

# The Constitutional Protection of the Right to Collective Job Action in Zimbabwe: A Comparative Analysis

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## Abstract

*The right to participate in collective job action is the most formidable weapon in employees' arsenal, without which workers' autonomy and democracy in the workplace would be under persistent onslaught. This article assesses whether Zimbabwe's constitutional protection of collective job action accords with general trends in comparative jurisdictions such as South Africa, Kenya and Australia. Further, the article establishes that Zimbabwe's 2013 Constitution is progressive on the right to collective job action. However, it fails to offer adequate constitutional protections and guarantees for the right. There are also several disconnects between the Constitution and the Labour Act. Additionally, Zimbabwe's legal and institutional framework is lagging behind when compared to other jurisdictions from which lessons can be drawn. The article makes constitutional, legislative, institutional and administrative recommendations with a view to enhancing the protection, enforcement and promotion of the right to collective job action in Zimbabwe.*

## Keywords

Australia; constitutional protection; Kenya; right to collective job action; South Africa; Zimbabwe

## 1. Introduction

Section 65(3) of the 2013 Zimbabwean Constitution provides that various constituencies have the right to collective job action.<sup>1</sup> This provision is given legislative effect by the Labour Act.<sup>2</sup> The perceived incompatibility between these two provisions regarding collective job action makes the interpretation, enforcement and limitation of the right a highly contested terrain. While section 65 of the Constitution of Zimbabwe clearly protects the right to collective job action, it is hampered by many limitations in the Labour Act which make the right practically non-existent. Such a legal framework means that the right is very susceptible to violation, in both the private and public employment domains.

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

2 Part XIII of the Labour Act [Chapter 28:01].

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The government's attitude to collective job action and the frequent litigation on labour matters highlight the weak and inadequate constitutional protection of the right.<sup>3</sup>

This article compares Zimbabwe's legal position with the position in the South African, Kenyan and Australian jurisdictions. Lessons are drawn from labour and human rights jurisprudence in these countries and some recommendations are made for Zimbabwe. Section 23 of the Constitution of South Africa is similar to section 65 of the Zimbabwean Constitution, and therefore it is useful to examine South African experiences. In order to provide the analysis with more insight, Australia, as a developed country, and Kenya, as a fellow African country, are also discussed.

## 2. The right to collective job action in the Zimbabwean Constitution

The right to collective job action in section 65(3) of the Constitution is one of the broad constitutional labour rights provided for in section 65. Numerous issues arise from a close reading of section 65(3) of the Constitution. Firstly, the provision states that members of the security forces cannot lawfully enjoy and exercise the right to collective job action.<sup>4</sup> Secondly, the express exclusion of members of the security forces suggests that any other employees in Zimbabwe can participate in collective job action, whether in the private or public employment sector. The third issue is that collective job action includes the right to strike, to sit-in, to withdraw labour, and to take other similar concerted action. Finally, the right to collective job action may be restricted or limited in order to maintain essential services.<sup>5</sup>

The Constitution of Zimbabwe is supreme, which is one of the basic tenets of Zimbabwe's new constitutional order.<sup>6</sup> This means that any unconstitutional decision, norm, practice, interpretation or law is trumped by a constitutional norm should a conflict between the two arise.<sup>7</sup> The effect of this is to give the courts jurisdiction to scrutinise any law, rendering such law unconstitutional should it be found to offend the constitutional right to collective job action. In the words of Michelman, constitutional supremacy sets 'a determinate hierarchical relation among legal norms emanating from various sources of law'.<sup>8</sup> These include statutes, common law, customary law, international law, customary international law and foreign law, if they affect the right to collective job action. Section 2(1) of the Constitution, as read with the Sixth Schedule, provides that even inconsistent and unrepealed provisions from non-constitutional sources should be read and construed in the light and spirit of the supreme Constitution.

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3 This refers to the role of Zimbabwean security services, ministers, courts and other state departments in handling matters concerning collective job action, as discussed below.

4 Section 65(3) of the Constitution.

5 *Ibid.*

6 Moyo, A 'Basic Tenets of Zimbabwe's New Constitutional Order' in Moyo, A (ed) *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (RWI Institute of Human Rights and Humanitarian Law, 2019) 10.

7 See *Pharmaceuticals Manufacturers Association of South Africa: In re: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

8 Michelman, F 'The Rule of Law, Legality and the Supremacy of the Constitution' in Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa* (Juta & Co, 2014) 11.

The right to collective job action is situated at the heart of the declaration of fundamental rights and freedoms.<sup>9</sup> This entrenchment gives the right immunity and constitutional protection from the tendency of the legislature, the judiciary and the executive to play politics with constitutional rights.<sup>10</sup> The constitutionalisation of the right to collective job action also makes it part of the justiciable fundamental human rights and freedoms.<sup>11</sup> This denotes a complete break from the repealed Lancaster House Constitution, which relegated the right to a mere legislative right enjoying no direct constitutional protection. The placement of the right to collective job action in the declaration of rights is important also because the Constitution states that every natural and juristic person, all the three arms of the government, and all state agents at every level must respect, promote, protect and fulfil the rights and freedoms that it sets out.<sup>12</sup> This approach emphasises the horizontal and vertical applicability of the declaration of rights, reminding the relevant duty-bearers and other stakeholders of the importance of such rights.

The Constitution also instructs and guides the interpretation process of the right to collective job action and its constituent elements.<sup>13</sup> Any court or tribunal interpreting the declaration of rights must give full effect to the rights and freedoms therein.<sup>14</sup> This implies a delicate balancing of the right to collective job action with other fundamental rights and freedoms. The polymorphic nature, interdependence and interconnectedness of rights should be considered. Thus, collective job action can be used to address issues of health and safety in the workplace, increases in salaries and allowances, improved working conditions or the existence of a trade union, thus advancing causes which are established by other independent rights and freedoms in Chapter 4 of the Constitution. In so doing, constitutional values and principles must be considered.<sup>15</sup> Thus any interpretation which negates these values, principles and objectives ought to be challenged and removed from Zimbabwe's human rights and labour jurisprudence for want of compliance with the rules of interpretation. Values and objectives like labour and employment relations,<sup>16</sup> respect for human rights and freedoms, and respect for international law and the rule of law are important. Therefore, a teleological and value-coherent approach to collective job action should be embraced as the Constitution leaves no space for a value-free statutory construction.<sup>17</sup>

9 See generally Chapter 4 of the Constitution.

10 Hofisi, DT & Feltoe, G 'Playing Politics with the Judiciary and the Constitution' *Zimbabwe Electronic Law Journal* <<http://www.zimlii.org>> accessed 10 December 2022.

11 Kasuso, TG 'Constitutional Labour Rights: Judicial Interpretation of the Right to Fair Labour Practices in Zimbabwe' in Tsabora, J (ed) *The Judiciary and the Zimbabwean Constitution* (University of Zimbabwe Press, 2022) 187-188.

