# AN EVALUATION OF THE EFFECTIVENESS OF THE LABOUR ARBITRATION SYSTEM IN ZIMBABWE

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## Declaration

I, .....do hereby declare that this dissertation is a result of my own work investigation and research, except to the extent indicated in the acknowledgements, references and comments included in the body of the report, and that it has not been submitted in part or in full for any other degree to any other university.

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Student Signature Date

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Supervisor Signature Date

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## Abstract

The purpose of this dissertation was to explore, discover and draw conclusions on the effectiveness of the labour arbitration system in Zimbabwe. The general conclusion from reviewed literature is that for an arbitration system to be regarded as effective, the institutional and administrative framework should comprise of factors such as accessibility, speed, expertise, and cost. The vast majority of the literature reviewed showed that this literature has been confirmed in other parts of the world and hence the purpose of this research was to make an attempt and fill in this research gap by critically evaluating whether our labour arbitration system as currently structured is effective. The research information was aimed at benefiting the academic community and policymakers in the country. Empirical data was obtained through face to face interviews with practising lawyers, arbitrators, judges and other administrative staff within the labour arbitration fraternity in Harare. The total number of the respondents was twelve. Unstructured questions were used for gathering of in depth information from the respondents. A qualitative research philosophy was used and the data gathered was analyzed through data displays in the form of content analytic summary tables.

The study concluded that as currently structured, the labour arbitration system in Zimbabwe was ineffective owing to several structural, institutional and administrative deficiencies. The study further found out that expertise of the arbitrators was questionable since there were no minimum guidelines on arbitrators' qualifications. These questionable qualifications were leading to questionable arbitral awards leading to unnecessary appeals. The study further concluded that the recent capping of arbitrator fees would actually stifle its development as capable arbitrators would now most likely shun the work because of low reward. The clumsy manner in which the Labour Act was crafted was also contributing to frivolous and vexatious appeals to the Labour Court thereby impacting finality of arbitral awards. In view of these findings, it is recommended that the labour arbitration system must be overhauled and ensure that it is based on an institutional and administrative framework that comprises of all the pillars of an effective arbitration system.

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1. **UNICTRAL** :United Nations Commission on International Trade Law
2. **MSA** : Master Servant Act
3. **L.R.A** : Labour Relations Act
4. **PESTELG** : Political, Economic, Social, Technological, Legal, Global

5. **SWOT** : Strength, Weaknesses, Opportunities, Threats
6. **MDC** : Movement for Democratic Change
7. **UN** : United Nations
8. **GNU** : Government of National Unity
9. **J.S.C** : Judicial Services Commission

# CHAPTER 1
# Introduction and Background

## 1.1 Introduction

This chapter introduces the study on the effectiveness of the current labour arbitration system in Zimbabwe. The chapter discusses the introduction, background to the study, statement of the problem, research objectives, and significance of the study as well as structure of the research.

In any industrial sphere, labour disputes between an employer and employee are common and cannot be avoided. Labour disputes are generally defined as controversies between an employer and its employees concerning the terms or conditions of employment. Whenever disputes arise, they need to be resolved. Labour dispute resolution is therefore a crucial part of any country's sustainable industrial relations system (Silverstein, 2011, p 102). Undoubtedly, because the relationship involves two parties being labour and capital, there has to be a balance between their respective interests as both are necessary ingredients for healthy economic and social development of a nation. The relationship between labour and capital is conflictual in the sense that labour is always clamouring for more pay whilst capital wants to pay less for more work done. As a result of this conflictual nature of the relationship between labour and capital, it becomes vital to have labour disputes settled through framework procedures designed to bring about effective, efficient and equitable resolutions for the benefit of parties and the greater economy (Silverstein, 2011 p 102). The author further argues that without the use of effective dispute resolutions methodologies, disputes will increase and ultimately undermine workplace productivity. The modern trend in Zimbabwe labour law is the utilization of labour arbitration as one of the major dispute resolution mechanisms (Madhuku, 2012, p 1). The arbitration laws currently in place are based on the Labour Act (Chapter 28.01) and the "Model" law which applies to both international and domestic arbitrations.

Arbitration itself has been defined by several authors differently and the following are just a few examples. Sklenyte (2003, p 6) defines arbitration as a private, informal process by which the parties to a contract agree, in writing, to submit their dispute to one or more impartial persons who will adjudicate and resolve the controversy by

rendering a final and binding award. Madhuku (2012,) defined arbitration as a procedure whereby a third party, not acting as a court of law, being empowered to take a decision which disposes of a dispute. Kissling (2010) defined arbitration as a process which presents an opportunity for parties to settle their differences using an independent third-party arbitrator.

From the above definitions of arbitration, it is clear that the main elements of arbitration is that it is an informal process in which parties subject themselves to a resolution of their dispute by a third party. This study is about evaluating the effectiveness of labour arbitration as a dispute resolution mechanism in Zimbabwe. It focuses on the current labour arbitration regime and in particular, the adequacy of the legal framework as currently constituted. The reason why the research was undertaken is that the effectiveness of the arbitration system has a huge bearing on productivity and industrial harmony at the workplace in Zimbabwe. The manner, resources and time spent in resolving labour disputes has an impact on a company's profitability. In exploring the subject matter, the researcher was guided by the definition of arbitration by Sklenyte (2003).

Literature on various forms of arbitration is available in other jurisdictions such as Sklenyte (2003), Kissling (2010), and (Makaramba, 2012). Very little studies have been done in Zimbabwe on this subject save for little studies done by Madhuku (2011) and Maitireyi and Duve (2010). It is against this background of very little literature in Zimbabwe that this investigation was undertaken.

Arbitration has been in existence for so long in many parts of the world and has been widely used for the settlement of a variety of disputes between state entities and private parties and between private parties themselves (Mustil & Boyd, 1989). In Zimbabwe pre-colonial settlements, various means ranging from Chief's courts, wars, family and religious platforms were used to resolve disputes amongst many different subjects and individuals. For example, Chiefs would hear disputes from their subjects and render binding decisions. Non compliance with rulings would lead to serious consequences which included banishment or death. Religious leaders would also render binding decisions to disputes between congregants and these decisions were widely respected as the laws of the land. Land disputes were settled through wars in which the victors would be allowed to claim certain portions of land. In present day Zimbabwe, industrial relations disputes are now largely being settled through labour

arbitration. The law through the Labour Act (Chapter 28:01) made it mandatory to have certain labour matters handled through labour arbitration.

