The Dyke
www.thedyke.msu.ac.zw

ISSN 2790-0940 (Online) ISSN 1815-9036 (Print)

Alternative dispute resolution mechanisms to manage workplace disputes among national employment councils in Zimbabwe

Itai Bonda[a] and Fidelis P. Tsvangirai[b]

[a] University of Zimbabwe

[b] University of Fort Hare, South Africa

ARTICLE HISTORY

Published online April, 2022

ABSTRACT

Most disputing parties have become more litigious as opposed to managing their disagreements through conciliatory methods. The main purpose of this study was to investigate the effectiveness of Alternative Dispute Resolution (ADR) mechanism in managing workplace disputes in the context of National Employment Councils (NECs) sector of Zimbabwe. The study was motivated by the need for organisations to harmoniously manage workplace disputes. Using a quasi-quantitative approach (otherwise, mixed methodology) and relying on survey design, 73 respondents participated in this study. Questionnaires and interview guides were used to collect data. Results show that ADR mechanism effectively manage workplace disputes among Zimbabwe NECs sector employees in line with reviewed literature. The findings of this study are of importance to the Zimbabwean labour policy towards formulating employment laws. Findings will also be of assistance to NECs managers on how to improve effectiveness of the ADR mechanism.

KEYWORDS

Effectiveness, Alternative Dispute Resolution, NECs, workplace disputes.

The Dyke
www.thedyke.msu.ac.zw

15(3):1-27
ISSN 1815-9036 (Print)
ISSN 2790-9036 (Online)

CONTACT: Itai Bonda mritaibonda@gmail.com

1. Introduction

This research is taking place during a very exciting time in the development of employment law in Zimbabwe. Many employment disputes are being settled via formal courts of law as opposed to alternative dispute resolution (ADR) methods. According to Mutimutema (2018) legislature is currently in the process of crafting new laws that govern ADR system. The government has not been left out as it outlined a number of measures aimed at improving the easy of doing business. Munyoro and Rupapa (2017) concluded that such proposals are likely to inspire some changes on how ADR system should be administered now and in the future. Munyoro and Rupapa (2017) noted that harmonious resolution of labour disputes is critical for attracting investment opportunities in the country and enhancing productivity, hence the need to investigate the effectiveness of ADR system in the National Employment Councils (NECs) sector. NECs are statutory bodies established in terms of section 56 of the Labour Act [Chapter 28:01] as Voluntary Employment Councils (VECs) (Mucheche, 2014).

2. Background

Alternative means of dispute settlement is the way to go for African organisations and the world at large while the traditional philosophy of over reliance on formal courts of law is fast loosing relevance (Mucheche, 2014). It is important for parties to have a choice whether they want to resolve their differences by out-of-court processes or through the formal court. According to Matsikidze (2012), China's current labour dispute system, is a one-sided process, consisting of mediation by enterprise labour dispute mediation committees, mandatory arbitration and litigation. The practice of out-of-court dispute settlement is mostly characteristic of the legal system in the United States of America (USA) dating back to the 1970s and the practice gradually spread to other western countries and Africa (Mashamba, 2014).

Matsikidze (2012) added that in Africa, ADR was ushered in by the developed western countries through the globalisation process in the 1980s through to the 1990s. Matsikidze (2012) bemoan the political interference by trade unions or employers in dispute resolution. On the legal aspect of ADR, the promulgation of new laws such as Statutory Instrument (S.I) 5 of 2015 increased powers of Designated Agents (DAs) under section 93 of the Labour Act, [Chapter 28:01] to make rulings on disputes of right. The process of ruling demands that the DA defends the ruling before a judge of the Labour Court in terms of S.I 5 of 2015.

As such, parties appearing before a DA may develop an attitude regarding the DA as a biased person and that may affect the effectiveness of the ADR system (Mucheche, 2014).

The primary mandate of NECs is to promote and maintain industrial harmony for enhancement of productivity and improved service delivery (Makings, 2015). The NECs also facilitate collective bargaining and enforcement of such Collective Bargaining Agreements (CBAs). In addition, the NECs also carry out statutory labour inspections and dispute resolution. As such, NECs allows the institutionalisation of labour disputes and provides localised platforms where parties could discuss their differences around the table through conciliation, arbitration, negotiation and inspections (Madhuku, 2015). Currently, 48 NECs are registered in Zimbabwe and such councils have been in existence since 1934 in some cases they were named Bargaining Councils (Mucheche, 2014).

According to Mucheche (2014) some types of ADR includes negotiation, conciliation, mediation, arbitration, submission to expert opinion and mini-trial or Executive Tribunal. Matsikidze (2012) noted that in Zimbabwe pre-colonial settlements the disputes were resolved through four major methods namely: wars, chiefs' courts, family platforms and churches. A number of legislations were introduced to regulate the colonial industrial relations. The Masters and Servant Act [1934] had civil and criminal remedies for breach of employment relations. The post-independent notable legislation is the Labour Act and its amendments and regulations (Matsikidze, 2012). Mucheche (2014) noted that in Zimbabwe, the neo-liberalism period after 1990, was centred on the Labour Relations Amendment Act of 1992, which witnessed the beginning of the liberalisation of the dispute settlement law, particularly through the Economic Structural Adjustment Program (ESAP) spearheaded by the International Monetary Fund (IMF) and the World Bank. Matsikidze (2012) reiterates that direct state control of dismissals through Labour Relations Officers was replaced by an employer-controlled system of employment codes made in terms of the Labour Act (Chapter 28:01) and the Labour Relations (Employment Codes of Conduct) Regulations of 1990 resulting in the role of the Tribunal being strengthened.

The Act streamlined the dispute settlement machinery with the abolition of the Labour Relations Board (Mucheche, 2014). Changes under the Labour Relations Amendment Act of 2002, read together with the Labour (Settlement of Disputes) Regulations S.I 217 of 2003, accelerated the move to 'labour autonomy' but

in the context heavily influenced by pluralist values (Madhuku, 2015). ADR, therefore, presents a state of affairs which call for investigation in order to appreciate its effectiveness. This paper is, thus, based on the research carried out to establish the effectiveness of ADR in resolving employment disputes. The paper, however, is narrowed to the effectiveness of ADR among NECs in Zimbabwe.