12 Sections 44 and 45 of the Constitution.

13 Section 46 of the Constitution.

14 Section 46(1)(a) of the Constitution.

15 Section 3 of the Constitution provides for values and principles while Chapter 2 stipulates national objectives.

16 Section 24 of the Constitution.

17 *Rattigan & Others v The Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S).

It is submitted that the statutory construction of collective job action rights should be approached from a generous, value-laden and broader praxis. In addition, the Constitution is clear that the declaration of rights does not preclude any other rights which are recognised or can be conferred by law, provided that they are consistent with the Constitution. This avenue allows for the indirect constitutional protection of those other constituent elements of the right to collective job action which are not expressly provided for in either the Labour Act or the Constitution. The wording 'and other concerted actions' in section 65(3) of the Constitution can embrace collective job action like boycotts, go-slows, sit-ins and other actions falling within the ambit of concerted industrial action. Thus, a restrictive and formalistic interpretation is not only unacceptable in a civilised constitutional democracy like Zimbabwe but, for all intents and purposes, should be avoided.

It can therefore argue that the Constitution has introduced a new legal culture and is the foundational premise of legal reasoning because of its pervasive normative effect.<sup>18</sup> It entrenches the right to collective job action and makes it a human right. Such constitutionalisation provides a useful model for conceptualising how labour law should develop, while also enhancing the legitimacy of workers' demands for protection, giving credence to policymaking.<sup>19</sup> The Constitution is thus the cornerstone of labour rights discourse in Zimbabwe today and specifically the right to collective job action.

## 2.1 Limitation of the right to collective job action

The right to collective job action is not unlimited. It is imperative to recall that although the ILO Conventions allow for the limitation of collective job action in the case of essential and security services, much detail as to the limitations is left to national laws. The key issue is the impact of the wording of section 65(3) of the Constitution on the exercise of the right to collective job action. The express exclusion of members of security services presupposes that every other employee is entitled to the right to collective job action. However, this is not the case as the Labour Act, which is primarily enacted to give effect to section 65 of the Constitution, does not apply to state employees whose conditions of service are provided for by the Constitution.<sup>20</sup> Statutes like the Public Services Act [Chapter 16:04], which regulates members of the civil service, do not provide for the right to collective job action or any equivalent mechanism which is effective, inclusive and timely. This means that such employees must invoke the constitutional right directly. Madhuku opines that the position is not clear for certain appointments established in terms of the Constitution but whose conditions are not provided for therein.<sup>21</sup>

In addition to the internal limitations on the right to collective job action imposed by section 65(3) of the Constitution, there are external limitations which should accord with the general limitation provision in section 86 of the Constitution. Thus, the courts and all key institutions involved in various processes should ensure they do not unnecessarily

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18 Moyo (note 6 above) 12.

19 Kasuso (note 11 above) 193.

20 Section 3 of the Labour Act.

21 Madhuku, *L Labour Law in Zimbabwe* (Friedrich Ebert Stiftung, 2015) 482.

stifle the exercise of the right to collective job action for malicious and unfounded reasons. It is important to ensure that the enjoyment of collective job action rights does not interfere with or infringe other rights and freedoms equally guaranteed and protected by the Constitution. The Constitution provides as follows:

The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including ...<sup>22</sup>

The term 'law of general application' means the existence of valid legal authority in the form of a statute or any other valid law upon which a limitation can be based and justified.<sup>23</sup> In *Majome v ZBC & Others* the court stated that there can be no justification of conduct for which no legal authorisation or rule of law exists.<sup>24</sup> A long line of cases has successively developed Zimbabwean and South African jurisprudence on this matter.<sup>25</sup> The plumb line of fairness, reasonability, necessity and justifiability in a democratic society has equally been dissected in many judicial pronouncements.<sup>26</sup> This threshold takes cognisance of the uniqueness of the circumstances of each case and extrapolates it to the values underpinning a democratic society. As stated in *Biti & Another v Minister of Home Affairs*,<sup>27</sup> determining what is a democratic society is a value judgment. Any legislative limitation imposed by the Labour Act or any law on the right to collective job action should fall squarely within section 86 of the Constitution.

## 2.2 Definition and scope of collective job action in the Labour Act

Part XIII of the Labour Act provides in detail for all matters concerning collective job action.<sup>28</sup> The consistent use of the term 'collective job action' throughout the Labour Act implies that Part XIII applies to all aspects of collective job action falling within the ambit of the definition of the term. Section 2 of the Labour Act provides as follows:

Collective job action means an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment, and includes a strike, boycott, lockout, sit-in and sit-out, or such concerted action.<sup>29</sup>

22 Section 86(2) of the Constitution.

23 *Democratic Assembly for Restoration and Empowerment (DARE) & Others v Saunyama & Others* HH-589-2016.

24 *Majome v ZBC* (2016) ZWCC para 21.

25 See *Wekare v The State & Others* CCZ-9-2016; *August v Electoral Commission & Others* 1999 (3) SA 1 (CC).

26 See *Zimbabwe Development Party & Another v President of the Republic of Zimbabwe & Others* CCZ3-18. See also *In re Munhumeso & Others* 1994 (1) ZLR 49 (S).

27 *Biti & Another v Minister of Home Affairs & Another* 2002 (1) ZLR 197 (S).

28 Sections 102-112 of the Labour Act.

29 Section 2 of the Labour Act.

This definition is a bundle of several entitlements and concepts that need to be briefly unpacked. Firstly, the conduct should constitute an industrial action whose effect is to cause the disruption or stoppage of work.<sup>30</sup> Secondly, the collective job action should be directed towards a demand emanating from the subsistence of an employment relationship.<sup>31</sup> The third tenet is that the conduct should be coming from and directed against a party to the employment relationship.<sup>32</sup> The last component is that it should be concerted action.<sup>33</sup>

The definition of collective job action in section 2 of the Labour Act lists the right to strike as the first component. The second item is a boycott, which denotes the concerted refusal of employees or a union to deal with an employer.<sup>34</sup> The third aspect is a lock-out as defined in the Act.<sup>35</sup> Here the employer withdraws the opportunity for the workers to work by locking them out of the premises. The fourth component is sit-ins. The open-ended text 'and other concerted action' in the definition means that the scope of collective job action is unlimited. What is important is the compliance of that particular conduct with the four aspects of industrial action listed above.