Even though the accelerated growth, recognition and development of the labour arbitration system has been rapid in Zimbabwe and met with some successes, the system has not been without challenges of its own and which are peculiar to this country. The system somehow seems flawed as the disputes do not seem to be resolved conclusively and usually find their way back to formal litigation platforms.

**International regulation of Arbitration**

Apart from the known domestic arbitration instruments there are various other international legal instruments that regulate the arbitration system in general. These instruments do not necessarily regulate labour arbitration in Zimbabwe but their importance lies in the fact that the labour arbitration system in Zimbabwe heavily borrows its backbone from these international instruments since the country is already a signatory to these international instruments (Tannock, 2008 p 72). There are two main international agreements which generally regulate arbitration on the international scene namely the New York Convention of 1958 and the United Nations Commission on International Trade Law (UNICTRAL) Rules known as the Vienna Convention of 1985. The success of the arbitration system in general hinges upon the acceptance of these international rules by individual member states.

**1.1.1 New York Convention of 1958**

The New York Convention of 1958 is the most important international instrument of arbitration pertaining to the use and enforcement of international arbitration. This instrument was drafted by the United Nations and all members states were asked to accede to it. Our Arbitration Act (Chapter 7:15) follows the principles of the New York Convention which explains the importance of this international instrument in this country as it forms the backbone of our labour arbitration system in terms of section 98 of the Labour Act. The main thrust of the New York Convention is to ensure that arbitration awards given in another country are enforceable in another jurisdiction. The New York Convention is an important instrument as it contains general rules regarding the recognition and execution of international awards.

### 1.1.2 United Nations Commission on International Trade Law (UNICTRAL) Rules of 1985 (The Vienna Convention)

The Vienna Convention was promulgated in 1985 and its main purpose was to bring about uniformity in terms of application by making the procedures more user friendly. For the simple reason that the New York Convention simply provided general rules, the Vienna Convention sought to complement it. The Vienna convention was updated in July 2006 to bring more efficiency, robustness and uniformity to the arbitration system. The difference between the New York Convention and the Uncitral model law is that whilst the New York Convention regulates the recognition and enforcement of foreign awards, the Uncitral model law regulates the arbitral process itself. The arbitral processes currently in place within our labour arbitration system are regulated under the Arbitration Act which explains the relevance and importance of the Unictral Rules.

## 1.2 Background to the Study

### 1.2.1 Historical Development of Arbitration System in Zimbabwe

In pre and post independent Zimbabwe, the government of the day has played a huge role in shaping up the character of industrial relations by being actively involved in its formative development. The involvement of the government in the industrial relations arena started very early. In the early stages of colonialism, the Rhodesian colonial government through the Masters and Servants Act (MSA), of 1901 specifically targeted the control of labour (Cheater, 1991). The Act was an oppressive enactment meant to silence the voice of the poor working class and continued in force until 1934. Labour had absolutely no voice in industrial disputes and therefore the Masters had absolute discretion in the settlement of labour disputes.

In 1934, a strictly labour arbitration law known as Industrial Conciliation Act was enacted. The Industrial Conciliation Act was largely informed by the government's perception of conflict between labour and capital and the government's view was that this perceived conflict required a system of bureaucratized adjudication (Maitireyi and Duve, 2010 p 137). The Industrial Conciliation Act therefore established a tier adjudication system that dealt with resolution of disputes through formal structures such as Conciliation Boards, Industrial Tribunals and Industrial Councils. The

Industrial Conciliation Act therefore hugely influenced the arbitration system by opening up the avenue of recognition of labour and its relevance in promoting and safeguarding industrial harmony (Maitireyi and Duve, 2010 p 138).

From the Industrial Conciliation Act, the government enacted the Labour Relations Act (L.R.A) in 1985. It was an important development in the history of labour law as it marked the beginning of the recognition of employees as an equal partner in the employment contract. Equally, the L.R.A became the preferred method of settling industrial labour disputes in order to avoid collective job actions by the masses. The key highlight of the L.R.A was the introduction of regulations governing conditions of employment and other related matters which Maitireyi and Duve (2010, p 138) argued to have been a revolutionary departure from colonial legislation such as the Industrial Conciliation Act. The L.R.A further introduced adjudicatory structures such as Labour Officers and Industrial Relations Boards but these autonomous functionaries still continued to operate at the whims of the Minister of Labour.

### 1.2.2 Current Arbitration system

In terms of the current Labour Act (Chapter 28:01), the handling of arbitration in labour matters is the responsibility of state institutions. Arbitrators are appointed by the Minister of Public Service, Labour and Social Welfare. In terms of sections 93 and 98 of the Labour Act, in the event of the Labour Officer failing to conciliate a dispute and subsequently issues a certificate of no settlement, the Labour Officer is obliged by law to refer the matter to “compulsory arbitration”. In practice, the Labour Officer agrees terms of reference with the two parties to the dispute which guides the arbitrator in resolving the dispute between the parties. The Labour Act insists that in arbitrating, appointed arbitrator is obliged to be guided by the provisions of the Arbitration Act (Chapter 7.05).

Previously conduct, fees and other general issues to do with Arbitration was unregulated but currently, the appointment, conduct and fees to be charged by arbitration are now contained in the Labour (Arbitrators) Regulations, 2012. The regulations are however silent regarding timeframes within which arbitration should be completed as is the case with other appeal processes.

