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Conciliation as a Mechanism for the Resolution of Labour Disputes in Zimbabwe: An Impediment to Speedy Social Justice?

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Abstract

The Labour Act of Zimbabwe places a premium on conciliation in that most labour disputes and unfair labour practice complaints must be referred for conciliation before referral to the next stage of the dispute resolution process. Conciliation is the nerve centre of Zimbabwe's labour dispute resolution system. Its objectives are speedy social justice, accessibility and legitimacy. In this regard, section 2A(1)(f) of the Labour Act provides that this form of dispute resolution aims to advance social justice and democracy in the workplace by securing the just, effective and expeditious resolution of labour disputes. Recent statutory developments and judicial pronouncements have redefined the role and functioning of Labour Officers and Designated Agents in the conciliation of labour disputes in Zimbabwe. It has therefore been questioned whether the current legal framework of conciliation as a labour dispute resolution mechanism impedes access to labour justice and speedy social justice. This contribution critically examines the legal framework of conciliation as a dispute resolution mechanism established in section 93 of the Labour Act. The analysis evaluates the possible shortcomings of the current framework of conciliation and how it can be improved. To put the study in its context, the contribution commences

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with an overview of the purpose of conciliation followed by a critical evaluation of section 93 of the Labour Act with specific reference to recent case law. It concludes with a set of recommendations and proposals for improving the effectiveness of conciliation. These include establishing an independent body for conciliation and adopting operational procedures and rules for conciliation that spell out the jurisdictional competence of Labour Officers, dispute referral procedures, referral timeframes and guidelines on conducting the conciliation hearing.

Keywords: Conciliation; labour dispute resolution; unfair labour practice; speedy social justice; Labour Officer; Labour Act

1 INTRODUCTION

The 2013 Constitution of Zimbabwe is founded on, among other values and principles, the respect for the supremacy of the Constitution, the rule of law and fundamental human rights.[1] Critical to the rule of law is the right of access to justice which entails that individuals have access to the courts or suitable forums which resolve their disputes through a fair process.[2] It also means that individuals are entitled to equal protection of the law[3] and related constitutional rights such as the right to administrative justice[4] and the right to a fair hearing.[5] The ability of individuals to seek legal remedies has strong constitutional foundations. Therefore, this implies that the State is obliged to deliver and maintain a civil dispute resolution system that functions optimally and guarantees access to, and the proper administration of justice.[6] The objectives of labour dispute resolution in Zimbabwe are also grounded on these constitutional values and principles. These are and have for a long time been speedy social justice, accessibility and legitimacy. In this regard, section 2A(1)*(f)* of the Labour Act of Zimbabwe (the LA)[7] provides that one of the purposes of the Act is to advance social justice and democracy in the workplace by securing the just, effective and expeditious resolution of labour disputes. As a result, labour dispute resolution mechanisms have always been ring-fenced from the traditional civil courts. They play an important role in maintaining access to labour justice and sustaining an appropriate balance between the competing rights and interests of employers and employees whilst preserving healthy industrial relations.[8] As with other jurisdictions in Southern Africa such as South Africa[9], Botswana,[10] and Lesotho,[11] the LA establishes a miscellany of labour dispute resolution mechanisms designed to confer labour law some autonomy from the common law.

1 Section 3(1)*(a)–(c)* of the Constitution.

2 Begiraji and McNamara *International Access to Justice: Barriers and Solutions* (2014) 8.

3 Section 56(1) of the Constitution.

4 Section 68 of the Constitution.

5 Section 69 of the Constitution.

6 Muller and Swanepoel "Dispute Resolution Does not Need to Be a Battle: The Case for Mediation as Transformative Dispute Resolution Mechanism" 2023 *Speculum Juris* 60.

7 [Chapter 28:01] (the LA).

8 Steenkamp and Bosch "Labour Dispute Resolution Under the 1995 LRA: Problems, Pitfalls and Potential" 2012 *Acta Juridica* 120.

9 Labour Relations Act 66 of 1995.

10 Trade Disputes Act 15 of 2004.

11 The Labour Code Order 24 of 1992 as amended by the Labour Code (Amendment) Act of 2000.

These include the Labour Court,[12] tribunals, administrative boards, or a combination thereof.[13]

Conciliation is central to labour dispute resolution under the LA. The LA places a premium on conciliation, and generally, most labour disputes and unfair labour practices must be referred to a Labour Officer or Designated Agent for conciliation before referral to the next stage of the dispute resolution process.[14] To enhance access to labour justice and speedy social justice, Zimbabwe recently enacted the Labour (Amendment) Act 11 of 2023.[15] The LAA has introduced a new conciliation process in section 93 of the LA. In light of this development, this contribution critically examines conciliation as a mechanism for resolving labour disputes in Zimbabwe. The analysis evaluates whether the current framework impedes speedy social justice and access to labour justice. To put the study in its context, the contribution commences with an attempt to define conciliation and an overview of its significance. This is followed by a critical evaluation of the current legal framework of conciliation with the aid of recent judicial pronouncements. It concludes with a set of recommendations and proposals for improving the effectiveness of conciliation as a mechanism for the resolution of labour disputes in Zimbabwe.

2 DEFINING CONCILIATION

Section 93(1) of the LA provides for conciliation in the following terms, "a labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration". The LA establishes a compulsory regime of conciliation in terms of which most disputes and unfair labour practices must be subjected to conciliation except where the parties opt for voluntary arbitration.[16] The LA does not define the term conciliation. Without a statutory definition, reliance must be placed on international standards, authoritative texts and the common law. Heron and Vandenabeele define conciliation as "a form of dispute resolution in which a third, neutral party, the conciliator, assists the parties in reaching an agreement or finding an amicable solution."[17] Deakin and Morris define it as the involvement of a third party to assist the parties to clarify their points of disagreement and attempt to promote a settlement but the terms of any settlement remain the parties' responsibility.[18] From an international perspective, the United Nations Commission on International Trade Law Model Law on International Commercial Conciliation, 2002 defines conciliation as:

> … a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (the conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

What is apparent from these definitions is that the thrust of conciliation is to afford parties

12 The Labour Court is established in s 172(1) of the Constitution and has jurisdiction over matters of labour and employment as may be conferred upon it by statute. Section 89 of the LA confers jurisdiction on the Labour Court over a *numerus clausus* of labour matters.

13 The basis of these alternative dispute resolution mechanisms is s 174(d) of the Constitution which provides for the establishment, composition and jurisdiction of tribunals and forums for mediation, conciliation and arbitration.

14 Section 93(1) of the LA.

15 The LAA.

16 Madhuku *Labour Law in Zimbabwe* (2015) 356.

17 Heron and Vandenabeele *Labour Dispute Resolution: An Introductory Guide* (1999) 23; Bosch *et al. Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedures* (2004) 11.

18 Deakin and Morris *Labour Law* (1995) 92.

an opportunity to amicably resolve their dispute with the assistance of a third party without imposing a solution on them. It is a process premised on the flexibility of both procedure and outcomes. Although the UNCITRAL Model Law definition does not strictly distinguish between conciliation and mediation, the two are different but related alternative dispute resolution mechanisms. The difference between the two systems lies in the degree of involvement of the third party. Mediation is a facilitative, consensual and confidential process, in which the parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated settlement.[19] On one hand, the mediator acts as a facilitator in that they actively take part in the resolution of the dispute by suggesting proposals and methods of resolving the dispute.[20] On the other hand, a conciliator plays more of an advisory role in the dispute resolution process and does not propose solutions.[21] Picard argues that mediation is purely an interest-based dispute resolution mechanism.[22] It expands the discussion beyond the parties' legal rights to look at the underlying interests of the parties and address their emotions. It seeks creative solutions to the dispute, whilst conciliation is based solely on the legal rights of the parties to the dispute.[23]

Despite these differences, section 93(1) of the LA in its current form only refers to conciliation and does not distinguish between mediation and conciliation.[24] The term conciliation in section 93(1) of the LA is therefore broad enough to cover mediation[25] and this expansive approach finds support in the definition of conciliation in the UNCITRAL Model Law. It was also endorsed by the Constitutional Court of Zimbabwe in *Isoquant Investments (Pvt) Ltd t/a ZIMOCO v Darikwa*,[26] in which the court held that the duty to attempt to settle the dispute imposed by section 93(1) of the LA is wide enough to confer on the Labour Officers the power to choose the steps and procedures ordinarily associated with conciliation as a method of dispute resolution including mediation.[27] Therefore, a Labour Officer has wide discretion to determine when to employ conciliation or mediation in an attempt to resolve the dispute.