3. Motivation of the study

Despite all the government efforts on liberalising the dispute resolution system through establishment of employer-employee ADR institutions such as the NECs, it remains intriguing as to why disputants seem to be more interested in settling their differences through litigation via the formal courts. According to Mucheche (2014), most in the Zimbabwean working class are highly educated and are exceedingly conscious of their rights, and entitlements, hence, focus on rights-based approaches to dispute settlement such as litigation. Madhuku (2015) concluded that under such a scenario, negotiations usually end in deadlocks thereby leading to litigation as opposed to ADR.

According to Matsikidze (2012), the national economic factors have seen the country using a multi-currency basket leading to some NECs failing to sustain the levels of wages adopted in 2009 when the country switched currencies. Madhuku (2015) noted that NECs member companies are, on average, operating below capacity and struggling to re-capitalise and that led to under-payment of wages, high production costs and retrenchments. The situation has led to an increase in disputes as parties fail to agree at conciliation or arbitration resulting in many pending cases (Mucheche, 2014).

The Zimbabwean economy is experiencing hyperinflation such that even if parties settle on a matter or at collective bargaining negotiations, employers do not have the money to honour their obligations (Mucheche, 2014). Such scenarios result in non-performance of ADR agreements leaving the employee to approach the formal courts for enforcement of rulings. The study was motivated by the need for organisations to harmoniously manage workplace disputes. This paper, therefore, narrows its focus on appreciating the effectiveness of ADR in resolving employment disputes in the context of NECs in Zimbabwe.

4. Review of Literature

According to Matsikidze (2012), literature on Alternative Dispute Resolution (hereinafter referred to as 'ADR'), discussing the meaning, dimensions and approaches applied in labour dispute resolution; principles and models applicable in ADR and skills pre-requisite to effective ADR. Specific methods such as conciliation/mediation, arbitration, collective bargaining negotiation and inspections are reviewed in the paper.

Mucheche (2014) defines ADR as dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement without resorting to the formal court processes. Matsikidze (2012) described it as a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. Mucheche (2014) outlined the methods as ranging from negotiation between two parties through mediation, consensus building to arbitration and adjudication. Shamir (2003) opines that ADR covers a broad spectrum of approaches, from party to party engaging in negotiations as the most direct way to reach a mutually accepted solution, to arbitration and adjudication at the other end, where an external party imposes a solution.

South Africa's Labour Relations Act (1995) provides similar coverage of conciliation as Zimbabwe, it defines conciliation as: "…a process by which a conciliator helps the parties to a dispute to reach a settlement. This can be done by any consensus-building process including mediation, by fact finding or by making recommendations, including advisory arbitration…" (Basson et al., 2009 p.19).

Madhuku (2015) noted that arbitration is a procedure whereby a third party; who can be a sole arbitrator, a panel of arbitrators or arbitration court not acting as a court of law, is empowered to make a decision which disposes of the dispute. In terms of the Arbitration Act, an arbitration process may also be pursuant to an arbitration agreement. Martin (2007) describes an arbitration agreement as an agreement to refer present and future disputes to arbitration. International Labour Organisation (1980) also argues that arbitration usually involves a contested hearing at which the parties present evidence and argument to a third party, followed by that arbitrator's decision or award, which is usually binding on the parties. Arbitration can be referred to as a mechanism for solving civil disputes, which takes place in private life because of an agreement made by the parties who are disputing.

Arbitration

Voluntary arbitration is provided for under Section 93(1) of the Zimbabwean Labour Act [Chapter 28:01] and is regulated by the Arbitration Act (1996). The Labour Act governs the compulsory arbitration and it also governs a new form of arbitration known as Con-Arb (ruling) that was introduced by S. I 5 of 2015. Voluntary arbitration mainly arise from three distinct scenarios. These are:

i) *Where parties agree to withdraw from mandatory conciliation in order to pursue voluntary arbitration in terms of section 93(1) of the Labour Act.*
ii) *Where after conciliating a dispute of interest, a certificate of no settlement has been issued and the parties agreed to submit for voluntary arbitration in terms of section 93(5) (b).*
iii) *Under the Arbitration Act 1996, following an arbitration agreement.*

In terms of Section 93(5) of the Labour Act [Chapter 28:01], compulsory arbitration largely arises when the disputing parties fail to have a meeting of the minds and subsequently a certificate of no settlement is completed to signify the end of conciliation.

It is submitted that an important aspect to note, introduced by S.I 5 of 2015, is the compulsory arbitration which is now applicable to disputes of interests only. Madhuku (2015) argues that the mere existence of compulsory arbitration, as an option, may encourage parties to co-operate with the conciliation process. Mariwo (2008) observed that in cases that involve unfair dismissal, the arbitral costs are usually excessive to the former employee who is actually out of employment and seeking remedy through reinstatement through the system. Maitireyi (2013) noted that the costs of arbitration unfairly favour employers who have a better financial footing than employees. Furthermore, it is submitted that section 98(11) of the Labour Act [Chapter 28:01] has the power of stopping any strike once the dispute is referred for compulsory arbitration.

Conciliation-Arbitration

S.I 5 of 2015 amended Section 93 of the Labour Act and introduced a new hybrid 'conciliation-arbitration' process (middle of the road technique), linked to the Labour Court. This dispute resolution strategy is neither conciliation nor arbitration. It is a blended strategy consisting of both conciliation and arbitration characteristics. In terms of procedure, Section 93(5) (c) empowers the DA to make a draft ruling over disputes of right and take the ruling for confirmation at the Labour Court. In terms of the old law, disputes of right were disposed of by way of compulsory arbitration. This method of conciliation-cum -arbitration

appears to be combining conciliation, arbitration and to some extent litigation. Conciliation-Arbitration is only competent for disputes of right. However, this paper submits that despite the seeming advantages of expeditious resolution of disputes of rights and reduced costs on the party of the disputing parties, the process has its problems. Procedures such as application for registration of an order at the Labour Court and enforcement at the High Court or Magistrate Court which traditionally was a preserve for the legal practitioners are now being done by DAs at no or less cost to the disputants. Some of the problems are:

i) *The use of a single person as both the conciliator and arbitrator may compromise the process of conciliation-arbitration. Parties will not open up to constructive suggestions, knowing that if they fail to agree, that same conciliator will determine the case.*
ii) *It may not be proper that the ruling officer that would have made a ruling appear before a judge of the Labour Court to defend his ruling. No judge should appear before another 'judge' to justify his decision, but an aggrieved party should be allowed to have a right to appeal against such a ruling.*
iii) *Conciliators are not qualified lawyers that they should appear before seasoned judges and be asked questions of law.*