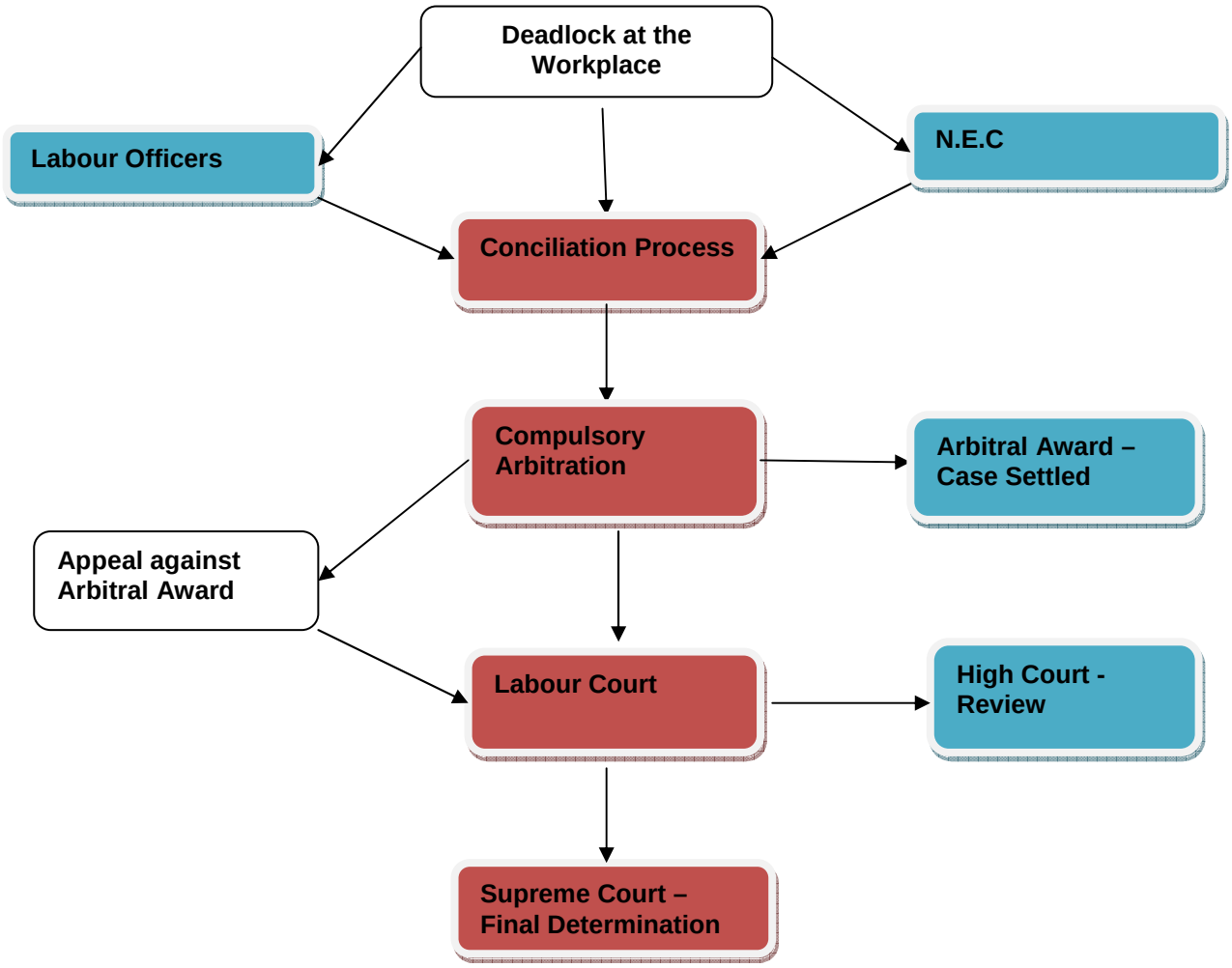
Under section 100 of the old L.R.A, where the Minister was empowered to refer a dispute to the Labour Relations Tribunal for arbitration or to appoint a mediator, the

Labour Act simply shifted that responsibility to the Labour Officer to appoint an arbitrator from a list compiled by the Minister of Labour in consultation with the President of the Labour Court under section 98 (5) and (6). Another new dawn established by the Labour Act is the obligation to allow the parties to the dispute to agree on their own the terms of reference in consultation with the Labour Officer which is a departure from the old L.R.A where the senior Labour Officer was empowered to state the issues which in his/her opinion had to be decided by the arbitrator.

This change was significant in that it gave room for the parties to the dispute to determine in their own language their understanding of their point of departure which they would want the arbitrator to determine. This flexibility ensures that the arbitrator is appropriately guided and decides on the exact issues that the parties wish to have determination on. In addition, the disputants mutually agree on what they want the arbitrator to decide upon and as a result there is absolutely no ambiguity on the nature of the dispute or the elements for which the disputants seek a resolution (Maitireyi and Duve, 2010 p 141).

Another key provision of the current Labour Act provides under section 98 (10) that an appeal on a question of law shall lie to the Labour Court from any decision of the arbitrator and alternatively an appeal for review can only be lodged with the High Court of Zimbabwe under very strict provisions of the ‘Model law’ of arbitration. See the flowchart below to illustrate the process.

**Figure 1: Arbitration Dispute Resolution Mechanism Flow Chart**




**Source: Adapted from the Labour Act (Chapter 28:01)**

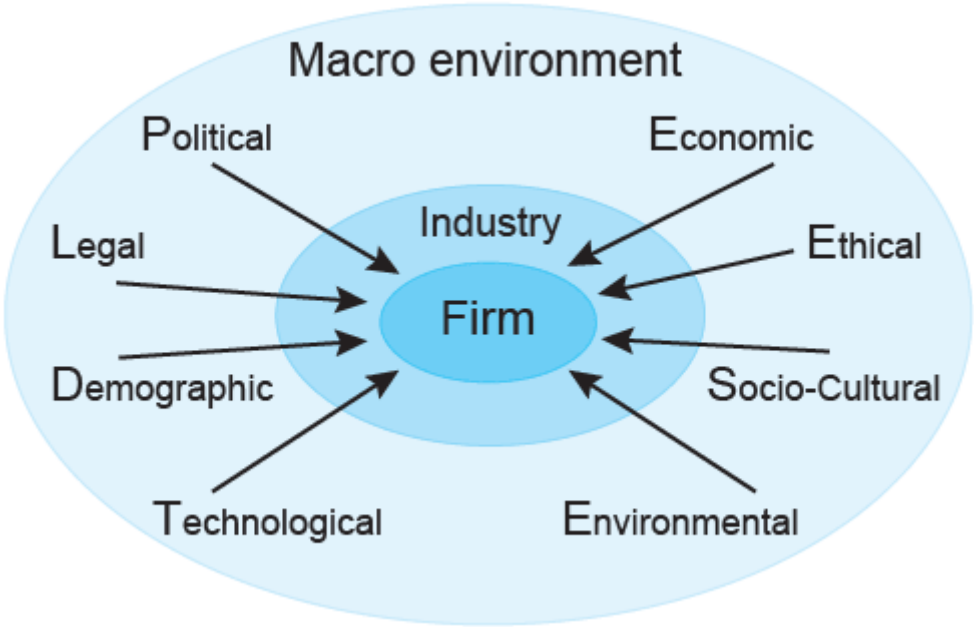
These interventions were made part and parcel of our labour law with the good intention of making labour arbitration achieve its goals of bringing finality and binding resolutions to labour disputes without involving costly litigation. The current arbitration system did not achieve its goal as the mainstream judiciary system continues to be clogged with appeals from arbitration that still find their way into adjudicatory courts in high numbers, a sure sign that the arbitration system as currently constituted is limping and facing a plethora of challenges.