3 THE SIGNIFICANCE OF CONCILIATION IN ZIMBABWE

The Zimbabwean labour law framework is a product of both the common law and other socio-historical and constitutional developments that have shaped the legal system as a whole since the colonial era. Importantly, the main basis of this area of law is to address the inequality of bargaining power that is inherent in individual employment relationships.[28] In addressing this inequality, labour law needs some autonomy, which, as Freedland asserts, requires the establishment of a distinctive administration of justice for labour disputes.[29] These specialised institutions have the potential to free labour law from the rules and methods of the traditional courts which are likely to prejudice workers. Conciliation is one such dispute resolution

19 Matsikidze *Alternative Dispute Resolution in Zimbabwe: A Practical Approach to Arbitration, Mediation and Negotiation* (2013) 73.

20 Boulle *Mediation: Principles, Processes, Practice* (2005) 43 47.

21 Heron and Vandenabeele *Labour Dispute Resolution* (1999) 23.

22 Picard *The Many Meanings of Mediation: A Sociological Study of Mediation in Canada* (2000) 33.

23 Boulle *Mediation* (2005) 43 47.

24 The old s 93(1) of the Labour Relations Act, 1985 provided for both conciliation and mediation.

25 Madhuku "The Alternative Labour Dispute Resolution System in Zimbabwe: Some Comparative Perspectives" 2012 *University of Botswana LJ* 4.

26 CCZ 6/20 (*Isoquant* case).

27 *Isoquant* case 13.

28 Kahn-Freund *Labour and the Law* (1972) 8.

29 Freedland "Otto Kahn-Freund: The Contract of Employment and the Autonomy of Labour Law" in Bogg *et al* (eds) *The Autonomy of Labour Law* (2015) 43.

mechanism best suited for labour conflict. The employment relationship is a profoundly personal relationship, based on trust and mutual respect.[30] Consequently, disputes arising from employment must be resolved amicably to preserve this relationship. Conciliation focuses on the ethics of responsibility, moral ambiguity and consequence, and is grounded in *Ubuntu*.[31] Its spirit emphasises respect for human dignity, marking a shift from confrontation, and seeking to cause the least harm to the parties involved. This is different from adversarial litigation in the traditional courts whose focus is an attempt to seek a perfect right, with a clear distinction being made between the winner and loser.[32] Therefore, conciliation as a labour dispute resolution mechanism has been justified on several grounds.

First, Article 3 of the International Labour Organisation (ILO) Voluntary Conciliation and Arbitration Recommendation 92 of 1951, recognises that conciliation is an accessible, informal and expeditious labour dispute resolution system.[33] Labour matters are bread-and-butter issues that require expeditious resolution. Thus, conciliation is an efficient labour dispute resolution system that is designed to achieve the expeditious resolution of labour disputes because it is informal and is not concerned with technicalities. Gwisai argues that overemphasis on technicalities could place a premium on legal formality over substantive justice, thus promoting the abuse of court processes by deep-pocketed litigants.[34] The informality of the system enhances efficiency in that disputes are not plagued with cumbersome procedures. Impoverished workers can present their disputes before a conciliator unaided.[35] Further, the conciliator enhances accessibility in that parties can be called upon to the dispute resolution system on short notice and the institution is expected to deal with the matter within a reasonably short period. Second, costs associated with conciliation are minimal. Any ideal labour dispute resolution system should not have cost implications for the parties, especially workers. Conciliation is not associated with any financial implications and costs associated with the referral of the matter.[36] This enhances accessibility to labour justice for disadvantaged and vulnerable employees.

Third, conciliation has been justified by the need for specially experienced and knowledgeable personnel in labour relations. Speedy social justice requires that labour disputes be handled by adequately skilled personnel with a sound understanding of the legal framework within which they function. This in turn contributes to the development of a coherent and uniform labour law jurisprudence. Fourth, labour law involves parties in personal relationships that can be long-term. Conciliation is more suited to resolving disputes in such relationships as opposed to litigation which is adversarial and confrontational. It has the effect of translating legal disputes into an expression of the personal needs of disputants thus converting a rights-based dispute

30 Du Plessis and Fouche *A Practical Guide to Labour Law* (2019) 22.

31 *Ubuntu* means humanness and is recognised as an African way of life that accords respect to human dignity, civility and equality to every person irrespective of status in a communitarian sense. It was described in *S* v *Makwanyane* 1995 6 BCLR 655 (CC) 308 as follows: "In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu* (the beliefs in a universal bond of sharing that connects all-man is man by man), describing the significance of group solidarity on survival issues so central to the survival of communities, while it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality." Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. See also Kamga, "Cultural Values as Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa" 2018 *AHRLJ* 625 649.

32 Trollip *Alternative Dispute Resolution* (1991) 7.

33 Niekerk "Speedy Social Justice: Streaming the Statutory Dispute Resolution Processes" 2015 *ILJ* 838.

34 Gwisai "Access to Labour Justice and Procedural Barriers in Commencement of Proceedings: A Paradigm Shift in Zimbabwean Court Practice or A Judicial Mirage" 2021 *ILA Network The Global Rights Reporter - Access to Justice* 15 16.

35 Brand *et al Labour Dispute Resolution* (2004) 15.

36 Article 3(1) of the ILO Voluntary Conciliation and Arbitration Recommendation, 1951 recognises that conciliation must be free of charge.

into an interest-based problem. This enables the parties to the dispute to exercise control over the dispute resolution process and take responsibility for the outcome. Lastly, conciliation is an entirely private and confidential process. Ultimately, this preserves relationships and ensures disputants' satisfaction with the outcome.

4 THE LEGAL FRAMEWORK OF CONCILIATION IN ZIMBABWE

Whilst it is increasingly common for statutory labour dispute resolution systems to function independently of the State, this is not the case with Zimbabwe. Conciliation is mainly state-funded and falls under the direct supervision of the Ministry of Public Service, Labour and Social Welfare. This is different from other progressive jurisdictions such as the United Kingdom, South Africa, Australia and the United States of America. The Australian Fair Work Commission,[37] the Commission for Conciliation, Mediation and Arbitration (the CCMA) of South Africa,[38] the Advisory Conciliation and Arbitration Services (the ACAS) in the United Kingdom,[39] and the Federal Mediation and Conciliation Services in the United States of America,[40] are all examples of independent, state-funded labour dispute resolution agencies. The independence of any dispute resolution forum is one of the cardinal principles of an effective dispute resolution system and is critical in contributing to the confidence of the parties in the neutrality of the machinery.[41] It enhances the efficiency and flexibility of conciliation since the process is not subjected to bureaucratic challenges associated with government administration.

