never been invoked.

(2) Review/ Appeal Structures

In Malawi, Zambia and Zimbabwe cases may be taken to the Supreme Court. In Malawi, a party to a dispute may bypass the Industrial Relations Court and go directly to the High Court,³⁸ which one could argue, has the propensity of compromising the specialized nature of labour disputes.

³⁸ Fashoyin T., *Supra* – from Banda R.Z., *Unfair Labour Practices - A Guide to Relevant Cases and Materials*, Lexis Nexis, Butterworth, 2005.

Labour Appeal Courts have been established in both Lesotho and South Africa under the Labour Code (Amendment) Act, 2000, and the Labour Relations Act, 1995, respectively. The Labour Court's decisions in Lesotho are subject to both review and appeal before the Labour Appeal Court which is the final arbiter in the adjudication of labour related disputes.³⁹ The establishment of this court as supreme, although confined to labour matters, has been received with mixed feelings because the highest court of the land is generally the Court of Appeal.

In *Muso Elias Ts'euoa v The Labour Appeal Court & 2 others C of A (CIV) No.27 of 2004* (unreported), the appellant sought to appeal from the Labour Appeal Court to the Court of Appeal. The latter held that neither the Constitution nor any other Act confers jurisdiction on it to hear applications for leave to appeal from the Labour Appeal Court to the Court of Appeal or to consider Labour Appeal cases. The appeal was dismissed.

It held further that the High Court of Lesotho being a Constitutional Court is the only one with powers to determine the constitutionality or otherwise of establishing the Labour Appeal Court as the final arbiter and not the Court of Appeal. The rationale behind this provision could have been to limit the stages that a labour dispute could go through in the name of speedy resolution of labour disputes. It would have been interesting to get the High Court's view on the issue, but the parties never pursued it.

Similarly, in South Africa, the Labour Appeal Court hears appeals against the decisions of the Labour Court. However, in stark contrast to the Lesotho situation, courts in South Africa have decided that an appeal lies from the Labour Appeal Court to the Supreme Court of Appeal,⁴⁰ and in constitutional matters to the Constitutional Court.⁴¹

3.3.5 Administrative Mechanisms

Labour Departments in the sub-region continue to play an active role in the promotion of collective bargaining and the resolution of labour disputes despite the ushering in of alternative dispute resolution (ADR) mechanisms.

On the promotion and protection of the right to bargain collectively, Labour Departments generally play an advisory role to employers' organizations and trade unions on the interpretation and application of labour laws including provisions relating to the promotion of collective bargaining, on matters relating to labour disputes resolution. The Labour Administration Convention, 1978 (No. 150) reinforces the importance attached to international standards contained in Conventions relating to collective bargaining by providing in Article 5(2) that:

Competent bodies within the system of labour administration should make their services available to employers' or workers' organizations, as may be applicable under national laws or regulations, or national practice, with a view to promoting the regulation of terms and conditions of employment by means of collective bargaining.

³⁹ Section 38 A (4) of the Labour Code (Amendment) Act, 2000.

⁴⁰ *National Union of Metalworkers of South Africa & Others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA).

⁴¹ *National Education, Health & Allied Workers Union v University of Cape Town & Others* (2003) 24 ILJ, 95 (CC).

And further in Article 8(1) that:

There should be administration programs aimed at the promotion, establishment and pursuit of labour relations which encourage progressively better conditions of work and working life and which respect the right to organize and to bargain collectively.

Labour dispute resolution functions have in most of the SADC countries been removed from Labour Departments. However, in practice Labour Departments continue to discharge this role. These countries include Lesotho, Malawi, Zambia and Swaziland. This position is commendable on the part of these governments and pursues the social responsibility agenda by not disturbing traditional arrangements the citizenry is accustomed to. The Botswana and Namibian situation is different in that conciliation and arbitration services are still retained within the Labour Departments, and not handled by a separate institution.

Besides the existence of mediation/conciliation forums and Labour Courts, Labour Officers in Lesotho continue to mediate between the parties, thereby promoting voluntary negotiation which is the thrust of Convention 154 on Collective Bargaining and other related Conventions. Labour Officers are empowered to institute proceedings on behalf of parties.⁴² As the Labour Department administers the Labour Code, this service does not extend to public officers who are regulated by a separate regime.

Another important role of Labour Departments is that of prevention of disputes through inspections. This minimizes labour disputes by nipping sources of disputes at the bud through the identification of aspects that do not meet requisite minimum labour standards laid down in the national legislation and in ILO Conventions and Recommendations. Labour Departments also provide administrative support to tripartite structures through facilitating meetings, and generally seeing to the smooth running of things.