### 1.3 Environmental Business Analysis

In order to appreciate the labour arbitration system in Zimbabwe and how it has developed over the years, it is necessary to embark on a PESTELG analysis of the business environment. PESTELG stands for political, economic, social, technological,

legal and regulatory and global factors. PESTELG is a simple and effective tool used in situation analysis to identify the key external (macro environment level) forces that might affect an organization. These forces can create both opportunities and threats for an organization. The outcome of PESTELG is an understanding of the overall picture surrounding the arbitration system. PESTELG analysis is also done to assess the potential of a new market. The general rule is that the more negative forces are affecting that market the harder it is to do business in it. The difficulties that will have to be dealt with significantly reduce profit potential and the firm can simply decide not to engage in any activity in that market.

**Figure 2: PESTELG business environment forces.**




Adapted from Strategic Management Insight website. Accessed 5 June 2014. Source: *http://www.strategicmanagementinsight.com/*

### 1.3.1 Political factors

**(a) Early 2000 period.**

The political landscape in Zimbabwe has not been stable since the year 2000 which was triggered by a chaotic land reform embarked upon in 1999. The chaotic land reform coincided with the formation of what was to become the biggest political opposition party in Zimbabwe, the Movement for Democratic Change (M.D.C). Parliamentary elections in 2000 saw the ruling ZANU (PF) party losing ground for the

first time since independence and the Presidential elections of 2002 was marred by violence which saw the developed world slapping the country with what was termed “targeted sanctions”. The targeted sanctions banned the political elite from travelling to certain countries as well as freezing of their personal assets. The international community further reacted to these targeted sanctions by imposing various economic measures to force the government of Zimbabwe to abide by international best practices and standards regarding human rights and governance. The international community argued that these sanctions were not economic but the government argued otherwise which led to the total collapse of relations between Zimbabwe and the rest of the world. Anna Tibaijuka, the United Nations Special Envoy, in her report on an exercise which became known as “Operation Murambatsvina” argued that,

> “While these sanctions were not directed against the economy per se, they contributed to the polarization of national and international media and the domestic political environment and also led to negative travel advisories that heavily affected the tourism industry.” (p 23)

The economic performance of the country deteriorated to alarming levels thereafter and was largely characterised by company closures and job losses particularly in the once thriving manufacturing sector. The textile industry ground to a complete halt, whilst the agricultural sector, once the backbone of the country’s economy took a severe knock that had ripple effects on the rest of the economy. Labour dispute resolution did not present much of a challenge since at that time, it made no difference whether one was employed or not. In fact, economic fundamentals had become skewed to the extent that it became more viable to be unemployed than to be employed. The unemployed members of the society would have more time to engage in illegal activities such as dealing in foreign currency and precious minerals such as diamonds and gold.

**(b) Mid 2000 period**

In late 2007, 2008 and early 2009, it was observed that the country was on the brink of total collapse. There were no labour disputes to talk about as the currency had become so worthless that it was now rarely being used by the majority. The United States currency had become the official legal tender. In March 2008, combined Presidential and Parliamentary elections were held and could not produce an outright

winner and a run off was held in June 2008. The election was boycotted by the main opposition party, M.D.C and the ruling party candidate was duly declared the winner. The announcement of the Presidential elections winner triggered a wave of further deterioration of the economy and by September 2008, it was observed that the economy had virtually collapsed. The soldiers became restless in the barracks. In October 2008, the Government that been sworn in July 2008, swallowed its pride and agreed to engage the M.D.C party. Negotiations were held which culminated in the swearing in of a Government of National Unity (G.N.U) in February 2009.

**(c) Post 2009 period**

The Government officially adopted the use of a multi currency regime system and dumped the Zimbabwe dollar which had become worthless. It is that period which signalled the growth of the economy once more. The economy grew in leaps and bounds during that period of the G.N.U. Industry were revived though at low capacity which signalled the emergence of the now defunct employment relationship. The tables were turned and suddenly, it made more sense to be employed rather than being unemployed. It became suicidal to lose a job and once dismissed, an employee would fight to the bitter end. Labour arbitration became so important in resolving labour disputes and to this day, the adjudicatory system is clogged with matters waiting to be adjudicated upon. The effectiveness of the system became a critical area to complement Government efforts to revive the economy.

### 1.3.2 Economic factors

Closely linked to the political factors are the economic factors. When targeted sanctions were imposed on the country, these had far reaching consequences on the wider economy. Resultantly, there was no foreign direct investment to talk about as exports came to a complete halt as the country was no longer producing anything worth exporting save for horticultural produce. It was observed that there was no policy consistency from the Government as they had become reactionary to almost every other crisis that was now gripping the country. Almost every other basic commodity was being imported into the country at huge cost because of runaway interest rates, sovereign risk and liquidity challenges. All these factors led to so many industrial disputes as workers continued to push for high wages in line with the runaway inflation which was estimated at some point to be around 11000% in 2007

which was a first in the modern world. This created a serious of backlog of cases as employers and employees were always at loggerheads over salary adjustments. These disputes required resolution and labour arbitration became very important.

The Reserve Bank of Zimbabwe tried as much to come up with a raft of economic measures which some economic commentators argued that these would even need revision even before the Governor had finished reading his speech at a press conference. Such was the severity of the situation before the legal adoption of the multi currency regime in 2009. The G.N.U undoubtedly stabilized the economy to some extent but because of the scarcity of the United States dollar, the industrial landscape changed as well as it became difficult to get rid of employees which also resulted in a lot of industrial disputes being referred to arbitration for resolution.