Furthermore, conciliation is largely conducted by labour officers.[42] These are State employees and in terms of section 121(1)*(b)* of the LA, "there shall be such number of labour officers as may be necessary for carrying out the functions assigned to such officers in terms of the Act". A labour officer is issued with a certificate by the Registrar of Labour stating their official title.[43] Section 121(2) of the LA empowers the Minister of Public Service, Labour and Social Welfare to give directions of a general nature to any labour officer as to the performance of their functions in terms of the Act. This could seriously affect the independence of labour officers. The independence, impartiality and effectiveness of courts and tribunals are central to the rule of law and democratic governance.[44] In any event, section 69 of the Constitution entrenches the right of every person to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.[45]

Labour officers are found in all provinces and districts of Zimbabwe. However, the LA is silent on the question of their territorial jurisdiction. Madhuku correctly argues that this suggests that they do not have territorial jurisdiction as with courts such as the magistrates' court.[46] This has the potential of encouraging forum shopping and making the process costly. Moreover, the LA does not prescribe minimum qualifications and competencies for one to be appointed a labour officer. As a result, the competency levels of most labour officers in Zimbabwe are unsatisfactory given that it is not a requirement that they must possess a law degree or a qualification in labour law. Speedy social justice demands that labour dispute resolution forums be manned by qualified

37 Established by the Fair Work Act 28 of 2009.

38 Established by the Labour Relations Act 66 of 1995.

39 See the Employment Protection Act c71 of 1975.

40 See the Labor Management Act of 1947 (Taft-Hartley Act).

41 Steadman *Handbook on Alternative Labour Dispute Resolution* (2010) 52.

42 It is also conducted by Designated Agents who are appointed in terms of section 63 of the Labour Act.

43 Section 121(4) of the LA.

44 Gathango and Walt "Towards an Effective Kenyan Labour Dispute Resolution System: A Comparison with South African Labour Dispute Resolution System" 2018 *Obiter* 458 477.

45 Section 69(2) of the Constitution.

46 Madhuku *Labour Law* (2015) 356.

personnel with a sound understanding of the legal framework within which they operate. Not only does this instil confidence in the process but it also facilitates the expeditious resolution of disputes.[47]

It has since been established that section 93(1) of the Labour Act requires that all disputes and unfair labour practices referred to a labour officer must first be subjected to the process of conciliation which is a precondition for arbitration.[48] In the *Isoquant* case, the Constitutional Court held that although the LA does not require a party to allege a cause of action, it is necessary to allege a dispute or an unfair labour practice within the jurisdiction of the labour officer. The Constitutional Court then proceeded to hold that, to do so, the following jurisdictional facts must be asserted when referring a dispute or an unfair labour practice to a labour officer in terms of section 93(1) of the LA:

(a) there must be a dispute or unfair labour practice;

(b) the dispute should have arisen within an employment relationship;

(c) the dispute should fall within the powers of a labour officer;

(d) the dispute must not be subject to proceedings under the employment code;

(e) the parties should not be subject to an employment council with jurisdiction, and

(f) the referral must be timeous.[49]

The above jurisdictional facts must exist and cannot be created by the consent of the parties[50] and are discussed in detail herein below.

4 1 The Existence of a Dispute

Section 2 of the LA defines a dispute as "a dispute relating to any matter concerning employment which is governed by the Act". Two types of disputes are recognised by the LA. On one hand, is a dispute of right which is defined as, "any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or any regulations made under this Act, or a breach or alleged breach of the terms of a collective bargaining agreement or a contract of employment".[51] The dispute of right can either be individual or collective in nature. On the other hand, a dispute of interest is defined as any dispute other than a dispute of right.[52] The definition is not very useful. Disputes of interest occur where there is no established right or entitlement but the claimant party seeks a benefit or advantage to which they have no legal entitlement.[53] For a dispute to exist, there must be a disagreement of law or fact. A demand must be communicated to another party and that party must be given an opportunity to comply.[54] Put differently, one party maintains a position different from the other party. In limited circumstances, a dispute may also include the failure of

47 Useful lessons can be drawn from section 3(2)(a) of the Labour (Arbitrators) Regulations 173 of 2012 (SI 173/12) which prescribes the following minimum educational qualifications for one to be appointed a labour arbitrator: a University degree with at least two years' experience in human resources or industrial relations field or a diploma in the field of personnel management, conciliation and arbitration or industrial relations.

48 *Mudzi Rural District Council v Makwembere* SC 90/05.

49 *Isoquant* case 11; *Vundla v Innscor Africa Brand Co. Zimbabwe (Pvt) Ltd* SC 14/22; *Dzenga v Grain Marketing Board* SC 84/23.

50 Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2011) 100.

51 Section 2 of the LA.

52 Section 2 of the LA.

53 *Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe* 2004 2 ZLR 103 (S).

54 Brand *Labour Dispute* (2004) 13 14.

one party to comply with a demand made by another party.[55] In light of the foregoing, a labour officer must take time before the commencement of conciliation and fully appreciate the nature and causes of the dispute between the parties. Their jurisdiction is premised on the existence of a dispute as defined in the LA.[56]

Section 93(1) of the LA maintains a difference between a dispute and an unfair labour practice notwithstanding the definition of a dispute in section 2 of the Act. The LA prescribes a general definition of unfair labour practice. Section 2 of the Act defines an unfair labour practice as "an unfair labour practice specified in Part III or declared to be so in terms of any other provision of the Act". Undoubtedly, an unfair labour practice must be specifically described as such by the LA for it to be referred to a labour officer. If a practice is not specified or described as such in the LA, an employee cannot raise it as an unfair labour practice under the Act. In Part III, the Act provides for four types of unfair labour practices, namely those committed by employers, trade unions, workers' committees, and other persons. These cover both individual and collective labour practices. Additionally, section 10 of the LA gives the Minister of Labour powers to prescribe, by statutory instrument, further acts or omissions which constitute unfair labour practices.[57]

4 2 The Dispute Must have Arisen Within an Employment Relationship

Disputes and unfair labour practices arise in a relationship between parties.[58] In conciliation, the dispute or unfair labour practice must have arisen between employees and employers and their respective collective organisations such as workers' committees, trade unions and employer organisations.[59] Disputes involving former employees can also be entertained by labour officers provided that the cause of action arose during the subsistence of the employment relationship.[60] In limited circumstances, the LA makes provision for unfair labour practices which can be committed against prospective employees.[61]

4 3 The Dispute Should Fall Within the Jurisdiction of a Labour Officer

Labour officers are creatures of statute in that their functions, powers, and jurisdiction are circumscribed within the four corners of the LA.[62] Therefore, before the commencement of conciliation, a labour officer must determine not only the scope of their powers but also ascertain whether the prescribed preconditions for acting exist and the permissible limits of their authority. This requires a referring party to describe the nature of the dispute or unfair labour practice with enough particularity to enable a labour officer to determine that the matter is one that they have jurisdiction to conciliate.[63] A labour officer would have no jurisdiction to

55 Brassey *Commentary on Labour Relations Act* (1998) A9:23; *Tjong Very Sumito v Antig Investments Plc Ltd* 2009 4 SLR 73.

56 See the dissenting judgment of Gowora JA in *Munchville Investments (Pvt) Ltd t/a Bernstein Clothing v Mugavha* SC 62/19.

57 For a detailed discussion of the Zimbabwean unfair labour practices regime see Kasuso "Revisiting the Zimbabwean Unfair Labour Practice Concept" 2021 *PELJ* http://dx.doi.org/10.17159/1727-3781/2021/v24i0a9016

58 Brand *Labour Dispute* (2004) 4.

59 For a further discussion of the meaning of employment relationship and parties to the relationship in the Zimbabwean context see Kasuso *Reflections on the Constitutional Protection and Regulation of Individual Labour Law and Employment Rights in Zimbabwe* (LLD-thesis, UNISA, 2021) 128 137.

60 Gwisai *Labour and Employment Law* (2006) 273.

61 For instance, in terms of s 8*(g)* of the LA, it is an unfair labour practice to demand from a prospective employee any sexual favours as a condition of recruitment for employment.

62 *Barclays Bank of Zimbabwe Ltd v Mapfanya* SC 90/21.

63 Du Toit *Labour Relations* (2011) 102.

attempt to settle a dispute or an unfair labour practice not covered by the LA.