3.4 The Right to Strike

The right to strike as a form of dispute settlement mechanism is a necessary corollary to collective bargaining and is resorted to when parties have reached a deadlock in their negotiations. The right has been described ‘as an indispensable component of a democratic society’ and been ‘justified as a countervailing force to the power of capital’.⁴³ It is an ultimate weapon in persuading the other party to bargain. Strikes occur due to a failure in the process of fixing working conditions through voluntary collective bargaining.

ILO instruments do not explicitly deal with the right to strike, but its supervisory bodies, in particular the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have long recognized the right to strike as an essential means available to workers and their organizations for the promotion and protection of their economic and social rights.⁴⁴ These Committees

⁴² Section 16 (b) of the Labour Code Order, 1992.

⁴³ Madhuku L., *Supra*, p. 509 (Note 25) quoting from Kahn Freund O., and Hepple B., in *Laws Against Strikes*, Fabian Research Series No.302, London.

⁴⁴ General Survey, 1983, paras 200 and 205.

inferred this right from the Convention on Freedom of Association and the Right to Organize. SADC has however taken a bold step to expressly provide for this right in its Social Charter.⁴⁵

Practice differs in different jurisdictions. The right to strike is either entrenched in the Constitution or contained in the legislation regulating employment relations. Malawi, Namibia and South Africa have the right to strike expressly entrenched in their constitutions.⁴⁶ The Namibian Constitution even goes further to guarantee all persons the right to *'withhold their labour without being exposed to criminal penalties'*. In Botswana, Lesotho, Swaziland, Zambia and Zimbabwe the right to strike is enshrined in the labour legislation.

In general, however, the use of economic power should be the last resort because of its adverse effects on the economy. It is therefore regulated by procedural limitations in all the jurisdictions. Before resorting to a strike, parties have to exhaust mediation and conciliation efforts⁴⁷ to try and solve the dispute amicably and avoid industrial action as much as possible. The Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) encourages parties who have consented to conciliation and arbitration to desist from engaging in strikes while the conciliation or arbitration processes are in progress (paragraphs 4 and 6) and indicates that none of its provisions may be interpreted *'as limiting, in any way whatsoever, the right to strike'* (Paragraph 7).

These procedural hurdles limit the legitimate use of the right to strike leading to a number of illegal strikes in the region, a factor which exposes employees to dismissals for participation in illegal strikes thereby seriously threatening the right to security of employment. The right to strike which is a negotiating tool, has been used a lot in South Africa. Statistics reveal that since 1995 there have been over twenty industry wide strikes.⁴⁸

Most jurisdictions exclude the police, armed forces, and Departments of Correctional Services from the exercise of the right to strike, an exception permissible under ILO Conventions. Convention 87 and 98 leave it to national legislation to decide whether the right applies to armed forces and the police or not.

Industrial action is also not permissible in essential services in all the jurisdictions covered. Some jurisdictions under examination have adopted the ILO definition of an essential service. These include Lesotho, Malawi, Namibia, Swaziland and South Africa. Essential services are defined by the ILO as services *'whose interruption would endanger the life, personal safety or health of the whole or part of the population'*.⁴⁹

Countries such as Swaziland, Zambia, Zimbabwe and Botswana have adopted a different approach by listing services designated as essential. In Malawi, it is courts that are empowered to determine whether a service is essential or not.⁵⁰ Some countries have set

⁴⁵ Article 4 (e) (i).

⁴⁶ In Namibia it is in terms of Article 21(1) (f) (1990), Malawi Section 31(4) (1994), and South Africa Section 23(2) (c) (1996).

⁴⁷ In South Africa it is regulated by Section 64 (1) of the Labour Relations Act 1995, in Botswana through Section 391 of the Trade Disputes Act, 2003, and Lesotho Section 225 of the Labour Code (Amendment) Act 2000.

⁴⁸ Tokiso Review, p. 10, *Supra* (Note 29).

⁴⁹ ILO, Freedom of Association and Collective Bargaining, Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4 B) International Labour Conference 69th Session, 1983, Geneva, p. 70.

⁵⁰ Section 47(2) of the Malawi Labour Relations Act, 1996.

up structures to determine what services could be regarded as essential. Swaziland and South Africa are cases in point where Essential Services Committees have been established to advise on sectors that could be declared as essential.⁵¹

South Africa distinguishes between protected and unprotected industrial action. A strike will be protected when it meets the procedural and substantive requirements laid down in the Labour Relations Act.⁵² Employees engaging in a protected strike may not be disciplined or dismissed for doing so nor may they be sued for any losses the employer suffers as a result of the strike. Equally, employers who institute a protected lockout may not be sued by their employees for wages or benefits forfeited as a result of the lockout.⁵³ In Swaziland as well, employees are protected against dismissals for participation in a lawful strike.