### 1.3.3 Social Factors

The period 2000 to 2009 was undoubtedly characterised by social upheaval in Zimbabwe. The economy had spiralled down which led to company closures as well as job losses. There was huge unemployment as graduates could not be absorbed in the formal markets after completing formal education. The informal market had become a heaven of illegal deals ranging from dealing in precious metals to illegal foreign exchange dealings. There were no exports to talk about in the country as the runaway inflation was fuelled by endless imports from neighbouring countries which created illegal pararell market structures which were so difficult to control. The Government even promulgated Statutory Instrument 302 of 2002 on Control of Goods (Price Freeze) order in November 2002. This statutory instrument was meant to control the prices of goods and services to ensure that at least the poor would also be able to access goods from the shops whilst ensuring discipline in the market at the same time.

The country also experienced brain drain as the most skilled employees left for greener pastures in neighbouring countries to the detriment of the wider economy. The little industry that was there was left in the hands of a few unskilled employees which caused further deterioration of the economy. For the few remaining employees, the burden became too much as the number of dependents grew by each day and at the same time, the employed breadwinners would take the war to their employers clamouring for salary increments in line with the runaway inflation and social

upheaval the country was experiencing. The arbitration system was not spared either as a lot of competent technical arbitration experts left the country to get into neighbouring countries in search of good employment opportunities.

Given the state of the economy, corruption became rampant and the judicial arbitration system was not spared either as the industry began to observe suspicious judgments coming out of the system as well as acceleration of disposition of some cases whilst some other cases would wait several years before being heard.

### 1.3.4 Technological factors

The period 2000 to 2009 was generally quiet in terms of technological advancement as the country's economy meant that there was no meaningful investment that was coming into the country. However, after the coming in of the G.N.U, a lot of things changed. The small number of companies that were revived started adopting technological advancement which entailed serious job losses in many sectors of the economy. The Zimbabwe Revenue Authority started using the Asycuda ++ system which dispensed with the need for manual recording of imports in favour of a clearance system off site. Almost all bank started the revolution of mobile banking and online banking which resulted in job losses. The construction industry was hit hard as new methods of doing business were developed which rendered a lot of employees jobless. Some firms were simply overtaken by technological developments such as Zimpost and Tel One which lost a lot of business. This scenario created industrial strife which required a mechanism for quick resolution and labour arbitration became important as a dispute resolution mechanism as companies had to lay off employees to cater for technology.

### 1.3.5 Legal/Regulatory factors

The period of economic upheaval saw the creation of pararell workers representative bodies to counter the Zimbabwe Congress of Trade Union which had aligned itself to the opposition M.D.C party. One such body formed was called the Zimbabwe Federation of Trade Union (Z.F.T.U) fronted by Alfred Makwarimba and Joseph Chinotimba would terrorise employers when disputes arose between the employer and the employee. In some instances, the body would actually act as a dispute resolution mechanism between the two warring parties and would give binding judgments mostly in favour of the employees. The arbitration system was rendered

useless because of the time it took to resolve dispute. The “Chinotimba” dispute resolution mechanism was preferred as it was quicker and brought immediate relief to the affected workers. The “Chinotimba” dispute resolution mechanism was also a way of fleecing workers their hard earned money as the Chinotimba gang would also demand a certain percentage of the money owed to the employee as payment for “services” rendered.

The arbitration system itself was largely an unregulated process until 2012 when the Government enacted the Labour (Arbitration) Regulations, 2012, which sort of brought some sanity in the arbitration system as the qualifications, appointment and ethics of arbitrators have now been clearly articulated. Whilst the Regulations cannot be said to be perfect, it is a positive step towards regulating the arbitration system and remove bottlenecks in the industry.

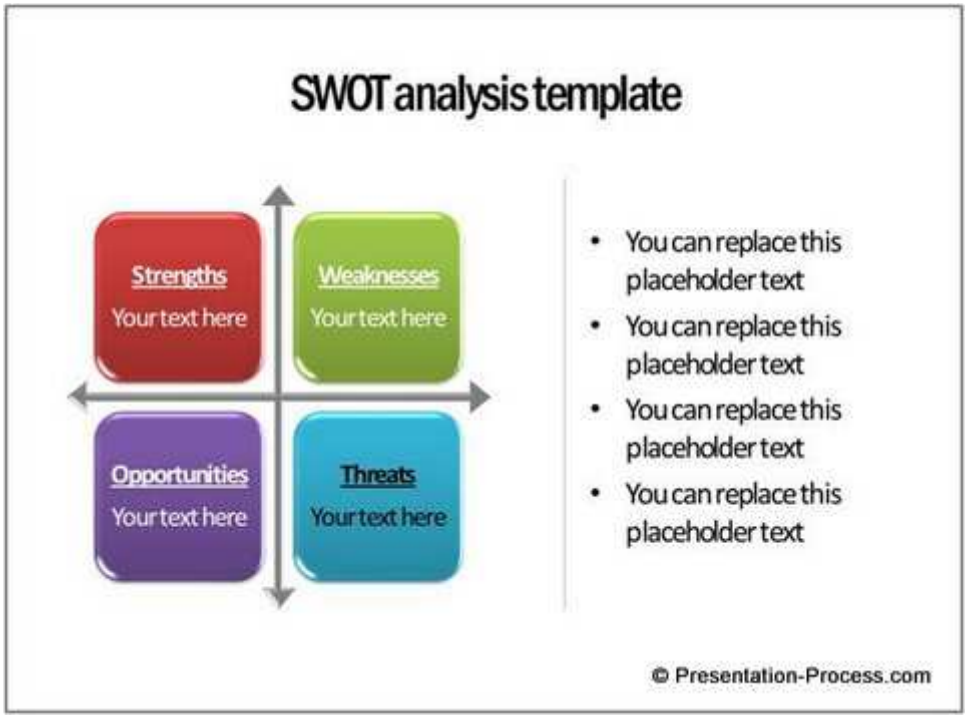
### 1.3.6 Global

Global factors affected the labour arbitration system in Zimbabwe in a significant way. In the last decade, it has been observed that a few companies are expanding into other countries whilst some foreign conglomerates are acquiring local entities. Examples include Pick n’ Pay in Harare and Choppies in Bulawayo. In the banking sector, banks such as Standard Chartered Bank, Barclays Bank, Stanbic Bank and MBCA are controlled at Group level in cities such as London and Johannesburg. Industrial relations disputes arise in such situations where because of different locations in which the businesses operate, workers and management always quarrel about working hours and conditions of service which necessitates labour arbitration as a dispute resolution mechanism.