4 4 The Dispute Must not be Subject to Proceedings under an Employment Code

Section 101(5) of the LA takes away the jurisdiction of labour officers by providing that no labour officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under an employment code, nor shall they intervene in any such proceedings.[64] Therefore, where an agreed procedure for resolving a dispute in terms of a code of conduct is in existence, that procedure must be exhausted before the referral of the dispute to a labour officer.[65] Any referral done where a dispute is the subject of an employment code is ill-conceived and premature. A labour officer must in such circumstances decline jurisdiction. Conciliation defers to a procedure contained in an employment code.[66] However, section 101(6) of the LA imposes a time limit within which a matter left undetermined in terms of an employment code may be referred to a labour officer by either the employer or employee. Such time limits play a critical role in bringing certainty and stability to social and legal affairs and maintaining quality adjudication of labour disputes.

With this rationale in mind, section 101(6) of the LA provides that if a matter is not determined within 30 days of the date of notification of any alleged breach of an employment code, the employee or employer concerned may refer the matter to a labour officer, who may determine or otherwise dispose of the matter in terms of section 93. Therefore, the three requirements which must be in existence for purposes of section 101(6) of the LA are as follows: notification must have been given to an employee that proceedings are to be commenced against them in respect of an alleged breach of the employment code; 30 days must have elapsed, and the matter must not have been determined in terms of the employment code.[67] It is a relief granted to a party who is concerned with the delay in determining a matter in terms of an employment code. It is not a referral intended to challenge a determination that has already been made.[68] Once a matter is referred to a labour officer *via* section 101(6) of the LA, the labour officer has two options available to them. They can attempt to conciliate the dispute in terms of section 93 of the LA or adjudicate the dispute and make a determination.[69] This is one of the limited provisions in the LA that gives labour officers adjudicatory powers. Any hearing before a labour officer in terms of section 101(6) is a fresh hearing of the matter and not a continuation of the uncompleted proceedings under the applicable code of conduct.[70]

4 5 The Parties Should not be Subject to an Employment Council with Jurisdiction

An employment council in the Zimbabwean context is a bipartite chamber formed by a registered trade union and a registered employer's organisation in a specific industry or undertaking.[71] Section 62(1)*(a)* of the LA clothes employment councils with the power to settle labour disputes between employers and employees within the registered industry. The settling of disputes in employment councils is done by designated agents who are appointed and authorised by the

64 Section 101(5) of the LA is rooted in the principle of exhaustion of domestic remedies.

65 Gwisai *Labour and Employment Law* (2006) 273.

66 See *Medicines Control Authority of Zimbabwe v Toronga* SC 10/17; *Chubb Union of Zimbabwe (Pvt) Ltd v Chubb Union Workers Committee* SC 1/01; *Sakarombe N.O v Montana Carswell Meats (Pvt) Ltd* SC 44/20.

67 *Watyoka v ZUPCO (Northern Division)* 2006 2 ZLR 170 (S); *Mwenje v Lornho Zimbabwe Ltd* SC 128/99; *Marimo v National Breweries* SC 125/00.

68 *Chipunza v Hammer & Tongues Auctioneers* SC 97/23.

69 *Isoquant* case 10.

70 *Mashonganyika v Lena N.O* 2001 2 ZLR 103 (H).

71 Madhuku *Labour Law* (2015) 315.

Registrar of Labour.[72] Section 63(3a) of the LA specifically provides that a designated agent can either redress or attempt to redress any dispute which is referred to them. In redressing the dispute a designated agent hears arguments from the parties and makes a final decision, ruling, or determination.[73] An attempt to settle a dispute involves conciliation as provided for in section 93 of the LA. Therefore, a designated agent who elects to redress a dispute by hearing and determining the matter cannot at the same time attempt to redress it or conciliate the dispute.[74] The jurisdiction of labour officers is expressly ousted by section 63(3b) of the LA which provides that:

> (3b) Subject to subsections (3c) and (3d) where a designated agent is authorised to redress any dispute or unfair labour practice in terms of subsection (3a), no labour officer shall have jurisdiction in the matter during the first thirty days after the date when the dispute or unfair labour practice arose, but a labour officer may assume such jurisdiction (and exercise in relation to that dispute or unfair labour practice the same powers that a designated agent has in terms of this section) after the expiry of that period if proceedings before a designated agent to determine that dispute or unfair labour practice have not earlier commenced.

Thus, a labour officer has no jurisdiction over a matter that a designated agent is seized with or a dispute which should have been referred to a designated agent in terms of section 63(3a) of the LA.[75] In such an event, a labour officer must decline jurisdiction and redirect the parties to the appropriate forum. They can only assume jurisdiction after the expiry of 30 days if proceedings before a designated agent have not commenced. The object of section 63(3b) of the LA is to exclude parallel processes and eliminate forum shopping.

4 6 Timeous Referral

Labour disputes must be referred to a labour officer within two years from the date when the dispute or unfair labour practice first arose.[76] The question of when a dispute "first arose" is settled in section 94(3) of the LA which provides that the date of the dispute is the date when the dispute occurred or the date when a party is, or ought to have been aware of it,[77] and the date is determined objectively.[78] If a dispute has prescribed, a labour officer has no jurisdiction to entertain the dispute. There is no provision for applying for condonation if the dispute has not been referred within two years.[79] Section 94(1) of the LA does not provide for a possible extension of the two years for good cause shown or any other ground. It can be argued that if a referral is not made within two years, the right to refer the dispute to a labour officer is irrevocably lost. In the absence of a provision in the LA giving them powers to entertain applications for condonation or extension of time no such application can be made. Comparable

72 For a discussion of the jurisdiction of designated agents see *Gutu Rural District Council v Mugayo* SC 86/23.

73 In the *Isoquant* case it was held that such a determination can only be challenged by way of an appeal or review in the Labour Court. However, the LA is silent on how such a decision can be enforced. Arbitral awards made in terms of s 98 of the LA are registered for enforcement purposes in terms of s 98(14) of the LA. It can therefore be argued that rulings by designated agents are unenforceable. See *Zimbabwe Rural District Council Workers Union v Nyanga Rural District Council* HH 118/22.

74 *Isoquant* case 30 31.

75 *OK Zimbabwe v Madzinga* HH 71/15.

76 Section 94(1) of the LA.

77 *Chombe v Rufaro Marketing (Pvt) Ltd* 2000 1 ZLR 425 (S); *Mawire v Rio Zim (Pvt) Ltd* SC 13/21; *Muteswa Wholesalers (Pvt) Ltd v Delta Zim Ltd* SC 81/19.

78 Du Toit *Labour Relations* (2011) 103.

79 See *City of Gweru v Munyari* SC15/05; *Triangle (Pvt) Ltd v Mutasa* SC 77/21.

jurisdictions such as South Africa provide for condonation if a referral is not made timeously.[80]

The viability of the two-year prescription period for labour disputes can also be questioned.[81] It does not reflect the intention of a system that seeks to expeditiously finalise the resolution of labour disputes. A shorter prescription period would be more reasonable for a system that aims to encourage speedy resolution of disputes consistent with the primary purpose of the LA. In South Africa, unfair dismissal disputes must be referred to the CCMA within 30 days of the date of dismissal,[82] whilst unfair labour practice disputes must be referred within 90 days of the act or omission that allegedly constituted the unfair labour practice.[83] Unfair discrimination disputes must be referred within six months after the act or omission constituting the unfair discrimination.[84] By their very nature labour disputes must be resolved expeditiously, therefore referrals must be made within short periods. Lastly, if a dispute is continuing at the time it is referred to or comes to the attention of a labour officer, the prescription period is irrelevant.[85] Under such circumstances, a labour officer must entertain the dispute or unfair labour practice.[86] The prescription period can also be delayed or interrupted in circumstances provided for in the Prescription Act [Chapter 8:11].[87]

4 7 Appellate and Review Jurisdiction of Labour Officers

Section 93(1) of the LA gives a labour officer the power to preside over a fresh hearing where a complaint has been lodged. When there is a determination on the merits of a dispute, for example, a determination on disciplinary proceedings conducted in terms of a code of conduct, a labour officer has no jurisdiction to attempt to redress such a dispute. Put differently, labour officers lack review and appellate jurisdiction.[88] Labour officers are creatures of statute and section 93(1) of the LA does not clothe them with review or appellate powers. It has since been established that conciliation is a form of dispute resolution in which a third, neutral party, the conciliator, assists the parties in reaching an agreement or finding an amicable solution. Therefore, there can be no attempt to settle a dispute which has been redressed. Conciliation is an attempt to settle a dispute in a fresh hearing and not a matter that has been determined on the merits.[89] This position also applies to designated agents. Section 63 of the LA does not endow them with jurisdiction over a matter that has been determined. Completed proceedings are not subject to scrutiny by a designated agent. The only option for an aggrieved party is to approach the labour court on review or appeal.[90]

Recently, there has been an attempt by the legislature to endow labour officers with appellate jurisdiction. Traditionally, section 101(5) of the LA provides that no labour officer shall intervene

80 See Rule 9 of the CCMA Rules, South Africa which provides that an application for condonation can be made and the following considerations must be taken into account: degree and reasons for the delay, prospects of success, prejudice to the other party and any other relevant factors.