The con-arb process distorts reality; not only are relations and national economy affected, but the real issues in dispute and the treatment of disputants by the professional dispute resolvers escape their control as well. The fact that the DA is cited as the Applicant in the Labour Court confirmation application is not in sync with reality. He or she is not party to the dispute whatsoever. As such, a DA may pitch tent with one of the parties in a quest to defend his position

Collective Bargaining Negotiations (CBNs)

The Labour Act [Chapter 28:01] does not define the term collective bargaining. What is defined under Section 2 is instead the term Collective Bargaining Agreement (CBA). A CBA is defined as an agreement negotiated in accordance with the Act which regulates the terms and conditions of employment. From this definition, inference can be had to the fact that collective bargaining process precedes the collective bargaining agreement. According to the International Labour Organisation (ILO) Convention 154, CBN is a process that covers all negotiations which take place between an employer, a group of employers or more employers 'organisations on the one side, or one or more trade unions on the other side. Mucheche (2014) defined collective bargaining as a process whereby employers and employees through their representatives collectively seek to reconcile their conflicting interests by way of mutual accommodation.

Makings (2011) also observed that bargaining involves compromise between what is in the best interests of the employer and what is in the best interests of the workers. Fennimore (2009) further submitted that CBN is the most common form of employee participation worldwide. It is, therefore, submitted that collective bargaining is a system based on autonomous resolution of differences in an employment relationship with the disputing parties voluntarily assuming the responsibility for reaching a settlement and honouring that settlement.

The CBN procedure was set out by the Supreme Court of Zimbabwe on dismissing an appeal by the employer citing irregularity in negotiations in the case of *Posts and Telecommunications Corporation vs Zimbabwe Posts and Telecommunications Workers Union & 2 Others* SC 107/2002. The judgment notes that it is the practice of the appellant to hold meetings every year and negotiate with the respondent Union's representatives, new salary increases and other benefits for each coming year in accordance with section 74 of the Labour Relations Act [Chapter 28:01].

At the global level, International Labour Organisation (ILO) has put in place two important Conventions regarding collective bargaining. There is Convention No. 87(C87) that is, Freedom of Association and Protection of the Right to Organise Convention. The other one is Convention No. 98 (C98) that is, Right to Organise and Collective Bargaining Convention. Both Conventions assures the right of employers and employees to form belong and participate in things that affect their interests.

The Constitution of Zimbabwe Amendment (No. 20) Act 2013 under Section 65(5) (a), the bill of rights clearly sets out the right of workers and employers to engage in collective bargaining. The Labour Act [Chapter 28:01] also under section 2A (1) (c) buttresses this right in no uncertain terms when it says that its purpose is to provide a legal framework for employers and workers to bargain collectively for determination and improvement of terms and conditions of employment. Two important tools are worthy noting in any collective bargaining process, that is, the power of the employer to stop paying wages and the employees 'power to collectively withdraw labour in various forms like strike and picketing.

In Zimbabwe, Section 74 of the Labour Act stipulates that parties should bargain on any conditions of employment, which are of mutual interest. However, it is submitted that, despite that freedom to consider any relevant factors to the negotiation table, employers and employees were not taking cognisance

of important national factors such as increased productivity, economic competitiveness and environmental sustainability. The legislature, through S.I 5 of 2015 prescribed these factors as recommended for fruitful negotiations. It should be noted that some jurisdictions prohibit the discussion of certain matters for reasons of general interest or public policy.

Inspections

The key objective of inspections is to prevent disputes from arising as opposed to fire fight through conciliation, arbitration and litigation. Inspection is submitted as another form of ADR in this article because it involves resolving underlying disputes between employers and employees. It is also a non-judicious method of resolving disputes. The D.A. derives his authority from Section 126 of the Labour Act [Chapter 28:01], Section 63 (3) (a) (i) (ii) and (b) of the Labour Act, [Chapter 28:01] as is read with the provisions of S.I 54 of 2003 (Inspection Regulations) in carrying out statutory industry inspections.

The Financial Gazette (2017) observed that where NECs ignore inspections, the result could lead to industry standards being compromised. It could also result in increased injuries and fatalities at work and the use of absolute machinery that pollutes the environment and may possibly lead to slow industry recovery.

The Labour Market Outlook (2016) Government Report observed that a number of impediments, chief among them lack of resources are hindering DAs from carrying out inspections. Employers and trade unions are of the opinion that corruption and embezzlement of funds were impeding the work of the NECs. Moreover, some NECs require approval for the DAs to carry out inspections. Such approvals may take longer or not be allowed at all. It is also submitted that some NECs do not have DAs to carry out that function or they may be having inadequate numbers to balance between inspection and conciliation. Guided by this limitation, it can be recommended that NECs may be compelled by law to employ at least two DAs or more depending on the size of the industry.

Influence of ADR facilitators on ADR effectiveness

Facilitators of ADR strategy such as conciliators, arbitrators and ruling officers have a positive or negative bearing on the success or failure of ADR as a mechanism for dispute resolution. The following are some of the influences facilitators have on ADR. DAs are the conciliators appointed by the department

of Labour under the Ministry of Public Service, Labour and Social service in terms of Section 63 of the Labour Act, [Chapter 28:01] to facilitate the process of conciliation in Zimbabwe.

Parties can only appeal to the Supreme Court against a confirmed draft ruling by the DA or alternatively challenge the confirmation process of a draft ruling before a Labour Court judge. Comparatively, jurisdictions such as United Kingdom and South Africa use statutory bodies funded by the state in place of DAs. Madhuku (2012) submitted that in 1975 UK replaced the use of Labour Officers and through the Employment Protection Act, established an independent tripartite body known as the Advisory, Conciliation and Arbitration Service (ACAS). This body helped in providing conciliation services through its conciliators. In 1995, South Africa also modelled its conciliation system after the UK one and they established the Conciliation, Mediation and Arbitration Commission (CCMA). The body is also tripartite in nature and is funded by the state. The South African system appoints commissioners as its conciliators.