## 1.4 Business Strength, Weaknesses, Opportunities and Threats Analysis

The SWOT analysis is an extremely useful tool for understanding and decision-making for all sorts of situations in business and organizations. SWOT is an acronym for strengths, weaknesses, opportunities, and threats. The SWOT analysis headings provide a good framework for reviewing strategy, position and direction of a company or business proposition, or any other idea. The strengths and weaknesses are normally considered as internal factors of the organization that you can control while opportunities and threats are external factors over which business has absolutely no control over. The figure below shows the SWOT analysis framework.

**Fig 3: Swot Analysis Framework**




Adapted from Presentation.Process.Com. Accessed 17 June 2014.

Source: *http://www.presentation-process.com/index.html*

### 1.4.1 Strengths

The labour arbitration system in Zimbabwe is a creature of statute. The Labour Act (Chapter 28:01) as read together with the Arbitration Act (Chapter 7:15) and the International Arbitration Conventions provides the framework for labour arbitration.

Section 93 (1) of the Labour Act clearly provides for the handling of a matter by a labour officer, failing which the matter would be resolved through arbitration on agreement of the parties. In the event of issuing a certificate of no settlement, the labour officer is obliged at law to refer the matter to compulsory arbitration with the agreement of the parties and in consultation with a senior labour officer in terms of section 93 (5). Thus, the law in Zimbabwe makes it mandatory for certain types of disputes to be resolved through arbitration and parties cannot opt of this process. It follows therefore that whenever an industrial dispute has been referred to a labour officer and if there is no resolution the matter has to be disposed through an arbitral process.

Section 98 of the Labour Act is critical in the sense that in resolving labour disputes, the parties and the arbitrator are obliged to follows the provisions of the International Conventions such as the New York Convention and the Vienna Convention. Section 98 (1) provides that in the determination of arbitral cases, the provisions of the Arbitration Act shall apply. The Arbitration Act itself is based on the New York and Vienna Conventions. The other strength of the framework is that the labour officer in consultation with the parties is permitted to come up with the terms of reference to be used by the arbitrator. This is significant in that it narrows down the issues that the arbitrator will have to decide upon. In terms of section 98 (5), the labour officer is guided by a list that is already available and therefore he does not have to scrounge for available arbitrators to handle a case. In order to cement the arbitration system, section 98 (8) gives the labour officer powers to determine the share of costs between the parties and section 98 (10) restricts an appeal from arbitral proceedings to those that raises a question of law to avoid frivolous and vexatious appeals going to the Labour Court.

Perhaps the biggest strength of the current arbitration system is the provision which allows the registration of an arbitral award as an order of the court which can be executed upon through the Deputy Sherriff or the Messenger of Court. To argument the strength of the arbitration system, the Labour Act made it clear that the provisions of the Arbitration Act (Chapter 7.15) would also apply. The Arbitration Act itself is also subject to the provisions of the New York Convention popularly known as the “Model Law”. The strength of the arbitration system therefore lies in the fact that it is fully entrenched in the law and that a litigant cannot choose to be subjected to arbitration or not. Once a labour officer has dealt with the matter, it will have to be dealt with by an arbitrator save where a party decides to petition the Labour Court directly in terms of the Act.

### 1.4.2 Weaknesses

The major weakness of the arbitration system in Zimbabwe is the chaotic manner in which it is administered. Unlike conventional courts with fully fledged registries such as the Registrar of the High Court, Supreme Court, Constitutional Court and Labour Court, arbitration system has no such registry. Even lessor courts such as

Magistrates Courts have Clerk of Courts to administer day to day operation of the courts.

The arbitration system lacks enforcement mechanism of its own. Arbitrators are not in a position to legally enforce their arbitral awards and have to rely on conventional courts for enforcement of awards in terms of section 98 (13)(14) of the Labour Act. Consequently, litigants do not take the processes seriously on the basis that there is always a higher authority which can enforce an arbitral award. The appointment of arbitrators to handle arbitrations is also shrouded in secrecy and often at times chaotic as the system is administered at the Ministry of Public Service, Labour and Social Welfare making the system susceptible to corruption.

### 1.4.3 Opportunities

Unlike the conventional court system, arbitration system offers a speedy and confidential resolution of industrial disputes using a less adversarial approach. It offers companies an opportunities to resolve their disputes amicably, much faster and less costly. Given the costs associated with the formal adjudicatory system, the arbitration system is in a good place for growth and expansion.

### 1.4.4 Threats

One of the major threats to the arbitration system is the proliferation of employment councils with their own Codes of Conduct. For example, the Banking Undertaking, Statutory Instrument 273 of 2000 contains a Code of Conduct which bypasses the use of arbitration as a dispute resolution mechanism. The code of conduct provides that if either party is dissatisfied with the decision of the National Employment Council for the Banking Undertaking, the employee can appeal against that decision directly to the Labour Court thereby bypassing the arbitration system. Recently, Standard Chartered Bank managerial employees applied to register their own code of conduct and the draft code contain a provision which seeks to have an appeal lie directly with the Labour Court. The drafters of the code contend that there is no use in having the matter referred to arbitration when it is clear that the matter will invariably end up at the Labour Court itself.

## 1.5 Statement of the Problem

As cited in the introduction, available literature indicates that an efficient and effective labour arbitration system is one where the system is underpinned by informal processes whereby the parties to a dispute subject themselves to an impartial person for adjudication of the dispute with the hope of a final and binding award. That is the whole essence of an effective labour arbitration system.