The Lesotho Labour Code is silent on the issue of protection against dismissals to employees who are on a lawful strike. The Labour Court has however intervened under its equity jurisdiction to protect employees even where the strike turned out to be illegal where clearly the strike was in pursuit of legitimate demands, and was actuated by unreasonable conduct on the part of the employer.⁵⁴ In general, however, employees who resort to an illegal strike risk dismissal.

3.5 Levels of Bargaining – Enterprise versus Sectoral (Centralized) Bargaining

It is arguable that the level of bargaining determines the success of the bargaining process. Disparities in wages and other conditions of work in the same sector have the potential for disputes and disturbing industrial peace. Thus centralized bargaining brings uniform application of employment standards in the same sector thereby promoting fair treatment of all workers in the particular sector. It saves time in that there is no need for unions to negotiate with each individual employer. It is also cost effective in terms of training because it is costly to train on a smaller scale.

It could however be argued to the contrary that centralized bargaining fails to accommodate economic realities of individual employers, and also undermines the power, and perhaps even the freedom of management and employees in a particular establishment to determine their own terms and conditions. On the whole, the case for centralized bargaining is stronger particularly in the context of the SADC sub-region. Most employers in the region are negative towards trade unions and an integration of efforts by trade unions would help instill principles aimed at achieving ‘decent work for all’ in the workplace. It cannot be left to individual employers. It is regrettable that the general trend in the sub-region is towards enterprise level bargaining.

Collective bargaining in South Africa and Zimbabwe happens at both the sectoral and plant/enterprise level. In Zimbabwe sectoral bargaining occurs through the National Employment Council, and in South Africa, it is effected through a number of bargaining councils whose primary function is to regulate relations between management and labour

⁵¹ In South Africa it is in accordance of Sections 70- 74 of the Labour Relations Act, 1995 read together with Section 65 (d) thereof.

⁵² Sections 64 and 65.

⁵³ Bosch C., and Hartzenberg T., ‘Law and Labour Market Regulation in Southern Africa.’ A paper presented at the University of Cape Town, January, 2006.

⁵⁴ Lesotho Haps v Employees of Lesotho Haps and Another, *Supra* (Note 36).

in the sectors of employment over which they have jurisdiction by concluding collective agreements and settling disputes.⁵⁵ Although provided for and promoted under the Labour Relations Act, the establishment of bargaining councils is purely voluntary, a true reflection of South Africa's general voluntarist approach to the regulation of the labour market.

Bargaining councils can apply for accreditation to the Commission for Conciliation, Mediation, and Arbitration (CCMA) through which they would be authorized to resolve disputes affecting parties falling within their council. This eases the workload of the CCMA and helps promote efficiency on its part. A number of bargaining councils have been set up in the various sectors which include the Public Service Bargaining Council (PSBC) which bargains on behalf of public officers.

At enterprise level, some SADC jurisdictions have established a system of works councils, notably, South Africa, Swaziland, and Zimbabwe. These are in-house institutions which operate within a particular company or division while trade unions generally draw their membership from a number of employers.⁵⁶ In South Africa they are styled workplace forums.

Swaziland has also adopted the concept of works councils under the Industrial Relations Act, 2000. They were first introduced through the repealed Labour Relations Act of 1996. The Act provides that where an employer employs more than twenty-five (25) employees and there is no recognized trade union or staff association, the employer is compelled to establish a works council.⁵⁷ This arrangement whereby works councils exist parallel to trade unions has come under severe criticism as an attempt to marginalize trade unions. This criticism was endorsed by the ILO which argued that it would lead to abuses on the part of employers who do not want to deal with representative trade unions.⁵⁸

It is arguable that if not abused, works councils are ideal where trade unions are weak or non-existent. In justifying the establishment of works councils, the drafters of the Labour Relations Act of South Africa have pointed out that they are not meant to be used as an alternative to trade unions. They are rather intended to be vehicles for promoting participative management through information sharing, consultation, and joint decision-making.⁵⁹

⁵⁵ Grogan J., p. 229 (Note 3).

⁵⁶ Grogan J., *Supra*, p. 293 (Note 3).

⁵⁷ Section 52 of the Industrial Relations Act, 2000.

⁵⁸ Dlamini S.P., *Supra*, p. 2179 (Note 17).