### 2.3 The consequences of collective job action in Zimbabwe

The consequences of lawful collective job action which complies with the provisions of section 104 of the Labour Act are clear. The first one is that employees participating in a strike, boycott, sit-in or any form of collective job action are not entitled to the payment of wages and salaries for the period for which they were engaged in collective job action. This approach is based on the common-law principle of 'no work no pay'.<sup>36</sup> On a positive note, employees are protected from discipline and dismissal while workers' committees and trade unions are given immunity from civil liability or any proceedings emanating from the collective job action.<sup>37</sup> This immunity is lost only when wilful and deliberate acts of participants in the collective action destroy property, which is common with strikes.<sup>38</sup> Protection is also offered to employees where their employer locks them out, in that the locked-out employees cannot be replaced by scab labour.<sup>39</sup>

Participants in unlawful collective job action are subject to an array of criminal and civil penalties. In *Lancashire Steel (Pvt) Ltd v Mandevana & Others*, the court reiterated that participation in unlawful collective job action amounts to a material breach of the employment contract and justifies dismissal of the employee.<sup>40</sup> It should, however, be

30 *ZB Financial Holdings v Manyarare* SC 3/12, *Wholesale Centre (Pvt) Ltd v Mehlo & Others* 1992 (1) ZLR 376 (H).

31 *ZUPCO v Mabande & Another* 1998 (2) ZLR 150 (S).

32 *Rutunga & Others v Chiredzi Town Council & Another* 2003 (1) ZLR 197 (S).

33 *Tsingano & Others v Munchville Investments (Pvt) Ltd t/a Bernstern Clothing* SC 163/98.

34 Lesnick, H 'The Gravamen of Secondary Boycott' (1962) 62 *Columbia Law Review* 1364.

35 Section 102 of the Labour Act.

36 *National Railways of Zimbabwe v Zimbabwe Railways Artisans Union & Others* 2005 (1) ZLR 314 (S).

37 Section 108(2) of the Labour Act.

38 *Communications and Allied Workers Union of Zimbabwe v Tel One (Pvt) Ltd* 2005 (2) ZLR 200 (H); *Tel One (Pvt) Ltd v Communications and Allied Services Workers Union Zimbabwe* 2006 (2) ZLR 136 (S).

39 Section 108(5) of the Labour Act.

40 *Lancashire Steel (Pvt) Ltd v Mandevana & Others* SC 29/95.

noted that the dismissal must comply with a registered code of conduct or, in its absence, the national employment code of conduct. Otherwise, dismissals made in clear defiance of due process can be lawfully challenged as unfair dismissals in terms of section 12B(1) of the Labour Act. The persistent and recurrent summary dismissals of nurses, doctors and teachers by the Zimbabwean government ought to be scrutinised through this lens. Often, employers use the common-law selective dismissals of ringleaders and persons who are instrumental in the occurrence of collective job action.<sup>41</sup> It can be argued that such a selective approach affronts the cardinal principle of the equal protection of the law.

There are heavy criminal sanctions for an unlawful strike. The Labour Act casts a wider net to cover workers' committees, trade unions, employers' organisations or federations as responsible persons who should bear criminal liability. This is extended to every official or office-bearer of the responsible person. Several offences are listed in section 109 of the Labour Act.<sup>42</sup> The Labour Act creates further offences in section 112, including disobeying a show cause order, disposal or cessation order. Despite such measures being justified as mechanisms to combat unlawful collective action, they are highly susceptible to manipulation and being used against genuine employee interests. The discretion afforded to the Minister is too wide. A court that has convicted a responsible person has powers to also award damages to recompense the affected person who incurs loss of property or suffers bodily injury.<sup>43</sup> Section 109(6) apportions standalone civil liability to the responsible persons who bear joint and several liability.<sup>44</sup> Section 109(3) of the Labour Act also empowers the Minister to suspend trade unions from collecting subscriptions through check-off schemes if there is reasonable suspicion of participation in unlawful collective job action.

The stiff criminal and civil penalties provided for by the Labour Act are open to criticism. Firstly, the scope of offences is too broad and too vague to define and delimit, especially where there are no express legislative or judicial guidelines to assist in the interpretation process. In addition, the offences affect people or groups who are not direct parties to the employment relationship. It is further submitted that awarding damages and imposing long prison sentences deter people from exercising and enjoying the right to collective action. It allows for widespread victimisation and suppression of the civic space within which the right to collective job action should be exercised. This position is worsened by the manner in which the Labour Act provides that the test in the Public Order and Security Act<sup>45</sup> should be used to determine whether the responsible

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41 *Ibid.*

42 Section 109(1) of the Labour Act provides that any person 'who advises, encourages, threatens, incites, commands, aids, procures, organizes or engages in any collective action ... shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.'

43 Section 109(7) of the Labour Act.

44 Liability under section 109(6) of the Labour Act is 'for any injury to or death of a person, loss or damage of property or other economic loss, including the perishing of goods caused by the employees' absence from work, or caused by or arising out of or occurring during an unlawful collective job action.'

45 [Chapter 11:17] (POSA).



person realised the real risk or possibility that collective job action would occur.<sup>46</sup> Even though POSA has now been repealed, this reference can be construed as referring to the Maintenance of Peace and Order Act,<sup>47</sup> also accused of extensively stifling the enjoyment of most civil rights and freedoms. Such reference has a deterrent effect and is capable of demonising and sterilising collective job action rights. Gwisai, Mucheche and Matsikidze submit that the provisions are draconian in nature and act as a disincentive for employees to exercise their right to collective job action.<sup>48</sup>

## 2.4 Juxtaposing the Constitution and the Labour Act on collective job action

To appreciate the disparity between the Constitution and the Labour Act, it is germane to briefly consider the timelines of the two laws. The Labour Act was enacted in 1985 and was amended several times under the Lancaster House Constitution. As earlier stated, the Lancaster Constitution did not provide for the right to collective job action even on the basis of a broad, purposive or generous interpretation, save to the extent it provided for the freedoms of association and assembly.<sup>49</sup> The 2013 Constitution marked a clear departure from the erstwhile Westminster model Constitution, by constitutionalising labour rights and in particular the right to collective job action. It is argued that, having learnt from the period before 2013, the Constitution drafters ought to have embedded several constitutional protections for the right to collective job action, which would have broadly informed the legislation giving effect to the constitutional right. The 2013 Constitution was an opportunity to perfect the right to collective job action and other labour rights so as to cure historical and foreseeable defects.

The Labour Act is the law envisaged in section 65(3) of the Constitution to give life to labour rights and freedoms. As of 2022, the Labour Act had been amended twice under the purview of the 2013 Constitution, in 2015 and in 2016. This was also a timely opportunity to comprehensively align the Labour Act with the Constitution and synchronise legal disconnects between the two laws. Unfortunately, some issues remain unresolved to date, leaving the judiciary to address these with statutory construction. Some examples of unevenness between the Constitution and the Labour Act with regard to collective job action are discussed below.

By excluding members of the security service, the Constitution expressly gives ‘every person’ the right to form or join trade unions or employers’ or employees’ organisations, and to participate in the lawful activities of such organisations. In addition, the right to participate in collective job action is given to ‘every employee.’<sup>50</sup> Given the direct

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46 Section 109(2) of the Labour Act.

47 [Chapter 11:23] (MOPA).