The background above indicates that since arbitration laws have become firmly entrenched in our labour laws, we should be seeing speedy resolution through the system in industrial relations matters. Contrary to experiences in other jurisdictions, our system seem not to have capabilities to render an effective, robust and binding dispute resolution mechanisms as invariably, matters that go through the arbitration process end up going back and to be resolved through formal litigation platforms thereby flooding the mainstream adjudicatory courts.

Given the scenario that most matters handled through the arbitration system find their way back into the mainstream adjudicatory system, the Labour arbitration system would be rendered obsolete if measures are not put in place to correct certain anomalies within the system or it will most likely continue as a mere stepping stone to approaching adjudicatory courts by the litigants. The research problem is, therefore, to evaluate the effectiveness of the current labour arbitration system and mainly to ascertain why the Labour Court is always flooded with appeals from arbitral processes and make recommendations.

## 1.6 Research Proposition

This study proposes that as currently constituted, the labour arbitration system is not effective.

## 1.7 Research Objectives

**The overall objective of the study is;**

To evaluate the effectiveness of the labour arbitration system in Zimbabwe.

**The specific objectives are;**

1. To identify weaknesses in the current labour arbitration system.

2. To identify reasons why appeals from arbitral proceedings still find their way to the Labour Court.
3. To assess the capacity of the Ministry of Public Service Labour and Social Welfare to support a well functioning arbitration system.
4. To assess whether parties to the dispute have a role to play supporting proper functioning of the arbitration system.
5. To determine recommendations to improve the current arbitration system.

### 1.8 Research Questions

**The main research question is;**

How effective is the current arbitration system as a dispute resolution mechanism.

**The research sub questions are;**

1. What are the weaknesses of the current arbitration system?
2. What are the reasons why appeals from arbitration proceedings invariably end up at the Labour Court?
3. Is the Ministry of Public Service, Labour and Social Welfare the ideal body to administer the arbitration system?
4. What role is played by the respective parties to the dispute to ensure an effective arbitration system?
5. What recommendations can be made to improve the arbitration system in Zimbabwe?

### 1.9 Scope of the Study

The study will investigate the effectiveness of the current arbitration system as a dispute resolution mechanism in Zimbabwe labour law. The study will not make reference to other forms of alternative dispute resolutions. The population would be limited to legal practitioners registered and practicing in Harare.

### 1.11 Significance of the Study

Not many studies of this nature have been undertaken in the past in this country and this study will contribute to the general understanding of the subject area. It seems this field of the law has been neglected by scholars and local universities and there is

no standard Zimbabwean text which is unfortunate given the relevance of arbitration at the work place. Arbitration is a fairly new phenomenon and it will equip the researcher with relevant knowledge regarding the justice delivery system at the work place. The study also seeks to invoke debate around arbitration to an extent that it will provide a platform for future studies on the same subject.

### 1.12 Limitation of the Study

In view of the technicalities involved, it would be unrealistic to assume that all necessary facts have been gathered in the process of the study.

(a) Because of client confidentiality, it proved difficult to obtain information pertaining to specific cases that have gone for arbitration from either the courts or legal practitioners save for those that the researcher was personally involved.
(b) The information could be limited to generalizations regarding the subject as the information gathered is limited to general information that is readily available in the public dormain.

### 1.13 Dissertation Structure

**(a) Chapter 1.0**

This chapter covers the introduction of the research being studied. In essence, the chapter gives an introduction and background of the study area. The chapter also covers the objectives of the research as well as articulating the research questions. The chapter concludes with the scope of the study, limitations of the study and the significance of the study to the academic community.

**(b) Chapter 2.0**

This chapter focuses on the literature review and. It outlines some of the works that have been carried out by other researchers and the theories underpinning the research study.

**(c) Chapter 3.0**

This chapter focuses on the methodology that will be used in carrying out the research. The chapter gives an outline of the analytical framework of the research design chosen, the justification for a single case study approach, the preparation for data collection, the main sources of data, and the data collection processes and data analysis.

**(d) Chapter 4.0**

The chapter focuses on data analysis and discusses the findings. This chapter will apply the theoretical framework from Chapter 2 to the case study, and will see how the selected theory explains the results obtained from the case study. The research questions articulated in chapter 1 will be given responses, suffice to say that the findings from the case study are discussed in this chapter.

**(e) Chapter 5.0**

The chapter will conclude the research study by having regard to the theory and its applications as well as the recommendations.

**Conclusion**

The chapter introduced the subject matter which is an evaluation of the effectiveness of the current labour arbitration system. The chapter contained a historical background to the problem question, research objectives and questions, the significance of this study, limitations as well as the overall structure of the study.

# CHAPTER 2

## Literature Review

### 2.0 Introduction

This chapter reviews existing literature on arbitration with particular focus on the labour arbitration system. It seeks to discuss in depth the theoretical framework underpinning the arbitration system. The researcher categories the literature read in four main areas namely advantages of arbitration over litigation, theoretical framework, nature of arbitration, structure of an arbitration system, criteria for evaluation of an effective arbitration system and the legal arbitration framework in various jurisdictions. The chapter ends with an analysis of prior literature and a conceptual framework for the present study.