Sebranek, Meyer and Kemper (1996) opined that for the conciliator to be effective in discharging this role in conciliation, they should have attributes like being a good and active listener. A person can become a good communicator only when they are clear and systematic in thinking and sharing ideas. This helps conciliators to be able to collect relevant information and get around people quickly. A conciliator must be a great negotiator. The ability to express powerfully and influence the attitude and behavior of people will aid settlement of disputes. Acton (2010b) notes that communication is critical in assisting parties to find compromising position to a dispute.

Andrews (2003) noted that conciliators should have analytical thinking skills. This refers to the ability to extract and prioritise information; ability to choose the appropriate medium and channel of communication; ability to analyse the reactions of the disputing parties. A mediator is expected to have good personality traits, such as charm, self-confidence, relaxed, easy-going and friendly manner, sensitivity, perceptiveness, emotional stability, objectiveness and patience, open-mindedness and flexibility (Acton, 2010b). These usually help parties to easily access the facilitator and also be ready to accept his or her recommendations. According to Rajeesh (2010), a good conciliator should be able to recognise potential barriers to agreement. Barriers are not always visible. A skilful conciliator finds and neutralizes these barriers. Be thoroughly prepared, an effective conciliator collects as much information as possible in

advance of conciliation hearing, is organised for all meetings, and uses each conciliating phase to prepare for the next. These skills are also applicable to arbitration and negotiation.

Impact of ADR agreements on ADR effectiveness

The state and nature of agreements concluded via ADR has a bearing on the success or failure of ADR as a strategy of dispute settlement. The following section shows some of the impact of ADR agreements on effectiveness of ADR.

In situations where a dispute is amicably settled by conciliation, a DA is required by law to enter a certificate of settlement that is signed by both parties to the dispute. This signing is in compliance with Section 2 of the Labour (Settlement of Disputes) Regulations, 2003 (S. I 217 of 2003). It is submitted that the certificate of settlement in the NECs context does not have direct legal force. Its effectiveness is primarily derived from the will of the parties. Where there is a weak social contract, the agreement may collapse. In principle, parties who enter into conciliation do not lose their legal rights or remedies. However, it is submitted that where a settlement is reached, legal rights and obligations maybe affected in different ways.

In the case of *Chawatama vs UTC*, SC 99/2004, the Supreme Court held that an appeal cannot be lodged against a judgment entered into by consent between the parties unless if it were entered into by mistake or as a result of fraudulent misrepresentation by one of the parties. It is therefore submitted that this case illustrates the value of entering into a consensual conciliation agreement. The conciliation agreement is binding if taken as a consent judgment with the authority of the said legal precedence.

What remains clear is that a certificate of settlement from conciliation is not competent for direct enforcement by the courts. The process becomes very protracted and expensive. It is therefore submitted that the Labour Act requires being amended in order to allow for direct enforcement of the conciliation agreements by the courts. According to Mucheche (2014), in Zambia, a decision from mediation is enforceable via the Industrial Relations Court as a court order of that particular court. The Industrial Relations Court of Zambia is an equivalent of the Labour Court of Zimbabwe.

Similarly, the decision of the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa is also enforceable at law. Mashamba (2014) submitted that, in Tanzania, the signed settlement order form is filed with the

court for record, where it will be recognised as a decree; because it has the same legal force as an ordinary court decree; so, it can be executed as a decree in case of default by any party. He further submitted that a consent order is generally not appealable except in situations where fraud or misrepresentation is alleged.

In the case of *Gur Engineering Works Limited vs CORECU*, High court of Tanzania at Dar es Salaam, civil case No.320 of 1996, a consent settlement order was successfully challenged and reviewed by the court because of misrepresentation. Comparatively, the Conciliation and Arbitration Act of India, 1996 under section 73 provides that with the consent of the parties and assistance of the parties, the conciliator may draw settlement agreement which shall be final and binding on the parties. Such an agreement is not open to challenge at any court of law. At least it can be assumed that there is some sense and assurance of finality in such a system.

An award obtained through voluntary arbitration is final. The courts can only intervene through an application for setting aside of the arbitral award lodged with the High Court. Mashamba (2014) noted that in Tanzania, for instance, section 16 of the Tanzania Arbitration Act, an arbitral award may be set aside by the High Court for only two reasons, that is, where an arbitrator misconducted himself or where an arbitration or arbitrator has been improperly procured. It is, therefore, respectfully submitted that voluntary arbitration possibly provides a concrete method of resolving labour disputes that can also help to maintain sustained relationships. Madhuku (2012) observed that a voluntary arbitration award that fails to comply with Article 31(2) of the Arbitration Act (failure to provide reasons) is not a nullity at law. He argued that the appropriate remedy is to approach the court for an order for *mandamus*.

The case of *NSSA vs Chairman, NSSA Workers Committee & others* 2002(1) ZLR 306 (H) is relevant. It is submitted that a compulsory arbitration award is not final. Madhuku (2012) observed that in terms of section 98 of the Labour Act, [Chapter 28:01], an arbitral award may be appealed against to the Labour Court on a question of law. He further argued that an arbitral award issued in compulsory arbitration proceedings is final over matters of fact.

Furthermore, a compulsory arbitration award cannot be challenged for being against public policy. The Supreme Court, in the case of Mbisva vs RTG SC/2/2009 observed that the issue of whether an award was or was not against public policy was only on point if voluntary arbitration is involved in terms of the Arbitration Act. Resultantly, the court ruled that the issue was not ground

for an appeal against an award made from compulsory arbitration in terms of the Labour Act. It is also submitted that a compulsory arbitration award can also be overturned if it is grossly unreasonable. This position is settled in the case of ZINWA vs Mwoyounotsva SC/28/2015. It can therefore be submitted for awards made from compulsory arbitration that they are not final and such may impact on the effectiveness of the ADR System.

In terms of Section 93(5a) (a), a DA's ruling is in draft form. As such, it is not final. The ruling is subject to confirmation by the judge of the Labour Court. An unconfirmed ruling is of no legal effect. Section 93 5(b) of the Labour Act emphasise that if on the return day of application, the respondent makes no appearance or after a hearing, the Labour Court confirms the application for the order with or without amendment, the Labour Officer concerned shall submit the order for registration to whichever court with the jurisdiction to make such an order, had the matter been determined by that court.