⁵⁹ Grogan J., *Supra*, pp. 293-294 (Note 3).

4. Tripartism in Context

The establishment of national tripartite structures promotes the principles of social dialogue and tripartism which are central to ILO operations and are in keeping with the Tripartite Consultation Convention, 1976 (No. 144). Tripartism in the context of this paper serves as a vehicle through which employers' organizations and trade unions participate in the design of policies relating to the protection and promotion of collective bargaining and to the establishment of effective dispute resolution mechanisms whose ultimate objective would be to achieve decent work for all. The inclusion of all stakeholders in the formulation of national policies regulating the labour market is important in ensuring ownership, sustainability and partnership to those policies. Tripartism plays a major role in promoting workplace democracy through the involvement of social partners in decision making processes.

All the countries in the sub-region have some form of consensus seeking body in one form or the other. A mention will just be made of those that deal with labour matters generally. In Botswana there is the Labour Advisory Council; in Lesotho, the National Advisory Committee on Labour; in Malawi, the Tripartite Labour Advisory Council; in Namibia, the Labour Advisory Council; in Zambia, the Tripartite Consultative Labour Council; in Zimbabwe, the Tripartite Negotiating Forum and in South Africa, the National Economic and Development Labour Council, which unlike the other tripartite structures in the sub-region consists not only of the traditional labour stakeholders (government, employers' organizations, and trade unions) but also of other national community groupings aimed at discussing and trying to reach consensus on issues of social and economic policy.⁶⁰ The advantage of this arrangement is that it comes up with more comprehensive policies which take into account the interests of as wide a spectrum of the population as possible. Again, plans or frameworks that are an outcome of consensus among stakeholders enjoy acceptance and successful implementation.

These bodies make it possible for government, business and labour to have systematic consultations on a wide variety of labour market issues. They derive from the ILO concept of tripartism, a unique feature of the ILO that is, as already indicated, central to all its operations. Through it, government, employers (business) and workers are able to plan together in regulating the labour market. It is a widely used and successful institutional practice for finding consensual and differentiated solutions to a wide variety of labour market issues.⁶¹

Tripartism plays a pivotal role in strengthening collective bargaining and ensuring the effective resolution of labour disputes at the national level. Tripartite structures provide a forum for debate, reform or review of national legislation, information sharing, acquisition of knowledge on prevailing labour laws, and awareness of developments in the labour market which will ultimately filter through to their respective constituencies and enhance observance of both international and national laws. Cooperation between

⁶⁰ See NEDLAC website at www.nedlac.org.za.

⁶¹ Somavia J., *Supra*, p. 33 (Note 5).

social partners is therefore very critical if working conditions are to improve and principles of decent work satisfied. It also gives an integrated and coherent approach to labour market issues.

The question is whether these tripartite arrangements are achieving their goal in this region. Olivier⁶² has noted that in practice these structures have had very little impact on labour law in SADC countries. This could be attributed to the calibre of some of the representatives of social partners to these bodies, particularly from the trade union side, some of whom lack the capacity to make any meaningful contribution to issues at hand. An observation from Malawi that there is a general inadequacy of skills and capacity in union officials as evidenced by the manner in which they carry themselves in tripartite meetings⁶³ does not come as a surprise.

Despite these problems on the whole, these tripartite structures have made a significant contribution in the whole sub-region in the design and implementation of economic and social policies such as minimum wage determination, safety and health, establishment of labour dispute resolution structures, employment creation, training and skills development, and social security.

⁶² Olivier M., 'Social Protection in the SADC Region: Opportunities and Challenges,' *International Journal of Comparative Labour Law and Industrial Relations*, Vol., 18, 2002, p. 379.

⁶³ Banda R.Z., 'Law and Labour Market Regulation in Southern Africa - Malawi' a paper presented at a workshop in Cape Town, January, 2006.

5. Challenges in Promoting Collective Bargaining

SADC countries face the challenge of keeping abreast with modern trends in labour market regulation. The promotion of collective bargaining characterizes modern labour relations, and these countries cannot afford to lag behind. In order to keep the momentum, labour laws in the region are constantly being reviewed. For instance, Namibia has just enacted the Labour Relations Act, 2004, not very far from the 1992 Act. Similarly, Lesotho is in the process of enacting the Labour Code (Amendment) Code Bill, 2006 due to be tabled before Parliament after the 1992 one, which had already been subjected to some amendments.