81 Article 3(1) of the ILO Voluntary Conciliation and Arbitration Recommendation, 1951 also recognises that time limits in conciliation must be kept at a minimum.

82 Section 191(1)*(b)(i)* of the Labour Relations Act 66 of 1995.

83 Section 191(1)*(b)(ii)* of the Labour Relations Act 66 of 1995.

84 Section 10(2) of the Employment Equity Act 55 of 1998.

85 Section 94(2) of the LA.

86 For the meaning of a continuing dispute or unfair labour practice see *Triangle (Pvt) Ltd v Mutasa* SC 77/21; *SABC Ltd v CCMA 2*010 3 BLLR 251 (LAC).

87 See ss 17 to 19 of the Prescription Act (Chapter 8:11).

88 See the *Isoquant* case; *Watyoka v ZUPCO (Northern Division)* 2006 2 ZLR 170 (S); *Mabeza v Sandvik Mining* SC 91/19; *Sakarombe N.O v Montana Carswell Meats (Pvt) Ltd* SC 44/20.

89 See also *Chipunza v Hammer and Tongues* SC 97/23; *Living Waters Theological Seminary v Reverend Chikwanha* SC 59/21; *Mukarati v Pioneer Coaches (Pvt) Ltd* SC 34/22.

90 *Gutu Rural District Council v Mugayo* SC 86/23.

in any dispute or matter that is the subject of proceedings under an employment code, nor shall they intervene in any such proceedings.[91] The LAA has a new *proviso* in section 101(5) of the LA which provides as follows:

> Provided that at the conclusion of such proceedings and notwithstanding anything to the contrary in an employment code, at the instance of any party aggrieved by those proceedings may appeal to a labour officer within 30 days of the conclusion of the proceedings whereupon the labour officer shall attempt to conciliate the dispute in terms of section 93 or exercise any other power provided for in that section.

The interpretation of the *proviso* in section 101(5) of the LA by the Labour Court of Zimbabwe has resulted in the emergence of two divergent approaches. In *Kutiwa v Harare Municipal Medical Aid Society*,[92] the Labour Court held that there is no appeal from a code of conduct to the Labour Court. It was the court's finding that in terms of the *proviso* in section 101(5) of the LA, an appeal against a determination made in terms of a code of conduct must be lodged at first instance with a labour officer even where the code of conduct provides that such an appeal must be lodged with the Labour Court.[93] Once the labour officer has ceased with the appeal they must deal with the matter in terms of section 93 of the LA. This reasoning was rejected in *St Giles Rehabilitation v Mubvumbi*[94] in which the Labour Court held that the interpretation of the *proviso* in section 101(5) of the LA in the *Kutiwa* case was too literal to lead to an absurdity. On page 6 of the cyclostyled judgment, the court held that:

> When the proviso to section 101(5) is reconciled with sections 93, 89(1), 89(6), and 92D of the Labour Act, the only reasonable conclusion is that an appeal properly lies to this court and that the Labour Officer does not always necessarily enjoy appellate powers on the completed disciplinary proceedings. The proviso must be interpreted in this context.

It is submitted that the interpretation of section 101(5) of the LA in the *Kutiwa* case results in an untenable situation that creates needless controversy. It is accepted that in interpreting a statute, the first cannon of interpretation to be applied is the golden rule. Where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with legislative intent.[95] A literal reading of section 101(5) of the LA gives rise to some absurdity or inconsistency given the limited powers of labour officers in section 93 of the LA.[96] It has already been established that conciliation in terms of section 93 of the LA only occurs if a dispute is being referred to a labour officer in the first instance and not as completed proceedings. There is nothing to conciliate where findings of fact and law have already been made. An appeal can only be brought after the original case has been finalised and is brought by way of a notice of appeal.[97] What would be at stake is the substantive correctness of the original decision. After hearing the appeal, the appellate forum

91 Section 101(5) has been discussed in detail in paragraph 4.4 above.

92 LCH/43/24 (the *Kutiwa* case).

93 On page 5 of the judgment the court stated that: "The amendment has introduced an appeal to the Labour Officer once the proceedings at the workplace in terms of the employment code are finalised. It has therefore cut out any direct appeal to the Labour Court. The word 'may' in the amendment is referring to the choice to choose to appeal. It would be ridiculous if it were to refer to the choice of approaching the Labour Court or Labour Officer … From the above analysis and conclusions, there is an appeal to the Labour Officer. There is no direct appeal to the Labour Court for the Applicant."

94 LCH/150/24 (the *St. Giles Rehabilitation* case).

95 See *Tapedza v Zimbabwe Energy Regulatory Authority* SC 30/20; *Endeavour Foundation v Commissioner of Taxes* 1995 1 ZLR 339 (S); *Chegutu Municipality v Manyora* 1996 1 ZLR 262 (S).

96 It is accepted that an interpretation which results in harmony between statutes instead of one which destroys them must be preferred. See *Sakarombe v Montana Carswell Meats (Pvt) Ltd* SC 44/20; *Tamanikwa v Zimbabwe Manpower Development Fund* SC 33/13.

97 *Watchtower Bible and Tract Society of Pennyslvania v Drum Investments (Pvt)* Ltd 1993 2 ZLR 67 (S).

has the power to set aside the proceedings of the lower tribunal or dismiss the appeal. Section 93(1) of the LA does not give labour officers these powers or jurisdiction to preside over an appeal. They can only attempt to conciliate a fresh dispute or unfair labour practice complaint. Therefore, the characterisation of the referral in the *proviso* in section 101(5) of the LA as an appeal is a misnomer as it completely ignores the limited powers of labour officers in section 93.

The *proviso* must not be interpreted as a standalone provision but in its context. Referring completed proceedings to a labour officer for conciliation results in an absurdity which the legislature could not have intended. Further, the provision is not the main provision but a *proviso* to section 101(5) which is couched in directory and permissive terms. It allows an aggrieved party to appeal to a labour officer without derogation from appeals to the Labour Court provided for in other provisions of the Act such as section 89. If the legislature intended to prohibit appeals to the Labour Court, certainly, it would have said so in clear, express and mandatory terms.[98] In the *St Giles Rehabilitation* case, the court further held that relevant provisions of the LA must be interpreted in a harmonious manner which secures the just effective and expeditious resolution of disputes and unfair labour practices.[99] The interpretation of section 101(5) in the *Kutiwa* case fails to advance the purpose of labour dispute resolution mechanisms as it prolongs the labour adjudication processes. In the circumstances, it is submitted that the Labour Court retains the jurisdiction to entertain appeals made in terms of a code of conduct notwithstanding the *proviso* in section 101(5) of the LA.

5 THE CONCILIATION PROCESS

Section 127(2) of the Labour Act gives the Minister of Labour powers to enact rules of practice and procedure for dispute resolution through conciliation. Notwithstanding the existence of such a progressive provision in the LA, no such rules for conciliation are in place. Be that as it may, conciliation commences with the referral of a dispute to a labour officer.