48 Gwisai, M, Mucheche, C & Matsikidze, R ‘The Right to Strike in the Context of the 2013 Context and International Law’ (2018) *University of Zimbabwe Law Journal* 68.

49 Kasuso, TG & Tsabora, J ‘Reflections on the Constitutionalising of Individual Labour Law and Labour Rights in Zimbabwe’ (2017) 48 *Industrial Law Journal* 56.

50 Section 65(3) of the Constitution.



relationship between the right to organise and collective job action,<sup>51</sup> it is surprising to see that both employers and employees can form or join or participate in the lawful activities of such organisations, but at the same time only employees have the right to participate in collective job action. The seeming absurdity is that employers can join employers' organisations while trade unions can join confederations, but they do not have the right to participate in collective job action of these organisations because they are outside the definition of 'every employee'. Such a gap indicates the absence of the direct constitutional protection of an employer's right to collective job action. The uncertainty is worsened by the Labour Act, which provides that the right to collective job action includes the right to 'lock-out', a right which only employers can exercise.<sup>52</sup> This means that lock-out remains only a statutory and not a constitutional right.

The term 'every employee' also presupposes that the right to collective job action is extended to anyone who is not a member of the security services or essential services. This means that even state employees who are not covered by the Labour Act but rather by the Public Service Act have such a right. However, there is no legislation giving effect to the right of state employees to engage in collective job action like strikes, and they have to invoke and rely on the constitutional right. The right to collective job action is only available for employer-employee related issues, covering only disputes of interest after an unsuccessful bargaining and dispute settlement process.<sup>53</sup> Madhuku contends that the constitutional right to strike is severely limited by the Labour Act and lists several restrictions.<sup>54</sup>

In listing the constituent elements of the right to collective job action, the Constitution includes the right to strike, sit-in and withdraw labour. The Labour Act lists the right to strike, boycott, lock-out, sit-in and sit-out. Thus, where the Constitution provides for the right to withdraw labour, the Labour Act does not include this in its wording. Instead, the Labour Act introduces boycott, sit-out and lock-out, which are not mentioned in the Constitution. Lock-out is separately defined in the Labour Act as including one or more acts or omissions listed thereunder.<sup>55</sup> Both laws provide that the right to collective job action includes any other concerted action. This means any other collective action that is industrial action, between parties to the employment relationship and concerned with resolving an issue arising out of the employment contract. Thus, the list of what potentially constitutes collective job action is endless.

The Constitution indicates that a law may limit the right to collective job action in order to maintain essential services. This limitation is envisaged to be in conformity with the general limitation provisions in section 86 of the Constitution, as discussed above. The Labour Act provides for disputes in essential services to be resolved by compulsory

51 Even in international law, the right to strike is derived from the ILO Conventions on freedom of association, mainly the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

52 Section 2 of the Labour Act.

53 A certificate of no settlement is issued in terms of section 104(2)(b) of the Labour Act.

54 Madhuku (note 21 above) 441.

55 Section 102 of the Labour Act.

arbitration and it allows for immediate collective job action in the case of emergencies like occupational hazards.<sup>56</sup> There is no direct constitutional protection to safeguard the rights of employees when compulsory arbitration or the designation of essential services act as a clear impediment to collective job action in the face of a genuine and imminent threat, as posed by the Covid-19 pandemic, for example. For the security services, where the right to collective job action is precluded, it is unclear how employees can seek recourse if internal organisational mechanisms fail to act in good faith or are captured by the government as the employer.<sup>57</sup>

There are a number of differences between the Constitution and the Labour Act as regards the scope of the right to collective job action and its limitations. It may be argued that the Labour Act excessively limits, stifles and disincentives the right to participate in collective job action. On the other hand, the Constitution has a number of deficiencies in its endeavour to protect the right to collective job action. This is further demonstrated below, where other jurisdictions are examined.

### 3. Collective job action in selected comparative jurisdictions

This part analyses constitutional and statutory protection of the right to collective job action in selected jurisdictions, namely South Africa, Kenya and Australia. It interrogates the relevant constitutional and legislative provisions, institutional frameworks and selected court decisions from these countries. The constituent elements of the right to collective job action are discussed, together with enforcement mechanisms and limitations of the right in these countries. From the comparative analysis, the study draws lessons for Zimbabwe and makes some recommendations.

#### 3.1 South Africa

##### 3.1.1 *The right to strike in the South African Constitution*

The South African Constitution<sup>58</sup> provides for labour relations from which the right to strike (the equivalent of collective job action in Zimbabwe) is derived.<sup>59</sup> South Africa has constitutionalised labour rights, which means they can be enforced, interpreted and limited like any other fundamental constitutional rights and freedoms. The location of labour rights in the Bill of Rights imposes an obligation on the executive, the legislature, the judiciary and every natural or juristic person to respect, promote and protect the rights.<sup>60</sup> As in many jurisdictions, labour rights are largely matters between private persons, hence the rights are largely applicable horizontally. Labour practices, trade unions and employers' organisations, collective bargaining and strikes all relate to the mediation of private relationships on an individual or a collective basis.<sup>61</sup> Such mainly

56 Sections 93(5)(a) and 98 of the Labour Act provide for compulsory arbitration while section 104(4) of the Labour Act provides for collective job action in the case of occupational hazards.

57 Each security service department has a special commission to deal with employment issues.

58 Constitution of the Republic of South Africa, 1996.

59 Section 23 of the Constitution of South Africa.

60 Section 8(2) of the Constitution of South Africa.

61 Cooper, C 'Labour Relations' in Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa* (Juta & Co, 2013) 53-3.

private conduct between employers and employees leaves little space for constitutional contestation in labour matters.<sup>62</sup>

In South Africa, everyone has the right to fair labour practices, while particular rights are afforded specifically for every worker.<sup>63</sup> In contrast, the Zimbabwean Constitution accords the right to collective job action to every employee. The constitutional use and scope of the term 'every worker' was explained in *National Defence Union v Minister of Defence & Another*.<sup>64</sup> The court's reasoning is appealing and highly instructive. The term 'worker' is broader than 'employee' and the two terms are not synonymous. Workers should thus be generously interpreted to include not only those persons who are formal employees in the strict sense of having a written employment contract, but also those in various typical work relationships, including those dependent and subordinate workers who might currently lack protection under the existing statutory framework. Cooper also notes that workers include those wrongfully treated as independent contractors, thus depriving them of the constitutional and statutory protection of labour rights afforded to workers, when in fact they are not such independent contractors.<sup>65</sup>

With regard to collective job action, the Constitution of South Africa expressly mentions only the right to strike as a right which is accorded to every worker.<sup>66</sup> It means other collective job action rights can be derived from legislative provisions or through a generous interpretation of the activities of trade unions which workers can participate in. This differs from the Zimbabwean Constitution which provides for several types of collective job action in section 65(3). It should be noted that the interim Constitution of South Africa<sup>67</sup> provided for the right to strike, but it curtailed the right as it restricted it to the confines of the currency of a collective bargaining agreement.<sup>68</sup> In departing from such a position, the Constitution of South Africa omitted the specific purposive context of collective bargaining, thus broadening the scope of strikes. The effect of such a deletion of the purpose was to embrace strikes or other forms of collective job action for social or economic advancement as envisioned by the ILO standards.<sup>69</sup> It should also be noted that the Constitution of South Africa removed the treatment of a lock-out as the employer's

62 *Ibid.*

63 Section 23(2) of the Constitution of South Africa.

64 *National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) para 22. The Court was called on to decide whether prohibiting members of the defence forces from forming and joining trade unions was an infringement of the right to freedom of association which applies to workers and employers.