It is only after that process when the order shall have effect for the purposes of enforcement, of a civil judgment of the appropriate court. However, the case of *John Shumba & 559 others vs. Delta Beverages* SC 606/17 ruled that an order where an employee would have lost the case is not competent for confirmation, hence final. Section 82 of the Labour Act stipulates that, once a CBA is registered, the agreement becomes binding on the parties to the agreement in the full sector or industry that the CBA relates. Makings (2017) observed that, what this means is that even employers who are not members of the employer's organisation for their industry, and even employees who are not members of the trade union for their industry, are still legally bound by the collective bargaining agreement for their industry or sector.

5. Theoretical Framework

Different scholars classify labour relations theories into either two or three major categories. Those who recognise two categories talk of communist versus capitalist perspectives (Gwisai, 2006). On the other hand, those who recognise the three categories speak of unitary, pluralistic and Marxist perspectives. This research adopts the three-tier perspective. It is put forward that the labour relations and dispute resolution in Zimbabwe is currently influenced by pluralistic beliefs. These perspectives are discussed in detail below.

This perspective view society as being post-capitalist, a relatively wide spread distribution of authority and power within the society, a separation of ownership, acceptance and institutionalisation of political and industrial conflicts. Makings,

(2017) noted that it assumes the organisation is composed of individuals who coalesce into a variety of distinct sectional groups, each with its own interests, objectives and leadership (either formal or informal). As such, it gives rise to a complex of tensions and competing claims which have to be managed in the interests of maintaining a viable collaborative structure (Gwisai, 2006).

The organisation is, therefore, in a state of permanent state of dynamic tension resulting from the inherent conflict of interest between the various sectional groups and requires to be managed through a variety of roles; institutions and processes (Fox, 1973). Industrial problems are also institutionalised through platforms such as NECs where conflicts are discussed freely. Within an organisation, there are distinct groups of people such as management, shop-floor workers and employers, and these groups share different conflicting interests. These groups of people then engage in collective bargaining in order to iron out their permanent problems. However, the radical pluralist criticises this perspective arguing that industrial relations can no longer stumble along, gathering empirical data, without reframing its underlying theoretical assumptions. The neo-pluralists also submitted that, having subtracted loaded assumptions about inequality and conflict, we may enlarge the frame to take in other tensions, again without pre-judging outcomes. Still following the internal logic of the employment system, we may insist, with classical pluralism, that relations of conflict and co-operation also exist as tensions between employees (Ackers, 2014).

The unitary perspective assumes the organisation is, or should be, an integrated group of people with a single authority/loyalty structure and a common set of values, interests and objectives shared by all members of the organization. Management's prerogative (i.e., right to manage and make decisions) is regarded as legitimate, rational and accepted and any opposition to it (whether formal or informal, internal or external) is seen as irrational. The underlying assumption, therefore, is that the organisational system is in basic harmony and conflict is unnecessary and exceptional: it is not a 'them-and-us' situation (Fox, 1973). Chalmers (2006) argues that the unitary approach represents a management ideology and as such, can create difficulty (for the manager), nor simply in acknowledging the legitimacy of challenges to it, but even in fully grasping that such challenges may at least be grounded in legitimacy for those who mount them. As such, collective bargaining within an organization may be regarded as an anti- social mechanism since it is founded on existence of conflicting interests, hence, resort to compulsory arbitration.

Marx (1983) argues that class conflict is the source of societal change. Marx believes that class conflict arises primarily from the disparity in the distribution of and access to economic power within the society. The principal disparity, therefore, is between those who own capital and those who supply their labour. As such, social and political conflict in whatever form is merely an expression of the underlying economic conflict within the society. Gwisai (2006) says Marxism rejects the existence of a supreme being and holds that change comes from the process of work, in particular the struggle between two key elements within it; the productive forces and the relations of production. Marx (1983) further argues that, historically, the contradictions between the productive forces and the relations of production become so severe that they can be resolved only by a fundamental overhaul of the relations of production to match up with the productive forces. In the Marxist set-up, production system is privately owned, profit is the key influence on company policy and control over production is enforced downwards by the owners' managerial agents.

These three broad theories of labour also give rise to three approaches of negotiation, which are: interested-based approach, possibly arising from pluralism; rights-based approach, possibly emanating from unitary and power-based approach, possibly motivated by Marxism. The theoretical framework guiding ADR was identified as broad theories of labour relations, specific theories for conciliation, arbitration and negotiation. It can be concluded from literature that most of these theories emphasise autonomy and self-determination of disputes by the parties.

6. Aims and research objectives

Research Objectives

The main aim of this study is to establish the effectiveness of ADR in resolving labour disputes among NECs in Zimbabwe.

Sub-aims of the study are:

- To appreciate how methods of ADR impact ADR effectiveness.
- To examine how ADR facilitators influence the ADR effectiveness.
- To establish the effectiveness of ADR agreements.
- To evaluate the effectiveness of approaches and theories used in ADR in relation to labour dispute resolution.

Research questions

1. *To what extent do the various methods used in ADR impact its effectiveness?*
2. *What influence does ADR facilitators have on ADR effectiveness?*
3. *What is the impact of ADR agreements on ADR effectiveness?*
4. *Is there a relationship between effectiveness of ADR and approaches and theories applied?*

Hypothesis

H_0: ADR is not effective in resolving labour disputes

Method

A mixed method involving both qualitative and quantitative was used in the study targeting selected Zimbabwean NECs. An online survey questionnaire was used to collect quantitative data. Interviews were also used to collect qualitative data from selected knowledgeable people in the field of labour. Mixed method studies also attempt to bring together research methods from different paradigms. According to Creswell (2014), the mixed method approach involves collecting and analysing both quantitative and qualitative data in one study. Khotari (2004) simply referred to this as triangulation.

This research adopted a census strategy encompassing all the 48 NECs across the industries. However, in industries where there were more than two DAs or trade unions, the researcher conducted a simple random sampling in order to pick one element. Procedurally, the researcher would draw lots to select representative NEC from a lot. The researcher also chose to have all the 48 NECs in order to have a complete appreciation of the effectiveness of ADR in the NECs sector of Zimbabwe while ensuring representativeness. The paper also used purposive sampling to select labour experts who had good prospects for accurate information. Table 1 below summaries respondents' category, target population, sample size and research instruments.