5 1 The Referral

Any party to a dispute or a victim of an unfair labour practice may refer the dispute or unfair labour practice to a labour officer. Although there is no formal process for referring a dispute, the practice is that the referral must be in the form of a written complaint describing the parties to the dispute, the nature of the dispute, and the date of the dispute.[100] Not only should the parties to the dispute be properly cited, but the dispute must also be described clearly and concisely to enable the labour officer to ascertain whether they have jurisdiction. A party can also attach to the referral letter relevant documents and evidence. The referral letter must be signed by the party to the dispute or by a representative of that party. Further, the referral must be timely.[101] Whilst the referral should not be treated as pleadings in civil courts, it must at least be couched in such a manner that identifies the parties and the nature of the dispute.[102]

98 *Shumba v Zimbabwe Electoral Commission* SC 11/08.

99 See s 2A(1)(f) of the LA.

100 Gwisai *Labour and Employment* (2006) 272.

101 See discussion under paragraph 4.6.

102 In the South African case of *Chemical Workers Industrial Union v Polifin Ltd* 2001 22 *ILJ* 1208 (LC) at para 43 the Labour Court of South Africa stated that: "The very least to be expected of a person referring a dispute is to articulate, objectively speaking, a dispute which is capable of being understood to encapsulate the persons and issues subjectively contemplated by him. If l were to set a threshold any lower than that, it would have the absurd result that notwithstanding what words or gestures or conduct of a person referring a dispute, the nature and scope of the dispute would be whatever that person wanted it to be regardless of whether or not it was capable of being understood in that way by any reasonable person. Self-evidently such an approach will not serve the interests of sound industrial relations."

It is suggested that labour legislation must provide a procedure or standard referral form to refer disputes to labour officers. Such a form must contain useful guidelines such as a list of possible disputes. Given that the majority of disputes brought before labour officers are raised by employees, standard referral forms assist unsophisticated and unrepresented employees in connecting the nature of the complaint to the relevant provisions of labour legislation.[103] It facilitates the expeditious resolution of labour disputes as it becomes easy for the labour officer to screen the referral, establish jurisdiction and understand the underlying factual matrix of the dispute.[104] It is also permissible for the parties to amend or abandon part of the original referral during conciliation.[105] However, a party cannot raise a new dispute, different from that referred for conciliation. For clarity and certainty, one would have to withdraw the original referral and lodge a fresh one.

5 2 Notification to Attend Hearing

On receipt of the written referral of the dispute, a labour officer must follow a systematic approach in the process of seeking consensus between the parties.[106] This starts with notification of the parties to attend conciliation in Form L.R.6.[107] The notification contains the following details: names of the parties to the dispute; the nature of the dispute; the name of the labour officer; and the date and time of the hearing. The referring party is responsible for serving the notification to all other parties to the dispute and must provide the labour officer with proof of service. Physical delivery of the notification is the more secure method. The notification is usually served seven days before the scheduled date of the hearing. In terms of section 93(7) of the LA as amended by the LAA where a referral involves an employer who is a statutory corporation, statutory body or an entity controlled by the State, the Minister responsible for that statutory body or entity must be cited as a party to the proceedings and served with the notification to attend proceedings.

5 3 Attending Conciliation

The parties to the dispute have a right to attend the conciliation in person or through their representatives. In Zimbabwe, the question of representation of parties in conciliation proceedings is settled. Section 69(4) of the Constitution guarantees every person's right at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.[108] Furthermore, section 4 of SI 217/03 provides that a party to conciliation may be represented by a fellow employee, an official of a registered trade union, an employer's organisation or a legal practitioner. The participation of legal practitioners in conciliation is questionable. Comparative jurisdictions such as South Africa do not allow legal representation in conciliation.[109] It has been argued that this results in the technicalisation of the conciliation process and tilts the scale in favour of employers.[110] Lawyers tend to be pedantic and technical in their approach and they

103 Du Toit *Labour Relations* (2011) 104.

104 Rule 10 of the CCMA Rules, South Africa makes provision for a standard referral form LRA 7.11 and the procedure for referring disputes.

105 For discussion of permissible amendments to a referral see Grogan *Labour Litigation and Dispute Resolution* (2014) 121.

106 *Isoquant* case 12.

107 Form L.R.6 is in the Schedule to the Labour (Settlement of Disputes) Regulations, 2003 (SI 217/03).

108 The term forum is wide enough to include conciliation and engaging one's employer over non-payment of wages and other grievances. See *ZUPCO v Mashinga* SC 21/21.

109 See R25 (1) of the CCMA Rules.

110 Van Eck "Representation During Arbitration Hearings: Spotlight on Members of Bargaining Councils" 2012 *TSAR* 774 774; Benjamin "Legal Representation in Labour Courts" 1994 *ILJ* 250 253.

have a limited role to play given the nature of conciliation.[111] There is a general perception that they are obtrusive because their interests lie in billable hours and protracted litigation is more beneficial for them than their expeditious resolution. This has the effect of inhibiting the expeditious resolution of labour disputes and making the process expensive to the prejudice of employees. Additionally, labour legislation does not afford labour consultants, paralegals and unregistered law graduates whose names are recorded by the Law Society of Zimbabwe the right of audience before labour officers. It is suggested that representation must be extended to these individuals as it provides opportunities for indigent employees, who would otherwise not be able to afford and ultimately enjoy legal representation.

5 4 Duration of Conciliation

Upon receipt of a dispute or unfair labour practice complaint, a labour officer must within 90 days start the conciliation process.[112] Once conciliation commences section 93(3) of the LA gives the labour officer 30 days to conduct the conciliation process subject to the parties' right to extend the period by agreement.[113] The 30-day period for conciliation starts from the time a labour officer begins "to attempt to settle the dispute."[114] The question when a labour officer "attempts to settle the dispute" is answered in section 3 of SI 217/03. It can be the date of any form of communication by the labour officer to either party in respect of the dispute, or the date of notification for the parties to attend conciliation or the date of any hearing that the labour officer may conduct, whichever is earlier.[115] It is submitted that the 90-day period is unreasonably long and inhibits speedy social justice.

The LA does not proscribe consequences for non-attendance by a party to conciliation. What is apparent from a reading of section 93(1) of the LA is that the labour officer cannot dismiss a matter at conciliation on account of the default of a party since they have no adjudicatory powers. In the event of default of a party on the hearing date, the practice has been for a labour officer to either adjourn the conciliation to a later date within the 30 days or continue with the proceedings or conclude the proceedings by issuing a certificate of no settlement.

5 5 Ethical Duties of Labour Officers

Zimbabwean labour legislation does not impose ethical obligations on labour officers when conciliating disputes. Unlike the Labour (Arbitrators) Regulations, 2012 which provide a code of ethics for arbitrators in compulsory arbitration conducted in terms of section 98 of the LA, there is no similar code for labour officers.[116] In the absence of such guidelines, reliance must be placed on the common law and related statutes. In *Majurira v Kuwirirana Bus Service (Pvt) Ltd*,[117] the Supreme Court held that although conciliation is informal, a labour officer must comply with basic principles of natural justice. They must not be biased, and must afford the parties an equal opportunity to be heard. Further, they must disclose any conflict of interest,

111 Collier "The Right to Legal Representation under the LRA" 2003 *ILJ* 753; Selala "Constitutionalising the Right to Legal Representation at CCMA Arbitration Proceedings: *Law Society of the Northern Provinces v Minister of Labour* 2013 SA 1 SA 468 (GNP)" 2013 *PELJ* 396; Van Eck and Kuhn "Amendments to the CCMA Rules: Thoughts on the Good, the Bad and the Curious" 2019 *ILJ* 711.

112 Section 3(6) of SI 217/03.

113 Section 93(4) of the Labour Act. Any extension must be recorded in Form L.R.3, agreement of parties to extend conciliation.