65 Cooper (note 61 above) 53-4.

66 *Ibid.*, where it is noted that the right to strike (with various qualifications) is enshrined in the constitutions of many countries, including Argentina, Bolivia, Chile, Colombia, Cyprus, Ecuador, Benin and France, among others.

67 Act 200 of 1993 (interim Constitution of South Africa).

68 Section 27(4) of the interim Constitution.

69 Gernigon, B, Odero, A & Guido, H 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 445. See generally the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

equivalent for striking employees, as was provided for in the interim Constitution. On that note, the Constitution of South Africa accords with ILO Convention No. 87.<sup>70</sup>

The Constitution of South Africa under 'Labour Relations' provides for the right of employers to join employers' organisations, which in turn can join federations, and to participate in the activities of such organisations. From the constitutional perspective, that open provision allows for collective job action like lock-outs to be effected by employers or employers' organisations. This position is substantially similar to that in Zimbabwe. Section 23 of the Constitution of South Africa does not expressly preclude members of the security services from enjoying collective job action rights, as is the case in Zimbabwe. Thus, as decided in *National Defence Union v Minister of Defence & Another*,<sup>71</sup> members of the South African Defence Force and the Police Service enjoy certain labour rights, like having their own trade unions and federations, and they can participate in their activities. However, their constitutional right to strike may justifiably be limited.<sup>72</sup>

An examination of the interpretation, enforcement and limitation of the right to collective job action in South Africa is germane to this paper. In interpreting collective job action rights, the South African courts are guided by the provisions of section 7 of the Constitution of South Africa, which restates that the Bill of Rights is a cornerstone of democracy.<sup>73</sup> Thus, the State must protect, promote and respect all the rights and limit them only as is consistent with constitutional limitation provisions. The Constitution of South Africa also states that all constructions of rights should promote the values underlying an open and democratic society based on openness, human dignity and freedom.<sup>74</sup> International law and foreign law are thus recognised to the extent that they conform to the Constitution of South Africa.

### 3.1.2 *The Labour Relations Act 66 of 1995*

The Labour Relations Act (LRA) gives effect to the constitutional right to strike. The long title specifies some objectives of the Act. These include regulating the right to strike and recourse to lock-outs, in conformity with the Constitution of South Africa. In addition, the LRA seeks to give effect to the public international obligations of South Africa with regard to labour relations. The LRA expressly mentions strikes and lock-outs as some of the industrial actions, while picketing is provided for as a complementary activity to strike action. Various provisions of the LRA are worth highlighting.

Firstly, the right to strike and recourse to lock-out are provided for in Chapter IV of the LRA. In section 213, the LRA provides a lengthy definition of a strike.<sup>75</sup> It can be observed from the definition that other constituent elements of industrial action like go-slows are covered by the word 'retardation' of work. Section 64, in particular, provides

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70 Articles 2, 3 and 5 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (ratified by South Africa on 19 February 1996).

71 *National Defence Union* case para 27.

72 See Amendment to the General Regulations for the South African National Defence Force and Reserve, section 6.

73 Hennie, PPL *Injustice, Violence, and Peace: The Case of South Africa* (Rodopi, 1997) 195-208.

74 Section 39 of the Constitution of South Africa.

75 Section 213 of the LRA.

that every employee has the right to strike.<sup>76</sup> There is a difference in wording as to who has the right to strike. The Constitution of South Africa accords the right to every worker while the LRA gives it to every employee. The interpretative debates and differences between the use of the term 'employee' and the term 'worker' have been discussed above. It can therefore be argued that the LRA restricts the right to strike, compared to the Constitution of South Africa, which is expansive and generous.

The LRA prescribes numerous aspects which should be complied with in order to qualify for the right to strike or lock-out. These include a certificate of no settlement, the lapse of the 30-day period, adequate timelines for notice, and notification of all concerned parties.<sup>77</sup> Unlike Zimbabwe, South Africa recognises secondary strikes in section 66 of the LRA. There are also a number of procedural and substantive issues concerning the exercise of the right to strike and lock-out. There are no criminal offences and sanctions associated with strikes in South Africa, as is the case in Zimbabwe. Such a stance promotes the exercise and enjoyment of the right.

Secondly, every employer has a right to lock-out, in response to striking employees.<sup>78</sup> A lock-out is defined in the LRA.<sup>79</sup> The right to lock-out provided for in the LRA was equally provided as a recourse to employee strikes in the interim Constitution of South Africa, but both the right and its perceived equivalence to a strike were removed by the Constitution of South Africa in 1996. Thus, currently, the right to lock-out is expressly recognised as a legislative right enjoying constitutional protection only to the extent that it can be construed as consistent with being a recognised activity of an employees' or employers' organisation. That would depend on the interpretation afforded by the courts to determine if the right to lock-out can survive constitutional validity. Cooper observes that the general absence of a constitutional right or recourse to a lock-out reflects a worldwide trend.<sup>80</sup> In opposing the right to lock-out, she argues that an employee's right or freedom to strike is already balanced by the employer's right of property and its prerogative to hire and fire at will. Rycroft and Jordan argue that it is the employer's power to act unilaterally that is the true equivalent of the right to strike. Granting the employer an additional economic weapon in the form of the lock-out would upset the delicate balance created by the recognition of the right or freedom to strike.<sup>81</sup>

The Constitutional Court of South Africa had an opportunity to dissect the use of a lock-out as recourse to striking employees in its first *Certification* judgment.<sup>82</sup> The court rejected inserting the right to lock-out into the Bill of Rights, arguing that collective bargaining and strikes were important shields through which employees advance and defend themselves against the greater power of their employers. On the other hand, employers have a variety of remedies at their disposal to disempower workers,

76 Section 213 of the LRA.

77 Section 64 of the LRA.

78 Section 64(1) of the LRA.

79 Section 213 of the LRA.

80 Cooper (note 61 above) 53-57.

81 Rycroft, AJ & Jordan, B A *Guide to South African Labour Law* (2nd ed, Juta & Co, 1992) 141.

82 *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744 (CC) (first *Certification* judgment) paras 64-68.

including dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace.<sup>83</sup> Such a bold stance functions to expressly exclude the right to lock-out from the Constitution of South Africa and no reasonable interpretation of section 23 of the Constitution should read in the right to lock-out. Such rejection need not be construed as declaring the right to lock-out to be unconstitutional. It can thus be said that the right to lock-out does not enjoy direct constitutional protection in South Africa.