The advent of globalization has also brought tremendous pressure on SADC countries. Globalization is characterized by trade liberalization which brings with it heightened competition as a result of the lowered trade barriers. In order to be able to attract trade links with other countries, SADC countries have to maintain a clean track record in terms of respect of fundamental rights. No country wants to be associated with a country renowned for inhuman treatment of its workers.

Pressure is also mounting from international organizations and the international community at large forcing States to make efforts to guarantee democracy and uphold fundamental human rights. To this end, policies such as the Africa Growth and Opportunity Act (AGOA), the Generalized System of Preferences (GSP)⁶⁴ the Millennium Development Goals and the Global Compact⁶⁵ come to mind. All SADC countries with the exception of Zimbabwe have been declared AGOA eligible.⁶⁶ The preferential treatment afforded by AGOA and GSP provides potentially huge opportunities for economic development for the sub-region as it affords access to United States' consumer markets on a duty free and quota basis on a wide range of approved textile and related products. In order to qualify for these benefits developing countries are encouraged to formulate policies geared towards poverty eradication and protection of human rights including worker rights. *'Working out of poverty'* is key to the realization of the Millennium Development Goals.

High levels of unemployment and underemployment pose serious problems to the SADC region. In Botswana for example, in 1994 unemployment rates stood at 36% among 25 to 29 year olds⁶⁷ and in Lesotho at 27.3 % and 31.1% when migrant labour is excluded.⁶⁸ The implications on the labour market is that it frustrates efforts for the promotion of collective bargaining efforts as workers are hesitant to report on the violations of basic employment standards for fear of losing their jobs. In the end, trade unions are not able to redress the ills that are occurring in workplaces.

⁶⁴ The Generalized System of Preferences program grants duty free access to specified goods from designated countries. The five members of the Southern African Customs Union, Botswana, Lesotho, Namibia, South Africa and Swaziland are currently eligible for the program.

⁶⁵ A United Nations Initiative originating from the World Economic Forum on 31st January, 1999 and has as one of its principles the upholding of the freedom of association and the effective recognition of the right to collective bargaining (Principle 3).

⁶⁶ <http://www.agoa.gov/eligibility> - downloaded 27th August, 2007.

⁶⁷ Mayer W., and Kayira G., Botswana: Addressing Unemployment Problems Through Expanding Labour – Based Public Works Programmes, 1997.

⁶⁸ Lesotho Labour Force Survey, 1999.

While institutional arrangements for enforcement of labour laws exist in the sub- region, lack of capacity and resources limit the ability of most of the States to implement them. This problem seems to be cross-cutting, and was underscored in Zambia, where capacity was identified as one of the constraints for implementation of labour standards.⁶⁹ This gap between theory and practice needs to be closed through the strengthening of labour administration structures with a view to improving, among others, labour inspections.⁷⁰ In some cases the problem is exacerbated by the fact that some workplaces are remote and not easily accessible.

Initiatives such as AGOA/GSP are showing significant increases in employment creation through textile industries across the region, but one is skeptical about too heavy a dependence on the textile industry. Signs of volatility have already emerged. For instance, Lesotho faced serious problems in 2004 when the Multi-Fibre Agreement (MFA) expired coupled with uncertainties with regard to the extension of trade arrangements under AGOA around the same period. The end of 2004 and the beginning of 2005 saw the closure of a number of factories. This significantly reduced the total number of jobs in the manufacturing sector from 47 754 in April, 2004 to 41 294 in April, 2005.⁷¹

The textiles and clothing industries' performance also deteriorated following the cessation of quotas under the Agreement on Textiles and Clothing (ATC) in January, 2005 which resulted in increased competition for Lesotho's exports from low cost producers such as China, and other economies.⁷² Efforts at diversification of programs are therefore a priority if SADC countries are to achieve sustainable economic growth, poverty alleviation, and promotion of decent work for all. At most, even within the textile industry itself efforts could be made to produce raw materials locally or in the sub – region as opposed to the prevailing situation where fabric and accessories are imported from the Far East. Even where fabric is produced regionally it is on a very small scale. Another option could be to tap other markets such as Europe.

Prior to concentration on manufacturing, it was on the export of labour to South African mines and farms which brought untold hardships and misery in the sub-region, with massive retrenchments following the decline in the price of gold. This also resulted in the decline of the national revenue base flowing from mineworkers' monthly remittances to their respective countries. Countries mainly affected were Botswana, Lesotho, Malawi, Mozambique and Swaziland.

Trade unions have a great potential for improving the industrial relations climate in the sub-region but they are making very little impact in countries such as Lesotho and Zambia. It is high time they made a difference and removed the perception of being associated with bickering and industrial strife.