Table 1: Categories of respondents and research instruments

Category	Target Population	Sample size	Research Instruments
ADR experts	10	5	Key informant interviews
DAs	48	48	Questionnaires
Trade unions	48	5	Key informant interviews
Employers' associations	48	5	Key informant interviews

Category	Target Population	Sample size	Research Instruments
Affected Employees (Claimants)	20	10	In-depth interviews
TOTAL	**174**	**73**	

Source: Researcher

7. Data framing and analysis

The interviewed participants provided insight on what the employees, employers, affected persons, ADR facilitators, labour practitioners and labour experts recognise as the position regarding the effectiveness of ADR system in resolving labour disputes in the NECs sector of Zimbabwe. Factors that influence the effectiveness of ADR system are shown in the Addendum and they were used for coding of the findings. In assessing the National Employment Council sector's effectiveness in resolving labour disputes, the researcher adapted the United States of America's model or framework called the Trial Court Performance Standards (TCPS). This framework was adapted and used in this current study as the ADR's Eight Point Measurement Compass (AEPMC).

The ADR's Eight Point Measurement Compass (AEPMC)

The **AEPMC** framework measures the following:

1. M**easure 1 Accessibility of the ADR methods** *(ratings of NECs ADR system users on the NECs' accessibility in terms of geography and practice).*
2. M**easure 2 Costs Affordability** *(capacity of the parties in the dispute to pay for the process of ADR in order to access justice at the NECs and the impact of resource inadequacy for the Designated Agents in carrying out inspections).*
3. M**easure 3 Time to Disposition** *(the rate at which cases and negotiation processes are disposed within prescribed time frames).*

M**easure 4 Impact of ADR methods** (the value of ADR methods to the total effectiveness of the ADR system as a whole).

1. M**easure 5 Influence of ADR facilitators** *(the contribution of Designated Agents and lawyers in the effectiveness of ADR processes).*
2. M**easure 6 Finality of ADR Agreements** *(the ability of ADR Agreements to completely resolve and dispose of the disputes without referring them to other forums such as the courts).*

3. M**easure 7 The relationship between ADR practice and theory (***the extent to which labour practitioners rely on theory during their practice sessions).*
4. M**easure 8 Employee Satisfaction** *(ratings of NECs employees (Designated Agents) assessing the quality of the work environment and terms of conditions of employment such as remuneration and feelings & experience by employees who once used the system).*

Validity and Reliability

According to Bryman and Bell (2007) no textbook can substitute a good supervisor. As such, to ensure content validity, the researcher involved subject experts who helped to assess whether the questions in the draft questionnaire were representative and suitable of eliciting and gathering the relevant responses.

Pilot testing of the questionnaire was also done on 10 Designated Agents selected from the total 48 NECs. The main objective of the pilot testing was to check the accuracy, reliability, and validity of the questions before sending out the questionnaires. Pilot testing also helped in advising the researcher on whether to the split between closed and open-ended questions was the correct one in terms of the responses. The pilot testing helped the researcher a lot in terms of correcting mistakes that were noted on certain questions as well as in eliminating ambiguity. The measures were initially tested for internal reliability using the Cronbach's Alpha reliability test and they were statistically significant with a coefficient value of 0.8.

The researcher observed four cardinal principles of research ethics and these were confidentiality, respect, truthfulness and objectivity. There was informed consent and voluntary participation of the research subjects. The individuals interviewed remain anonymous. The researcher treated participants with utmost respect and equally.

8. Results and discussion

The main objective of this study was to establish the effectiveness of ADR in resolving labour disputes. The major question that needed to be answered was whether the methods used in ADR such as conciliation, arbitration, negotiation, inspections and the ADR facilitators were of any value in the resolution of labour disputes since matters referred for litigation were on the increase. The following were the findings of the study.

From the study 83% of the participants involved in the survey strongly agreed that the methods of ADR such as conciliation were readily available to the clients. On the other hand, 72% of the participants involved in the survey agreed that ADR methods for labour dispute resolution such as ruling are affordable in their respective NECs.

Findings from the participants the major drawback of the ADR system is that it is silent with regards to the actual timelines within which the process of ruling and arbitration could be concluded. Largely, participants interviewed unanimously agreed that the methods of ADR are valuable in dispute resolution as a whole.

Regarding the Das who participated in the study, 75% showed that they strongly disagree that involvement of lawyers in ADR has a positive influence and a further 20% of the DAs disagreed that lawyers' involvement has a positive contribution in the process of ADR. Participants showed mixed feelings about the finality of the products of ADR process. However, 75% of the DAs generally disagreed that ADR is conclusive and the remaining 25% of the participants tentatively agreed that ADR results are final in determining labour disputes.

Participants unanimously agreed that there was a general relationship between theory and ADR practice particularly when one is looking at the broad philosophical level.

The objective of this study was to assess the effectiveness of ADR system in resolving labour disputes in the NECs sector of Zimbabwe in light of a sharp increase in cases being referred to litigation. The ADR's Eight Point Measurement Compass (AEPMC) framework was used to assess the usefulness of ADR in resolving labour disputes among NECs in Zimbabwe.

Trade unions, employers, affected employees and labour experts who participated in the interviews showed a concurrence with the online survey findings in that the system of ADR is generally available and accessible in resolving labour disputes in the NECs sector. That is very much so in terms of geographical coverage because a bigger number of the 48 total numbers of NECs are present in the ten (10) provinces of the country. Participants also revealed that the accessibility have increased in practice due to technology. Moreover, a greater number of NECs also conducts conciliation and arbitration circuit hearings in areas where they do not have a physical presence.

Request Machimbira, a labour practitioner and expert who was interviewed, submitted that ADR system in the NECs sector is accessible at the perspective of being a localised system of labour dispute settlement. Another labour practitioner and expert, Allen Masiya, (then the Company Secretary for Hwange Colliery Company) weighed in by saying that the ADR system is a conduit that provides primary tools for resolving labour disputes in their infancy in a highly simplified manner that is understood by all. The ADR system is, therefore, a simple process with no strict rules of procedure such as those found in the formal courts that could technically exclude other players. In addition, another employer who took part in this study emphasised that ADR is accessible to both the educated and non-educated persons, small to medium enterprises as well as large established corporations as opposed to the formal courts that seem to be favourable to the large corporations since they could afford to hire lawyers to represent them.

Affected employees also interviewed concurred that delays in conclusion of matters at the NECs allows for brooding of corruption between DAs and employers. They also felt that delays in resolving labour disputes are very visible and threatening if one has been dismissed from employment because standards of life will change, respect is lost among neighbours, and school going children might also be affected.