Thirdly, protest action covers several activities.<sup>84</sup> The LRA provides for protest action to promote or defend the socio-economic interests of workers.<sup>85</sup> This provision affords employees an alternative avenue to advance their economic and social interests which would otherwise not be acceptable under strike action. Zimbabwe has no such provision as collective job action is restricted to matters emanating from the contract of employment. Socio-economic interests can be advanced through a generous interpretation of labour rights in section 65 of the Zimbabwean Constitution. The right to picket is related to protesting.<sup>86</sup> Generally, this activity is regarded as complementary to strikes. The essence is to obtain the sympathy of other workers or the general public in the cause of the industrial action. With picketing, rules can be drafted by both parties and it can be done inside or outside the employer's premises. Picketing does not enjoy express constitutional protection in both South Africa and Zimbabwe.

The LRA defines essential services<sup>87</sup> in section 213. The definition in the LRA draws heavily on that provided in the ILO Conventions. The South African Police Service and the Parliamentary Service constitute essential services. There is also an Essential Services Committee which manages all issues relating to essential services, including designation and challenges thereof.<sup>88</sup> For essential services, industrial disputes are resolved through simple, impartial and accessible conciliatory and arbitration processes. On this it is important to draw comparison with Zimbabwe's Labour Act, which does not provide for an essential services committee. Zimbabwe gives the Minister very wide discretion to designate essential services as he or she wishes, and the Minister can choose whether to appoint an advisory council on essential services.<sup>89</sup> In addition, there is no requirement for technical expertise in labour matters required for members of the advisory council, unlike in South Africa, which lays down these prerequisites. The establishment of a permanent committee is important to provide checks and balances on the Minister, who can potentially abuse his or her wide discretionary powers. Section 103 of the Labour Act only provides for reactionary measures to challenge the designation of a service as an essential one, without giving many proactive measures. The term 'essential services'

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83 *Ibid.*

84 Section 213 of the LRA.

85 Section 77 of the LRA.

86 Section 69 of the LRA.

87 'Essential service' means – (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Service.

88 Section 70 of the LRA.

89 Section 102 (definition of essential services as read with section 19 of the Labour Act).

should thus be narrowly construed. If left unchecked, the designation of essential services arbitrarily removes the right to collective job action.

### 3.2 Kenya

The Republic of Kenya introduced a new Constitution in 2010.<sup>90</sup> The preamble outlines the need to establish a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. This value system is important to the extent that it influences the interpretation of the Constitution and particularly the Bill of Rights, where the right to collective job action appears.<sup>91</sup> The Constitution of Kenya states that a court shall adopt the interpretation which favours the enforcement of a fundamental right or freedom. Article 4 of the Constitution of Kenya provides for the Bill of Rights. All enforcement and limitation of these fundamental rights and freedoms should be as provided for in the Constitution.<sup>92</sup>

The Constitution of Kenya provides for labour relations in Article 41. Only the right to strike is expressly mentioned as a constitutional right in Article 41(2)(d) of the Constitution. Any other constituent of collective job action can be inferred from a broad interpretation of every worker's right to participate in the activities and programmes of a trade union. The same applies to employers, who can participate in the activities of employers' organisations, to the extent that such organisations can initiate collective job action.<sup>93</sup> The old Kenyan Constitution did not provide for any specific right to collective job action, but only for the right of trade unions, freedom of assembly and association, from which collective job action could be derived. The constitutionalisation of the right to strike is thus a positive development which gives the right constitutional protection like any other fundamental right or freedom.<sup>94</sup> The wording and scope of the constitutional protection of the right to collective job action in the Kenyan Constitution is substantially similar to that of South Africa discussed above. The key difference from Zimbabwe is that the Zimbabwean Constitution lists several elements under collective job action, including strikes, sit-ins and the withdrawal of labour.

The Labour Relations Act of Kenya (LRA, 2007) gives effect to the provisions of Article 41 of the Constitution. The terms 'strike' and 'lock-out' are both defined in the LRA, 2007 with meanings materially similar to the terms used in Zimbabwe and South Africa. Whereas in Zimbabwe the Labour Court adjudicates matters relating to collective job action, in Kenya the Employment and Labour Relations Court was established pursuant to Article 162(b) of the Constitution. In *The County Government of Kakamega & Another v Kenya National Union of Nurses*, the court reiterated that it has jurisdiction

90 Constitution of Kenya, 2010.

91 Yash, G 'Decreeing and Establishing a Constitutional Order: Challenges facing Kenya' <<https://www.law.ox.ac.uk>> accessed 21 December 2022.

92 Article 22 of the Constitution of Kenya provides for enforcement while Article 24 provides for the limitation of rights.

93 Article 41(3)(f) of the Constitution of Kenya.

94 Kabiru, MW 'Critical Analysis of the Right to Strike in Kenya: The Balancing Act between the Constitutional Right to Strike and the Constitutional Right to Economic Social Rights' (unpublished PhD thesis, Riara University School of Law, 2018) 36.



to determine industrial disputes, including lock-outs and strikes, as provided for in the LRA, 2007.<sup>95</sup> Part X of the LRA, 2007 provides for strikes and lock-outs. The wording of the statute treats a lock-out as an employer's response to striking employees.<sup>96</sup> The debates about lock-outs have been discussed above under South African law. Similarly, the employer's right to lock-out in Zimbabwe is a statutory right. Statutory protections enjoyed by workers include immunity from dismissal or discipline for participating in lawful collective job action, and the dismissal of an employee lawfully engaged in collective action amounts to an unfair labour practice.<sup>97</sup> Kenya, like South Africa, does not impose criminal sanctions for merely participating in unauthorised collective job action like a prohibited strike or lock-out.<sup>98</sup> The person is only disciplined or loses certain benefits. In sharp contrast, Zimbabwe has stiff criminal penalties in the form of fines and imprisonment.

As to the minute detail of limitation and procedural issues, nothing is unique in Kenya. The right to strike or lock-out is also not available for essential services. Here there is a striking similarity with Zimbabwe on how the Minister may designate essential services. There are, however, two key differences. Firstly, the LRA, 2007 provides that where a strike or lock-out has persisted so as to endanger public life or health, the Minister may designate any other service as an essential service.<sup>99</sup> This section was explained in *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & Others*.<sup>100</sup> Here the rationale is to mitigate looming danger to the public, while not using the designation of essential services as a tool to frustrate collective job action without offering viable alternative mechanisms to resolve the dispute. Secondly, any dispute emanating from an essential service is resolved by adjudication in the Industrial Court.<sup>101</sup> This process seems expedient, compared to Zimbabwe which provides for arbitration processes which are likely to prolong the dispute, offending the need for expediency and efficiency in alternative methods of dispute resolution where the right to collective job action is restricted or totally curtailed.<sup>102</sup>

### 3.3 Australia

Australia is a federal state, whose federal Constitution of 1908, as amended, does not expressly provide for the right to strike.<sup>103</sup> The Fair Work Act provides the statutory framework for the right to strike in Australia.<sup>104</sup> It is imperative to note that this law does not apply to state employees, who are governed by state legislation and industrial

95 *The County Government of Kakamega v Kenya National Union of Nurses* [ELRC, Kisumu] 13 of 2016.