114 Section 93(3) of the LA.

115 Madhuku argues that s 3 of SI 217/03 is *ultra vires* the LA in that the Minister has arrogated to himself the power to interpret the Act. This is an affront to the principle of separation of powers. See Madhuku *Labour Law* (2015) 357.

116 See s 7(1)*(a)-(h)* of the Labour (Arbitrators) Regulations, 2012.

117 1990 1 ZLR 87 (SC).

respect the duty of confidentiality and discharge their duties with propriety. In addition, labour officers are creatures of statute and are administrative authorities as defined in section 2 of the Administrative Justice Act [Chapter 10:28].[118] Thus, when conducting conciliation they are obliged to act lawfully, reasonably and fairly.[119] They must comply with the basic principles of natural justice, that is, the *audi alteram* principle and the *nemo iudex in sua causa* rule.[120] They should be fair, independent, and effective and must act in good faith in assisting the parties to resolve their dispute by agreement without imposing a solution.[121] It is therefore critical that a labour officer must not only be knowledgeable in labour law but also have the requisite skills for conducting conciliation.[122] Any party aggrieved by the conduct of a labour officer during conciliation can challenge the conciliation proceedings on review under the LA[123] or the Administrative Justice Act.[124]

5 6 The Hearing Process

As for the formal process of conducting conciliation, the ILO proposes the following stages: the explanation phase; relationship-building phase; reality testing phase; problem-solving phase; solution gathering phase; capturing agreement phase; and the concluding phase.[125] In the Zimbabwean context, Gwisai recommends a five-pronged process that entails the following: introductions; fact-finding; mediation; recommendations and conclusion.[126] In the absence of statutory guidelines on how to conduct conciliation, the Constitutional Court in the *Isoquant* case recommended the following approach: introduction and housekeeping stage; storytelling stage; dispute analysis stage; problem solving stage and the concluding stage.[127] These stages are discussed in detail below.

5 6 1 Introduction and Housekeeping Stage

This is the relationship-building phase which commences with formal introductions by the labour officer and the parties. Its purpose is to ensure that the parties develop trust and rapport with the conciliator.[128] The labour officer must also strive to ensure that the parties feel confident that he or she is independent and has no interest in the dispute.[129] Preliminary issues such as the language to be used, preparation of attendance list, disclosure of conflict of interest and ground rules are covered.[130] The labour officer also explains the conciliation process, their powers and duties and the consequences of failure to settle. The difference between conciliation and adjudication is also explained. The aim is to offer the parties a basic understanding of the conciliation process. Jurisdictional issues are also canvassed at this stage. In paragraph 4.4 above it was established that in the *Isoquant* case, it was held that a labour officer must first

118 Section 2 of the Administrative Justice Act defines an administrative authority to include "an officer, employee, member, committee, council, or board of the State or a local authority or parastatal".

119 Section 3(1)*(a)* of the Administrative Justice Act.

120 These principles are not only codified in s 3(2) of the Administrative Justice Act but are also constitutionalised in s 68 of the Constitution.

121 *Isoquant* case at 11 12.

122 Gwisai *Labour and Employment* (2006) 274.

123 Section 92EE of the LA.

124 Section 4 of the Administrative Justice Act.

125 Foley and Cronin *Professional Conciliation in Collective Labour Disputes: A Practical Guide* (2015) 68 76.

126 Gwisai *Labour and Employment Law* (2006) 274.

127 The Constitutional Court largely borrowed the approach recommended by Brand *Labour Dispute* (2004) 85–96.

128 Brand *Labour Dispute* (2004) 86.

129 *Isoquant* case 15.

130 Brand *Labour Dispute* (2004) 87.

ascertain whether they have jurisdiction to entertain a dispute or an unfair labour practice. If the dispute or unfair labour practice is not covered by the LA, the labour officer must decline jurisdiction. With due respect, there is no provision in the LA for a labour officer to deal with jurisdictional challenges. This is understandable given that section 93(1) of the LA does not give labour officers adjudicatory powers. As such, they are not bound to rule on jurisdictional issues. Grogan submits that they should leave these issues to be determined in the ensuing arbitration.[131]

5 6 2 Storytelling Stage

This is the fact-finding stage and it gives the labour officer an understanding of the issues in dispute. The conciliator invites each party to present their case starting with the referring party. Thereafter, the parties are allowed to ask questions and respond. This stage concludes with a summary of the issues. Conciliation is not a trial or hearing in the strict sense and neither is a labour officer an adjudicator. Zimbabwean courts have held that in a properly conducted conciliation, a labour officer does not direct the parties to file a statement of claim, statement of defence, replication and heads of argument.[132] Requiring the parties to file written submissions or pleadings followed by oral arguments is alien to conciliation. It turns conciliation into adjudication and such proceedings are a nullity.[133]

5 6 3 Dispute Analysis Stage

After affording the parties an opportunity to be heard the conciliator must analyse the information gathered to further appreciate the dispute.[134] This is key in ascertaining the causes of the dispute and evaluating possible solutions. Brand submits that dispute analysis gives a conciliator "a proper understanding of the real fears, concerns and interests underpinning the parties' positions and expectations".[135] During this reality-testing phase, the labour officer encourages parties to analyse their best alternatives to a negotiated settlement. However, a labour officer must not pressurise a party to settle; parties remain the masters of the conciliation process.[136]

5 6 4 Problem-Solving Stage

The solution-gathering phase involves the parties exploring options for settlement with the assistance of the labour officer.[137] The parties must consider moderating their positions and expectations, harmonise their needs, and find joint gains and mutually beneficial needs.[138] A labour officer must assist the parties to agree to a solution that is practical, and cost-effective and to maximise the mutual satisfaction of their needs. The conciliation must achieve win–win outcomes. For these reasons, conciliation as envisaged in section 93 of the LA is not a mechanical chairing of meetings between the parties before an independent third party but a process that involves active participation by the labour officer in assisting the parties to resolve the dispute.[139]

131 Grogan *Labour Litigation* (2014) 130.

132 *Vundla v Innscor Africa Bread Company* SC 14/22; *Dzenga v Grain Marketing Board* SC 84/23.

133 *Isoquant* case 23.

134 *Isoquant* case 18.

135 Brand *Labour Dispute* (2004) 91.

136 *Isoquant* case 18.

137 *Isoquant* case 18.

138 *Isoquant* case 18.

139 *Isoquant* case 18.

5 6 5 Concluding Stage

The conciliation process is concluded by the parties settling the dispute, and a certificate of settlement is issued — or failing settlement, the issuance of a certificate of no settlement.

Certificate of Settlement

Section 93(2) of the LA provides that if the dispute is settled by conciliation, the labour officer shall record the settlement in writing, in Form L.R.1.[140] The labour officer and the parties must all append their signatures to the certificate of settlement which confirms the termination of the labour officer's jurisdiction. Before the enactment of the LAA, a certificate of settlement was unenforceable and could not be registered with a competent court for enforcement purposes. Its enforcement was dependent on the goodwill and good faith of the other party. In the event of non-compliance with a certificate of settlement, section 93(2) of the LA now provides for the registration of the certificate with a competent court for enforcement purposes. A certificate of settlement is an acknowledgement of debt executable upon registration with an appropriate court.[141] Through the registration process, an unenforceable certificate of settlement is converted into a fully enforceable civil judgment of either the High Court or magistrates' court. This registration is purely an administrative process by the registering court which does not sit as a review or appeal court with jurisdiction to question the certificate. Therefore, a litigant in registration proceedings cannot seek any other relief beyond the registration of the certificate. Once registered the certificate shall have the effect for purposes of enforcement of a civil judgment of the registering court. Notwithstanding this positive development, the LA is silent on the procedure for registration and the requirements that must be satisfied in an application for registration.[142] In addition, a party aggrieved by the issuance of a certificate of settlement or no settlement can take the matter on review. The LA has no provision for rescission or withdrawal of a certificate issued in terms of section 93 of the Act. The labour officer becomes *functus officio* and the certificate can only be set aside by a competent court order.