Employers showed worry in situations where an employee would have committed a serious misconduct such as theft or corruption. They felt that the more an employer keeps an employee who is no longer trustworthy, the more an organisation becomes threatened, and it also sets a bad precedence to other employees as it may appear as if the long arm of law is not catching up on the offender.

One interviewed employer submitted that the ADR methods are the foundations of the whole dispute resolution system. They set the tone by which labour disputes are going to be resolved up to litigation by the formal courts. No wonder why some cases are remitted from the Labour Court to the NECs for procedural corrections, it is because that is where the formulae is set

As such, these methods are primary tools by which parties amicably resolve their differences in their infancy. Employers argued that these methods are positively impactful to the extent that they deal with labour matters in their bulky nature. Interviewed employers also submitted that inspections were helpful in giving the practical financial position and performance of the

companies especially when faced with a case of incapacity to meet contractual obligations. This finding was also confirmed by Zvimba (2018) who notes that inspections help in giving a correct position of the company records and also assists to dispel mistrust from the employees. However, employees were of the belief that employers just comply at the time of inspection and once the DAs leave, they revert to their old ways of doing things. DAs who participated in the online survey indicated that resources were an impediment in their duties of conducting statutory inspections.

Lastly, on arbitration the participants had mixed feelings on its contribution. The trade union parties believed that arbitration is too legalistic. It was also noted as complicating the whole process to an extent that an ordinary employee would not understand the process. Gohori (2018) confirmed these findings saying that in arbitration, it is the third party that makes the decision on behalf of the disputing parties; in that case, arbitration becomes a quasi-judicial process and to that extent it is not very effective because it promotes adversarial processes and not consultative discussions.

In line with these same sentiments, Zvimba (2018) submitted that the labour fraternity should revert to the old system where arbitrators were allowed to determine the disputes and give a binding determination or award through the process of arbitration rather than the current situation where DAs are merely giving half-baked draft rulings that are subject to confirmation by the judge. Machimbira (2018) bemoaned the lack of appraisal tools to measure the impact of the ADR methods. Machimbira further adds that for anything that is measured, there should effectively be a performance architecture that should drive the effectiveness of such tools. As such, effectiveness should be supported by output or change in monetary value or sustained relations between parties. For instance, conciliation could be appraised in terms of conversion, like to say how many settlements did a DA achieved within a specified period as opposed to how many cases were disposed.

It is, thus, concluded that the labour practitioners do not use specific theories of ADR but rely on general theories. These findings were at variance with what the researcher held to be the position before undertaking the research. The researcher assumed that the labour practitioners use specific theories of conciliation, arbitration, negotiation and con-arb in practice but research results showed that they do not use theories. The study, hence, finds that ADR agreements are not conclusive in resolving labour disputes in the NECs sector.

The ADR system is alternative to litigation as a method of dispute settlement and as such should provide finality in dispute resolution.

While the study was limited in using purposive judgmental sampling method of which the researcher's subjective judgment of what constitutes labour experts could have some elements of biased, the search for independent opinion from subject experts was thus necessary to close up this gap. Thus, the study focused on private sector and future researchers could extend focus to include the public sector. Future researchers may also deepen the methodology and use inferential statistics on the quantitative side in order to obtain the level of statistical significance of the study.

The policy implications are aimed at providing the legislature and industry policy makers with proposed areas upon which they can amend, repeal or include in the ADR system for it to be effective in resolving labour disputes. It is recommended that the law makers consider prescribing maximum timeframes for corn-arb, arbitration and negotiation as the case with conciliation. NECs may adopt the use of technology such as world-wide websites, business communication emails and online conciliation and arbitration in order to broaden their physical presence through virtual means, as that is the trend with other jurisdictions.

In order to remedy the costs problem, it is suggested that NEC administrators be allowed to appoint their own internal arbitrators paid from the NECs coffers in order to minimise costs. The managers are also encouraged to compensate their DAs handsomely in order to cushion them from the vice of corruption that always haunt their practice since they usually deal with issues that involve huge amounts of money. The Designated Agents are also encouraged to establish a Professional Association of their own designed to regulate their professional conduct. Some quarters of the participants also recommended that Designated Agents be protected from possible interference in their work from their employers (trade unions and employers) who also happen to be their clients at the same time if they are to discharge their services effectively.

The research results also imply that lawyers be generally removed from the ADR processes and exceptions be allowed in special cases such as dismissal cases or any other areas as determined by the NECs upon application by the employee or employer. The recommendation is in line with best practice in neighbouring jurisdictions such as the Republic of South Africa and Tanzania. Alternatively, only specialised labour lawyers may be allowed in ADR, or

lawyers may enrol in ADR courses such as the Post-Graduate Diploma in Conciliation and Arbitration offered by the University of Zimbabwe, in order to acquaint themselves with ADR principles and practice. Lawyers may also align their fees to be as low as an individual employee could afford in order to keep with the fundamental principle of affordable costs that form the backbone of the ADR system.

Policy makers are encouraged to consider conciliation agreements such as the certificate of settlement, be considered final and be enforced like consent judgments. The option for appeal against arbitration awards may also be removed as that renders the process useless as the awards may be challenged on questions of law or gross misdirection of facts. That may call for the abolition of the 'so called' compulsory arbitration and promote voluntary arbitration that is not subject to appeal but can only be set aside through review. Draft rulings by the Designated Agents may also be made final and only subject to review at the Labour Court.

Conclusion

The study evidence showed that ADR system is effective in resolving labour disputes among NECs in Zimbabwe. The research findings do not support the proposition that ADR is not effective in resolving labour disputes. However, it is important to note that there are certain areas such as lack of proper ADR procedural guidelines, code of ethics to guide facilitators, non-finality of agreements, involvement of lawyers, delays in concluding arbitration and negotiation processes, inadequacy of resources to carry out inspections and uneven powers in collective bargaining because of the economic conditions that need to be looked at and require continuous improvement in order to enhance efficiency and effectiveness in the ADR system.

The research is critical to the existing body of knowledge and future research as its contribution can be classified under three categories as follows: theoretical, methodological and empirical. Theoretically, the study contributed new data to the existing body of knowledge by introducing a performance measurement framework in the ADR system. Named the ADR's Eight Point Measurement Compass (AEPMC), the framework has eight measures for the effectiveness of ADR system; accessibility of ADR methods, costs affordability, influence of ADR facilitators, finality of ADR agreements, time to disposition, employee satisfaction, impact of ADR methods and relationship between theory and ADR practice.