96 Article 76 of the LRA, 2007.

97 Article 46 of the LRA, 2007.

98 Article 80(1) of the LRA, 2007.

99 Article 81(2)(b) of the LRA, 2007.

100 *Joseph O Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & Another* [2017] eKLR.

101 Article 81(4) of the LRA, 2007.

102 Compulsory arbitration provided for in section 98 of the Labour Act is used to resolve disputes in essential services.

103 Neilson, A 'The Right to Strike in Australia' (2009) 16(4) *International Centre for Trade Union Rights* 6-7.

104 Act 28 of 2009.

instruments. The statute reflects the law of strikes at both the federal and state levels. This statute defines industrial action broadly to include strikes, lock-outs, work to rule, slow-downs and refusal to work overtime.<sup>105</sup> Strikes are only permissible during the period of negotiations concerning a proposed enterprise agreement. This means that a strike is restricted only to bargaining issues, hence for any industrial action outside the scope of bargaining, unions can be held liable and face dire consequences.<sup>106</sup> Such a restriction offends the possible use of a strike to advance other social and economic interests of workers. The statute also establishes a Fair Work Commission with wide discretionary powers to interfere with the exercise and enjoyment of the right to strike.

This Commission has powers to make orders which prohibit unprotected industrial action.<sup>107</sup> What is disturbing is its capacity to suspend protected or authorised industrial action if it considers that there is a threat to the life, safety, health or welfare of the population or part of it, or the Australian economy or an important part of it.<sup>108</sup> Such an order of suspension can be made by the Commission on its instance, or upon application by the Minister or other person so listed. In addition, any breach, however trivial, of the provisions of a collective bargaining agreement is met with the harsh penalty of rendering the whole industrial action illegal. The wording of section 424 of the Fair Work Act provides for a wide range of grounds, which are excessively broad and highly subjective. It is difficult to determine what constitutes the welfare of the population or a part of it or what can be said to affect the economy or part of it.<sup>109</sup> Such wording makes the statutory provision fertile ground for thwarting reasonable industrial action. The section is couched in broad terms and has little guide for its interpretation, thus heavily burdening the courts if they are to decide such a matter.

A look at a few cases decided by the Australian courts is important to understand the labour rights jurisprudence. Such an interrogation of case law serves to emphatically demonstrate the role of the courts, administrative institutions and the legislature in undermining collective job action rights. In *Esso Australia Pty Ltd v Australian Workers Union*, the court had to interpret section 413(5) of the Fair Work Act, which makes industrial action illegal for any breach of the terms of the bargaining agreement.<sup>110</sup> The lower courts held that the section meant that if the union rectified its breach, or was not in breach at the time it sought to take future industrial action, it could take protected

105 Section 19 of the Fair Work Act.

106 Section 408 of the Fair Work Act.

107 Section 418 of the Fair Work Act.

108 Section 424 of the Fair Work Act.

109 Jennings, K & Western, G 'A Right to Strike?' (1997) 4(4) *Nursing Ethics* 277-282.

110 It reads as follows: 'Compliance with orders:

- (5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
- (a) if the person organizing or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;
  - (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the employee and the bargaining representative of the employee.'

industrial action again.<sup>111</sup> Thus, any breach can be rectified and any previous breach cannot be relied upon as a ground for refusing to allow a protected industrial action to proceed.

However, on appeal, the High Court rejected the findings of the court *a quo*. It concluded that a bargaining representative could not meet the prerequisites to take protected industrial action if, at any point during negotiations for the agreement, they had breached any order of the Fair Work Commission or a court.

The court held that the right to take protected industrial action was a privilege. Therefore, the majority observed that the apparent purpose of the provision was to ensure that persons who have shown that they cannot be trusted to comply with orders relating to the agreement or matters arising from bargaining for the agreement, are not to be trusted with the immunity afforded in relation to protected industrial action.<sup>112</sup> It can be argued that regarding industrial action as a privilege is erroneous in law. At least, the court should have considered it as a statutory right capable of limitation in reasonable and justifiable circumstances. This finding effectively rules out protected industrial action for employees, regardless of whether the breach is minor, inadvertent or merely technical. Lawful industrial action is prohibited until bargaining commences for a subsequent agreement. Giving a dissenting judgment in the High Court, Gageler J observed that the approach created industrial outlaws, and was not consonant with a statutory scheme designed to be fair, flexible and efficient.<sup>113</sup> He reiterated that requiring strict compliance with all orders, on pain of loss of access to protected industrial action, has the effect in practice of further juridifying a system which should be flexible enough to accommodate the natural ebb and flow of industrial dispute that accompanies collective bargaining. It restricts access to the right to strike as a punishment for past transgressions, however minor.

The second decision with profound implications for access to the right to strike in Australia is *Sydney Trains v Railway, Tram & Bus Industry Union (RTBU)*.<sup>114</sup> The RTBU notified the employer of protected industrial action in the form of indefinite overtime bans, and a 24-hour work stoppage by its railway members. The Fair Work Commission suspended the industrial action, holding that such action could affect the economy, cause inconvenience to commuters, and would cause traffic jams if there were no trains, thus endangering public welfare, as provided for in section 424 of the Fair Work Act. Such a finding by the court defeats the whole purpose of collective job action which is to pressurise an employer or employee to concede to an employment demand. It is fear of the impending inconvenience and loss of business which can compel the employer to act, thus a finding that such an industrial action violated public welfare was misplaced, especially given the availability of alternative modes of transport for public use.<sup>115</sup> The court relied on precedent in *Monash University v NTEU* which concerned protected industrial action

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111 *Eso v AWU* (2015) 253 IR 304; *Eso v AWU* (2016) 245 FCR 39.

112 *Ibid* at 34.

113 *Ibid* at 36.

114 *Sydney Trains v Australian Rail, Tram & Bus Industry Union (RTBU)* [2018] FWC 632.

115 Cooper, L 'The Right to Strike and Organise in Australia' <<https://search.informit.org>> accessed 22 December 2022.

by university lecturers.<sup>116</sup> The action was suspended because it was held that withholding exam results endangered the welfare of university students. Suspension of the action for two weeks meant that all results were released, and the impact of the strike was undermined. Here, it can be argued that the Commission failed to realise that lecturers do not constitute an essential service, so the withdrawal of their labour cannot endanger public welfare. The decision therefore failed to differentiate and reach a balance between the public interest and employees' right to collective job action.