In order to be able to engage meaningfully in the collective bargaining process, trade union officials need to have the capacity to negotiate. The ability to negotiate effectively calls for skill. An assessment of the sub-region reflects that the majority of trade union

⁶⁹ Labour Department of Zambia – Annual Report, 2004.

⁷⁰ Dlamini S.P. 'Law and Labour Market Regulation in Southern Africa – The case of Swaziland' A paper presented at the University of Cape Town in January, 2006.

⁷¹ Lesotho National Development Corporation (LNDC) News, January- March, 2005.

⁷² Lesotho Review, 2007, pp. 14 & 16.

officials lack the necessary negotiation skills. This results in lack of confidence during the negotiation process. Trade unions therefore need to acquire expertise or reinforce whatever knowledge and analytical skills that they already possess. Basic knowledge of interpreting financial statements is also essential. At times, employers claim to be in dire straits financially when in reality they are not.

Training in basic legal skills is also a must for trade unions and employers' organizations alike. Informal as they are, Labour Courts and Labour Appeal Courts are at the end of the day bound by the fundamental rules of procedure. For instance, they cannot admit hearsay evidence, and litigants must adduce evidence to support their claims to be able to tilt the legal scale in their favour. Enrolment in courses such as para-legal studies would go a long way in equipping trade unions with the necessary skills to enable them to bargain with an informed mind and come up with favourable outcomes. Para-legal skills will also enable them to prosecute or defend cases either before a conciliation and arbitration forum, the Labour/Industrial Court or the Labour/Industrial Appeal Court, as the case may be.

The calibre of some of the trade union officials who represent their members before Labour Courts is disturbing. The President of the Labour Court in Lesotho raised concern in *Factory Workers' Union v Ever Unison Garments (Pty) Ltd* LC 7/04 (unreported), over the 'shoddy state' of pleadings. In this case evidence led was unrelated to reliefs sought, and the union representative went to the extent of asking the Court to imprison the employer without giving the basis of his claim. It is unfortunate that employee rights are compromised in the process.

The Directorate of Dispute Prevention and Resolution, the conciliation and arbitration forum in Lesotho provides training to all stakeholders in line with one of its mandates viz., to prevent disputes. A total of nineteen (19) training workshops were conducted in 2006.⁷³ While this is commendable, a lot still needs to be done. Training initiatives have to come from unions as well.

Very little use is made of collective bargaining as a machinery for the general regulation of the labour market in the sub-region. It was observed in Botswana that only a few industries, notably the mining and the banking sector, participated actively in collective bargaining for employment regulation.⁷⁴ This is indicative of the general lack of appreciation of what trade unions and collective bargaining are all about. In the same breadth, it was pointed out by the Labour Department in Lesotho that trade unions make no effort to educate their members about their rights at work. A typical example is that every time following the review of minimum wages, workers engage in strikes.⁷⁵ This is absurd because trade unions are represented in the Wages Board and it goes back to the argument that their participation in tripartite structures is minimal due to a limited knowledge base and negotiation skills.

Trade unions in Botswana are no exception in the tendency to rely on the State and then react to policy changes.⁷⁶ Clearly, trade unions expect the State to negotiate for better wages on their behalf when in fact its role is restricted to the setting of minimum labour

⁷³ The Directorate of Dispute Prevention and Resolution 2006 - Annual Report.

⁷⁴ Ntuny E.K.B 'Law and Labour Market Regulation in Southern Africa- the Botswana Experience' A paper presented at the University of Cape Town, January 2006.

⁷⁵ Labour Market Information Bulletin, Labour Department, Lesotho, 2006.

⁷⁶ Ntuny E.K.B., *Supra* (Note 76).

standards on which unions must build. Collective bargaining proper is over matters of 'mutual interest' but trade unions tend to concentrate on enforcement of rights instead of engaging in negotiations to improve on what the law offers. In order for collective bargaining to achieve its goals, trade unions must be pre-emptive.

Because of the office they hold, trade union leaders need to command respect. The level of education among union officials, particularly the key office bearers, is critical. Educational skills will enable them to better articulate their members' social and economic interests and to avoid being undermined by employers. Qualified union leaders will give credibility and integrity to trade unionism. South Africa's and Zimbabwe's trade unions are a living example that unions if properly managed and manned by trained leaders acquire strength. Trade unions therefore need to invest in training to make a difference.

It is ideal that collective bargaining agreements are reviewed from time to time to accommodate changes in the workplace and labour market trends. Interviewing one of the veteran trade union officials in Lesotho it emerged that most of the collective bargaining agreements were dated.⁷⁷ Swaziland is making strides in this regard in that collective bargaining agreements may only be in force for a period not exceeding twenty four (24) months,⁷⁸ and have to be registered with the Industrial Court.