Certificate of No Settlement

A labour officer must issue a certificate of no settlement if the dispute is not settled within 30 days or any further extension agreed between the parties.[143] The certificate of no settlement is in form L.R. 2 and captures the names of the labour officer, the parties, the date of the matter's referral to conciliation and the issues in dispute.[144] A certificate of no settlement is issued by operation of the law and is not subject to consent by the parties. It is a consequence of a failure by the labour officer to have the matter settled and he or she has no discretion.[145] The certificate of no settlement should be issued within a reasonable period of the expiry of the 30 days or the agreed extension and its effect is to terminate the labour officer's conciliation jurisdiction.[146] It is therefore improper for labour officers to request parties to conciliation to file statements of claim and responses or heads of arguments as a pre-condition for the issuance of a certificate of no settlement or after its issuance.[147] Based on this reasoning section 3(4) of SI 217/03 is *ultra*

140 See Schedule to SI 217/03.

141 *Mukuradare v David Whitehead* HCC 15/24.

142 It is submitted that the procedure for registration of arbitral awards made under compulsory arbitration is applicable to registration of certificates of settlemement. See *Lowveld Rhino Trust v Dhlomo-Bhala* SC 34/20.

143 Section 93(3) of the LA read with s 3(3) of the SI 217/03.

144 See Form L.R.2 in the Schedule to SI 217/03.

145 See the dissenting judgment of Gowora JA in *Munchville Investments (Pvt) Ltd t/a Bernstein Clothing v Mugavha* SC 62/19.

146 *Isoquant* case 19.

147 *Isoquant* case 19.

vires section 93(3) of the Labour Act. It makes provision for the extension of conciliation by agreement of the parties notwithstanding the issuance of a certificate of no settlement. A labour officer cannot extend a process that has already been terminated.

Another effect of a valid certificate of no settlement is the referral of the dispute to the next dispute resolution forum. If the dispute is of interest and the parties are engaged in an essential service, the dispute is referred to compulsory arbitration which is conducted in terms of section 98 of the LA.[148] The labour officer may also, with the agreement of the parties, refer the dispute or unfair labour practice to voluntary arbitration and the arbitration is conducted in terms of the Arbitration Act [Chapter 7:15].[149] The labour officer may also refer the dispute or unfair labour practice to compulsory arbitration if it is a dispute of right and the arbitration is conducted in terms of section 98 of the LA.[150] Any referral of a dispute to the next stage without a certificate of no settlement is a nullity given the peremptory wording of section 93. The referral is also done by the labour officer who attempted to settle the dispute after consultation with any labour officer with seniority and responsible for the area.

5 6 6 Failure by a Labour Officer to Act

To prevent disputes from stalling, section 93(6) of the Labour Act affords parties to a dispute the right to approach the Labour Court if a labour officer fails to refer a dispute to the next forum after issuing a certificate of no settlement or if they completely fail, neglect and/or refuse to issue a certificate of no settlement. It provides as follows:

> (6) If, in relation to any dispute –
>
> (a) after a labour officer has issued a certificate of no settlement in relation to the dispute or unfair labour practice, it is not possible for any reason to refer the dispute or unfair labour practice to compulsory arbitration as provided in subsection (5); or
>
> (b) a labour officer refuses, for any reason, to issue a certificate of no settlement in relation to any dispute or unfair labour practice after the expiry of the period allowed for conciliation under subsection (3) or any extension of that period under subsection (4);
>
> any party to the dispute may, in the time and manner prescribed, apply to the Labour Court –
>
> (i) for the dispute or unfair labour practice to be disposed of in accordance with paragraph (b) of subsection (2) of section eighty-nine, in the case of a dispute of interest; or
>
> (ii) for an order in terms of paragraph (c) of subsection (2) of section eighty-nine, in the case of a dispute of right.

Any application made in terms of section 93(6) of the LA must comply with the procedural requirements of Rule 14 of the Labour Court Rules, 2017. The difference between the two applications in section 93(6) lies in the remedies that the Labour Court can grant.[151] Regarding disputes of interest, the Labour Court's power is limited to the remittal of the dispute to the same or different labour officer.[152] Gwisai submits that this position is sensible since a court cannot force adjudication over disputes of interest or compulsory arbitration because the Act gives the parties another dispute resolution mechanism in the form of collective job action.[153] As for disputes of right, section 89(2)*(c)* of the LA gives the Labour Court full powers of

148 Section 93(5)*(a)* of the LA.

149 Section 93 (5)*(b)* of the LA.

150 Section 93(5)*(c)* of the LA.

151 Gwisai *Labour and Employment* (2006) 276.

152 Section 89(2)*(b)* of the LA. See also *Eastern Highlands Plantations v Mapeto* SC 43/16.

153 Gwisai *Labour and Employment* (2006) 276.

adjudication over the dispute.

6 CONCLUSION

This article has demonstrated that conciliation remains the nerve centre of Zimbabwe's labour dispute resolution system. Whilst it is acknowledged that the purpose of the current legislative framework is to advance social justice and democracy at the workplace by securing the just, effective and expeditious resolution of labour disputes, several problem areas are undermining speedy social justice and access to labour justice. It has been established that the current conciliation framework is not independent of the State and as a result, could be clogged with bureaucratic challenges. Labour officers are not independent. They work under the direct control of the Minister of Labour and do not have territorial jurisdiction. Also, the Labour Act does not prescribe minimum qualifications and competencies for labour officers. The long referral period of labour disputes in the LA has the potential of undermining the purpose of the Act: the speedy resolution of disputes. As if that is not enough, there are no rules of practice and procedure for initiating referral of labour disputes and conducting conciliation including rules of ethical conduct of labour officers. The problems presented by allowing the participation of legal practitioners in conciliation proceedings were also brought to the fore. Although it is commendable that settlement certificates can now be registered with civil courts for enforcement purposes, the LA does not provide the procedure or requirements for such registration. These challenges render the conciliation process onerous, cumbersome, time-consuming and expensive. It has also led to unnecessary complexity and forum shopping. If Zimbabwe is to continue its march towards an effective, accessible and speedy labour dispute resolution system, these issues require the legislature's serious attention.

Several recommendations are proposed to enhance the effectiveness of conciliation as a labour dispute resolution process in Zimbabwe. First, Zimbabwe must follow the trend in progressive jurisdictions such as Australia, South Africa, the USA and the UK by establishing an independent body for conciliation. The independence of labour officers is key to enhancing the efficacy and flexibility of the system. Second, the appointment of labour officers must be based on knowledge and experience in labour law and alternative dispute resolution. Speedy social justice requires adequately skilled personnel with a sound understanding of the legal framework within which they operate. Consequently, labour legislation must prescribe minimum qualifications and competencies for the appointment of labour officers. Third, the Minister of Labour must exercise his powers in terms of section 127(2) of the Labour Act and promulgate rules of procedure for conciliation. There is a need to develop operational procedures and rules that spell out the jurisdictional competence of labour officers, dispute referral procedures, referral time frames which are short, condonation for late referrals, forms and templates for notifying the other party to the dispute of the referral, and guidelines on conducting the conciliation and termination of the process. The CCMA Rules of South Africa serve as a model and an inspiration for such operational procedures and rules. Fourth, the legislature must adopt a code of ethics regulating standards of performance and ethical obligations of labour officers. This can be complemented by a Code of Good Practice on Conciliation for employers, employees and their representatives in handling labour disputes during conciliation. Fifth, the right to legal representation in conciliation must be limited. The representation of parties must be restricted to fellow employees, officials of registered trade unions or employer organisations and paralegals. It has already been established that lawyers have a limited role in conciliation. Finally, it is submitted that these proposals could go a long way in enhancing speedy social justice and an

effective, accessible and legitimate labour dispute resolution system.