There is no direct constitutional protection of the right to strike in Australia, unlike in Zimbabwe. The existing Australian statutory framework provides for the right to strike. However, this right is severely affected by draconian procedural and substantive requirements for the pursuit of industrial action. Of particular importance are the notorious sections 418 and 424 of the Fair Work Act, which lay down unrestricted grounds upon which collective action can be prohibited. This is coupled with the wide discretionary powers given to the Fair Work Commission to prohibit unprotected industrial action and to stop protected industrial action when it deems it fit to do so. The Australian courts have further shrunk the democratic space within which collective job action should be enjoyed by their interpretation of the Fair Work Act. Decisions like *Esso Australia Pty Ltd v Australian Workers Union* and *Sydney Trains v Railway, Tram & Bus Industry Union* and *Monash University v NTEU*, discussed above, are highly instructive. They provide a rich lesson for Zimbabwe on how various entities can work towards the progressive erosion of collective job action rights in a country. They reflect, firstly, the need for the legislature to protect, promote and enhance the right to collective job action through legislative measures. Legislation can be used as a tool to undermine and suffocate industrial action in a country, as in Australia, which makes it impossible to easily engage in industrial action. Secondly, the role of the courts to defend, enforce and protect the right to strike is demonstrated. A restrictive interpretation of the right to strike is prejudicial and offends the spirit of democratic and open societies. Thirdly, the need for independent, efficient, impartial and objective institutions in a country is apparent.<sup>117</sup> The Fair Work Commission, as a regulatory and expert body, is vested with wide discretionary powers, which it exercises in a manner that is prejudicial to the genuine need to advance employment causes through industrial action. It is concluded that where there is no constitutional protection of the right to collective job action, worsened by a draconian legislative framework, then democracy and collective job action in the workplace remain a dream.

#### 4. Conclusion

The article has examined the right to collective job action in international law and in Zimbabwe. It compared Zimbabwe with South Africa, Kenya and Australia. It unpacked the constitutional protections and legislative framework providing for the right to

116 *Monash University v NTEU* [2013] FWCFB 5982.

117 Runciman, C 'The Double-Edged Sword of Institutional Power: COSATU, Neo-Liberalisation and the Right to Strike' <<https://doi.org/10.15173/glj.v1Oi2.3585>> accessed 22 December 2022.

collective job action and its constituent elements. The study also discussed the role of various institutions in the protection, promotion and enforcement of the right to collective job action. The article established that Zimbabwe is lagging behind in the constitutional and statutory protection of the right to collective job action. Several substantive and procedural limitations, coupled with criminal and civil sanctions on striking employees, practically remove the right to collective job action in Zimbabwe. In addition, limitations on the right to collective job action in the Labour Act should be revisited in order to harmonise the Labour Act and the Constitution. The proposed recommendations will enhance the promotion, protection and enforcement of the right to collective job action in Zimbabwe.

## **5. Recommendations**

In light of the above discussion and the findings of the article, the following recommendations are made:

### **5.1 Constitutional reforms**

The Constitution of Zimbabwe as it stands does not recognise the right of employers to participate in collective job action. It only recognises the right of employees to do so. At the same time, the Labour Act recognises an employer's right to lock-out. There is a need to expressly provide for the employer's right to collective job action as this will entrench the right and afford it direct constitutional protection, as is the case for employees.

The Constitution does not provide for constitutional guarantees and safeguards to enable members of the security forces to have expedient, efficient, independent and inclusive alternatives. The current commission system is not appropriate for junior employees to participate in the processes which affect their employment issues due to the nature of discipline and command inherent in the security services. Where a certain category of persons is deprived of the right to collective job action, constitutional guarantees and safeguards are needed to ensure the efficiency, objectivity and inclusivity of such alternative mechanisms.

The Constitution does not address the rights of senior state employees to collective job action. It excludes only members of security services, implying that any other employees, regardless of appointment or occupation, are entitled to the right to collective job action. Clear constitutional provisions are needed to address the plight of such state employees who are not members of the security services.

### **5.2 Legislative reforms**

The Labour Act has several substantive and procedural issues which excessively shrink the right to collective job action and thus stifle the generous constitutional provisions on the right. The removal of draconian criminal penalties for offences in relation to collective job action is crucial. The imposition of fines and imprisonment limit the right to collective job action. Kenya and South Africa do not have such stiff measures, which should be purged from the Labour Act.

The Minister's discretionary powers in matters to do with collective job action, especially in the designation of essential services, are too wide and unchecked. The Minister is not obliged to consult with the advisory council, and there is no requirement of technical expertise in labour issues for members constituting the advisory council. As in South Africa, an essential services committee should be established that includes labour experts, to provide checks and balances on the Minister and to enhance broad stakeholder consultation.

The Labour Act restricts collective job action to industrial disputes only. Collective job action as the employee's most formidable defence should be used to pursue social and economic interests which the employer can address, as is the case in South Africa.

The Public Service Act should be amended to reflect the constitutional right to trade unionism and collective job action, giving effect to and creating relevant institutions for the realisation of the right and its various aspects. More importantly, it should address the right of senior state employees who are covered under the term 'every employee' and are not members of the security services.

### **5.3 Institutional conscientisation and capacitation**

Without robust institutions, collective job action rights remain rights on paper only. Various institutions, like the legislature, ministries, the police, trade unions and employers' organisations, should be conscientised and capacitated to embrace the civil space within which collective job action should be exercised. The Fair Work Commission of Australia has very wide and unchecked powers which are prejudicial to the right to collective job action. Institutions monitor compliance, consult and research, and then recommend reforms. Their various roles are crucial for the right, therefore, conscientisation should enhance their professionalism, objectivity, impartiality and independence commensurate with constitutional values and a democratic society.

### **5.4 Intensification of citizen education and awareness**

The state and all stakeholders should intensify educational campaigns to make citizens aware of their constitutional right to collective job action and the remedies available to them. The use of print media, electronic media and other technology networking platforms is crucial. Also, the mainstreaming of the subject area is key, given that every person can be an employer or an employee at some stage. An uninformed citizenry is disenfranchised and people's rights can be trampled upon with impunity and contempt. Enlightened people will be empowered to enforce their rights. Also, the state has a constitutional mandate to make known the declaration of rights.

### **5.5 Enhancing judicial scrutiny and independence**

The judiciary is the ultimate bulwark in the protection and enforcement of the right to collective job action. There is a need to ensure compliance with the principles of professionalism, and to embrace institutional and personal independence and impartiality by courts and labour tribunals. As demonstrated by the Australian jurisprudence, judicial interpretation can be used to stifle, excessively limit and make it impossible to exercise the

right to collective job action. Politicisation, capture and weaponisation of the judiciary is a fatal blow to the enjoyment of the right to collective job action. Measures to ensure continuous independence and objectivity in the judiciary need to be intensified.

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