Legal frameworks in the region can accommodate negotiations over a variety of issues as they have no statutory limitations on issues that may form the subject of collective bargaining. Unions have to seize this opportunity and bargain beyond the traditional bargaining issues confined to wages, and terms and conditions of employment. With evolution of time, new issues are emerging and trade unions need to respond accordingly to the changing socio-economic environment, exploit new opportunities and adjust to contemporary circumstances. Issues such as the scourge of HIV and AIDS, gender equality and child labour have ushered in new challenges. As advised by the Ministry of Labour in Namibia, unions need to focus on issues of importance to workers including medical and pension benefits, housing, training needs as well as social security, rather than always seeking wage increments.⁷⁹

Protection of workers is at the heart of the ILO mandate and accords with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, and the Decent Work Agenda. Unfortunately too many employees are still excluded from the mantle of freedom of association and collective representation, and this is cause for concern by the ILO, hence its adoption of the Employment Relationship Recommendation, 2006 (No. 198). Most employees are excluded from protection because of the problem of identifying whether they are in an employment relationship or not. Trade unions have to be seen to be actively involved in the implementation of international labour standards.

Most statutes exclude domestic, agricultural, migrant workers and workers in the informal sector from the definition of employee. Unfortunately, these are the most vulnerable of workers. While, these areas pose problems in terms of enforcement of prescribed minimum standards because of the nature of the work and the workplaces involved

⁷⁷ Jonathan S.M., of the Lesotho Trade Union Congress (LTUC) on 30th July, 2007 – In an interview I held with him in preparation for this paper.

⁷⁸ Dlamini S.P., *Supra*, p. 2179 (Note 17).

⁷⁹ Fenwick C., *Supra*, p. 439 (Note 6).

existing legislation need needs to be amended to cover them as well. For instance, domestic workers are engaged individually and in private households, and agricultural workers are located in relatively remote parts of the country. This can be addressed by employing more flexible standards in respect of these sectors.

It would perhaps be prudent to have a separate regime with less stringent conditions. Some kind of regulation is necessary to ensure that all employees work under decent conditions. To this end, Botswana has a separate framework for domestic and agricultural employees under the Employment (Domestic Employees) Regulations, 1984, and the Employment (Agricultural Employees) Regulations, 1984 respectively.

Namibia seems to have moved ahead as well in this regard. The Employment Act 2004 has extended its scope of protection by accommodating every worker who is in an employment relationship in its definition of an employee. Section 1 of the Act defines an employee as:

- an individual, other than an independent contractor, who -*
- (a) works for another person and who receives, or is entitled to receive remuneration for that work; or*
 - (b) in any manner and for remuneration assists in carrying on or conducting the business of an employer.*

In South Africa the Basic Conditions of Employment Act, 1998 includes a statutory presumption of the existence of an employment relationship and has provided a list of determining factors.⁸⁰ These examples are worth emulating in the rest of the region.

Section 3 of the proposed Labour Code (Amendment) Bill, 2006 intends to extend the scope of application of the Labour Code. It defines the term employee:

'as any person who works in any capacity under a contract with an employer in either an urban or rural setting.'

The proposed Bill further includes domestic workers under the Code under Section 2(4) but excludes them from several important provisions such as those concerning termination, weekly rest, hours of work and public holidays. Furthermore, the Bill gives the Minister a broad discretion, after consultation with the National Council on Labour (NACOLA). The protection does not go far enough as it excludes this group which is already particularly vulnerable from some of the basic rights and protections of the Code. This could also be considered as indirect discrimination on the basis of sex contrary to the Discrimination Convention (No.111) which has been ratified by Lesotho, as more women than men are likely to be affected given the large number of female domestic workers. It is better not to make a blanket exclusion from these fundamental protections but to provide standards that could accommodate the special nature of domestic work, for instance in terms of hours of work. Regulation of some sort is necessary to protect this category of employees if the ILO objective of decent work for all is to be achieved.

Export Processing Zones also pose a problem for the sub-region. Lesotho does have EPZs but labour laws are equally applicable to them. The problem is the rampant violation of workers rights, particularly by investors from Asia despite prevailing laws.

⁸⁰ Section 83A of the Basic Conditions of Employment Act, 1997.

There is therefore a pressing need to focus on strengthening the Inspectorate Division of the Labour Department. It is one of the current priorities of the Department, with the active involvement of the ILO project, Improving Labour Systems in Southern Africa (ILLSA). The project is also involved in Botswana, Namibia and Swaziland.