In terms of method, research in the labour fraternity is usually done qualitatively or quantitatively but in this present research, the researcher it was demonstrated that triangulation can be used thereby balancing the shortcomings of the methods if used separately. As such, the study presents a wholesome feel of both the statistical and non-statistical view of labour issues.

Empirically, the study contributes data to every method used in resolving labour disputes in the NECs sector unlike other research that concentrate on one method such as collective bargaining. The study also studied National Employment Councils which are unique bodies or set-ups, which are different from other jurisdictions.

REFERENCES

Ackers, P. (2014). Rethinking the employment relationship: a neo-pluralist critique of the British industrial relations, *Orthodox 25*(18): 26-28.

Basson, A. C, Christianson, M. A, Dekker, A. Garbers, C. KleMischke, A. P. and Strydom, E. M. L (2009). Essential labour law. *Labour Law Publications*, Cape Town

Chalmers, J. N (2006). *Industrial relations in Japan: The peripheral workforce.* Routledge: London.

Creswell, J. W (2014). *Research design: Qualitative, quantitative, and mixed methods Approach*. Ontario CA: Sage.

Fennimore, M (2009). Introduction to labour relations in South Africa, Tenth Edition. Lexis Nexis Butterworth, Durban.

Fox, A (1973).*Man and Organization.* Allen & Unwin, London.

Moazzam (2014) *Sampling & Sample Size Estimation*, World Health Organization, Geneva, Switzerland

Bryman, A. (2012): *Social Research Methods*, 4thedition, Oxford University press, Oxford.

Gwisai, M. (2006). Labour and Employment Law in Zimbabwe*: Relations of work under Neo-Colonial Capitalism*. Zimbabwe Labour Centre, Harare, Zimbabwe

Labour Market Outlook (2016). *Government Report*, Mambo Press, Gweru.
Madhuku, L. (2010). *Audit of the Alternative Labour Dispute Resolution System in Zimbabwe*. ILO Publications, Harare.

Madhuku, L. (2015). *Labour Law in Zimbabwe*, Weaver Press, Harare.

Matsikidze, R. (2012). *Alternative Dispute Resolution in Zimbabwe: A practical Approach to Labour Law*, Matsikidze Foundation Trust, Harare.

Makings, G. (2011). *Essential Guide to Collective Bargaining Agreements in Zimbabwe*. Aquamor, Harare.

Makings, G. (2016). *Employment Handbook*, Aquamor, Harare.

Marx, K (1983). *The Communist Manifesto*, Penguin Classics, Ontario.

Makings, G. (2017). *George Markings 2017 Labour Law Update: Newsflash*. Aquamor, Harare.

Mariwo, T (2008). *Working conditions and labour relations in the private security industry in Zimbabwe* ILO Publications, Harare.

Martin J, (2007). *Looking at the English Legal System*. Hodder& Stoughton Educational, London.

Mashamba, C.J (2014). *Alternative Dispute Resolution in Tanzania Law and Practice*. Mkuki NA Nyota, Dares Salaam.

Mucheche, C. (2014). *A practical Guide to Labour Law, Conciliation, Mediation& Arbitration in Zimbabwe.* African Dominion Publications, Harare.

Mutimutema, Z. (2018), Labour Act Review Sparks Debate. *The Sunday Mail*, 23-29 March, pp.8-9.

Shamir, Y. (2003). *Alternative dispute resolution approaches and the application*, UNESCO

Walton, R. E. & Mckersie, R. B (1991). A behavioural theory of labour negotiations, *Journal of Organisational behaviour 13*(3): 289-295.

Yin, R, .K. (2006).*Case study research*: Design and methods. 3rd edition. Thousand Oaks, CA,

Yin, R. K. (1984). *Case study research*: *Design and methods.* Beverly Hills, CA: Sage Publications.

L**ist of Statutes:** *Zimbabwean Statutes*

Arbitration Act (1996). Chapter 7:15. Government Printers, Harare.

Constitution of Zimbabwe Amendment (No.20) Act 2013. Government printers, Harare Labour Act. (2015). (Chapter 28:01). Government Printers, Harare.

Labour Relations Act, 16 of 1985. (Chapter 28:01), Government Printers, Harare Statutory Instrument 173 of 2012. Labour Arbitrators Regulations. Government of Zimbabwe, Harare.

Statutory Instrument 54 of 2003. Inspection Regulations. Government Printers, Harare Statutory Instrument 217 of 2003. Labour Dispute Settlement Regulations. Government Printers, Harare.

Statutory Instrument 5 of 2015. Labour Amendment No.5. Government Printers, Harare.

Statutes from Other Jurisdictions

Civil Procedure Code (2002). (Chapter 33) R. E–. Government Printers, Dar es Salaam Employment Protection Act (1978). UK Public General Acts, United Kingdom. Arbitration Act (1937). Chapter 15. Government Printers, Dar es Salaam

International Instruments

International Labour Organization (1981). Convention No.154, ILO Publications, Geneva

International Labour Organisation (1948). ConventionNo.87. Freedom of Association and Protection of the Right to organise Convention. ILO Publications, Geneva.

International Labour Organisation (1949). Convention No.98, Right to Organise and Collective Bargaining Convention. ILO Publications, Geneva.

International Labour Organization (2007). The ILO and Internal Labour Standards, ILO Publications, Geneva.

List of Cases:

Zimbabwean Cases Mbisva vs RTG, Supreme Court Judgement SC/2/2009 *Nunurai Bore vs Juvanna Takeaways (Private) Limited & Florence Chinyoka.* Labour Court judgment No.LC/H/LRA/174/2016

Nyamande & Donga vs Zuva Petroleum (Private) Limited, Supreme Court Judgment SC 43/2015

Posts and Telecommunications Corporation vs Zimbabwe Posts and Telecommunications Workers' Union and 2 Others, Supreme Court Judgement SC 107/2002.

NSSA vs Chairman, NSSA Workers Committee & Others 2002(1) ZLR 306 (H) *Samudzimu vs Dairyboard*, High Court Judgement HH/204/2010

Watyoka vs ZUPCO SC 76/2006

Mudzi Rural District Council vs Godfrey Makwembere, Supreme Court Judgment *SC/90/2005*

ZINWA vs Mwoyounotsva Supreme Court Judgment SC/28/2015.