Even where there is an EPZ policy trade unions can use the collective bargaining machinery to improve terms and conditions of employment. This worked in Namibia where an EPZ policy was translated into the Export Processing Zone Act of 1995, through which the Labour Act, 1992 would not apply. The National Union of Namibian Workers opposed this move, and a compromise was reached by which all the labour laws would apply with the exclusion of the right to strike for the first five years of the operation of the EPZ Act. This prohibition was never re-enacted.⁸¹

Zimbabwe has also enacted the Export Processing Zone Act which excludes employees in the export processing zones from protection by the Labour Relations Act. Unions have however been strong enough to be able to negotiate for better wages and standards in these areas despite the legal limitations. This reflects what collective bargaining is capable of achieving.

Another challenge is the proliferation of unions. Lesotho, with a small working population that is mostly absorbed by the public service, has thirty registered trade unions, three employee federations and four employer organizations,⁸² which are often competitive. Namibia also faces the same problem, as observed by the Ministry of Labour in 1999 that *Namibia is having unnecessary and sometimes ineffective trade unions (GRN, 1999:21)*⁸³. One of the problems precipitating this is the lack of minimum membership requirement for registration of trade unions.

In Lesotho, the minimum requirement is an application signed by ten (10) members of whom some may be officers of the proposed union or employer's organization. In Zambia, it is fifty (50) or such lesser number as may be prescribed by the Minister of Labour. There is a need to build strong unions which will have the capacity to pursue workers' economic and social interests. The strength of unions lies in their unity instead of having a proliferation of small unions which unfortunately appears to be encouraged by the law. As earlier pointed out as of August, 2007 there were thirty (30) trade unions registered in Lesotho. For a country with a labour market as small as Lesotho, to say the number of unions is 'too many' is an understatement.

The quality of collective bargaining agreements is important for meaningful protection of employee rights. In Lesotho there is no obligation on the part of unions or employer's organizations to register collective bargaining agreements. In Malawi, Swaziland and Zimbabwe, this obligation exists and registration of collective bargaining agreements may actually be refused if they are inconsistent with the law, alternatively an amendment may be effected. This serves as a quality control measure.

⁸¹ Fenwick C., Hansohm D., and Petersson J., p. 13 (Note 31).

⁸² Source: Labour Department, Maseru, Lesotho, August 2007.

⁸³ Fenwick C., *Supra*, p. 439 (Note 6).

6. Conclusion

The need for the promotion of collective bargaining and effective mechanisms for the resolution of labour disputes as tools for the maintenance of harmonious relations between employers and employees cannot be overemphasized. While acknowledging the importance of sustained economic growth, it has to go hand in hand with decent wages, improved quality of life, and respect for human dignity which is a basic human right.

As far as compliance with international labour standards is concerned, it is obvious that there are good intentions on the part of SADC countries to keep abreast with international trends as evidenced by the prevailing legal frameworks in the respective countries, but there are manpower and financial resource constraints which limit their capacity to make good on the statutory obligations. This gap between the law and practice renders efforts aimed at the promotion of collective bargaining, and the attainment of decent work for all meaningless. On their own, trade unions can make a difference, but they currently have limitations which need to be addressed. The legal framework within the sub-region is facilitative enough for collective bargaining to blossom, but trade unions in the majority of the SADC countries do not engage in collective bargaining and still look up to the State for intervention because of a critical need for capacity building. If SADC countries are to make good on the laws they have promulgated and are keen to implement ILO standards particularly those relating to collective bargaining with the objective of improving working conditions, a lot still has to be done towards improving skills in the negotiating process and general appropriate knowledge on labour legislation. This calls for active participation by all social partners in efforts aimed at the promotion of collective bargaining.

It is clear that a lot has to be done particularly in empowering trade unions to promote collective bargaining and to ultimately countervail the inherent power imbalance between employers and workers. The ILO still has to reinforce its efforts at capacity building in the sub-region.

Every employee must enjoy the right to strike. This right is in most SADC countries not extended to public officers. The latter are consequently denied the right to join trade unions of their choice and to the use of their economic power when things have reached a dead end. Countries such as Lesotho, Mozambique and Swaziland have to revisit their stance in this regard in line with the rest of the sub-region.

The different approaches within the SADC countries towards collective bargaining and the resolution of labour disputes is inevitable in light of the differing socio-economic conditions, and the level of development of trade unions. Some of the unions still need a lot of boosting from the State, hence an interventionist approach in the majority of the SADC countries.

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