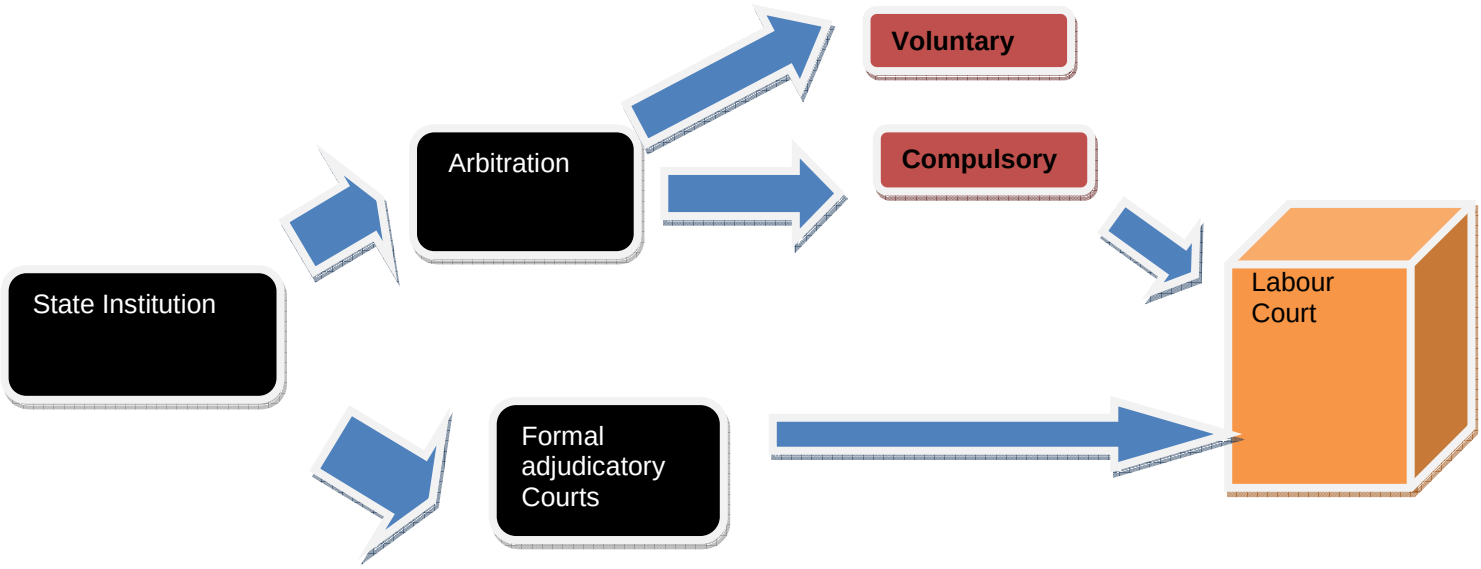
According to White (2000), literature is done to aid the prevention of working on what has been done already without any perceived particular added value of the research. Literature review helps to bring clarity and focus to one's research problem, through giving a better understanding of the subject area which helps with the conceptualization of a research problem precisely and clearly. A review of related literature provides a researcher with important facts and background information about the subject under discussion (Welman, Kruger and Mitchell, 2007). According to Johann Mouton, the importance of literature review is to discover what the most recent and authoritative theorising about the subject area is.

### 2.1 Conceptual framework

Labour arbitration can be conceptualized as the resolution of industrial disputes through the arbitration process entrenched in our Labour law, wherein third parties acting as quasi judicial officers making binding decisions on behalf of the parties (Hagglund and Provis, 2005). Sklenyte (2003, p 6) defined arbitration as a private, informal process by which the parties to a contract agree in writing to submit their dispute to one or more persons who adjudicates and resolves the controversy by rendering a final and binding decision. The basis for resolution of labour disputes through arbitration is that litigation is regarded as expensive and does not support businesses which require speedy resolution of disputes. Alan Shilston (1999) that arbitration "in its procedural conduct is a civilized, user friendly non confrontational

way of settling business disputes the outcome of which has a binding enforceability. Being procedurally flexible, arbitration is concerned with devising the most suitable procedure appropriate for the occasion". The main attraction according to Makaramba (2012) is the ability of the parties to resolve disputes privately without the intervention of the courts which is generally referred to as party autonomy and give rise to *arbitral* justice. The implication of party autonomy is that arbitration is taken outside the glare of publicity associated with litigation. Falke-Moore (1965) cited in Maitireyi and Duve (2010) derives the concept called social semi autonomy which deals with the operation of social and quasi legal processes with some degree of autonomy from the state's judicial institution.

**Fig 4: Conceptual Framework of the arbitration system**




**Source: Adapted from the arbitration framework in section 98 of the Labour Act**

## 2.2 Advantages of arbitration and litigation

Arbitration as opposed to civil litigation has advantages which makes it an attractive dispute resolution mechanism. Table 2.1 below shows summarised advantages of arbitration and litigation and which ultimately shows that arbitration advantages far outweigh the advantages of civil litigation.

## Table 2.1: Advantages of arbitration and litigation

| Arbitration | Litigation |
|---|---|
| Speedier resolution; however, there can be exceptions due to multiple parties, arbitrators, lawyers and litigation strategy. | There is a large body of substantive law and procedure that exists which automatically controls the lawsuit and the parties don't have to create the rules that will govern the lawsuit |
| Less costly; however, there can be exceptions due to multiple parties, lawyers, arbitrators and litigation strategy | The judge, by law, must be impartial and the judge's pay check is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case; |
| Exclusionary rules of evidence don't apply; everything can come into evidence so long as relevant and non-cumulative | The place of the trial is in the courthouse and therefore neutral territory |
| Not a public hearing; there is no public record of the proceedings. Confidentiality is required of the arbitrator and by agreement the whole dispute and the resolution of it can be subject to confidentiality imposed on the parties, their experts and attorneys by so providing in the arbitration agreement | If a litigant is unhappy with a decision of the judge the possibility of an appeal exists |
| From defense point of view, there is less exposure to punitive damages and run away juries | |
| A party may record a lis pendens even if there if an arbitration pending by filing a law suit and then holding the case in abeyance until the arbitration is resolved | |
| The ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise | |
| Limited discovery because it is controlled by what the parties have agreed upon and it is all controlled by the arbitrator | |
| Often, the arbitration process is less adversarial than litigation which helps to maintain business relationships between the parties. | |
| The finality of the arbitration award and the fact that normally there is no right of appeal to the courts to change the award. | |

## Table 2.1: Adapted from Makaramba (2012)

## 2.3 Theories of arbitration

According to Barraclough and Waincymer (2005, p 5), there is a longstanding debate over arbitration's real underlying nature and this theoretical dilemma creates real, practical problems as different conceptions of what arbitration is can influence how the parties and arbitrators rights are understood In order to understand the concept of arbitration in the modern day society, at least four theories have been developed.

### 2.3.1 The Contractual Theory

According to Barraclough and Waincymer (2005, p 5), the contractual theory sees arbitration as contractual in nature. The reason why this is so is because from the setting up of the arbitral tribunal to hear the dispute, the powers and authority rendered to arbitrators to the binding effect of arbitral awards is seen as a product of the parties to dispute "agreement" as argued by Grigera Naón (1992). The contractual theory is based on the statement that an award is a contract which is made by the arbitrator as an agent of the two parties to the dispute (Sklenytre, 2003 p 6). The state plays no role in the contractualist nature understanding of arbitration but however there is an exception where in the event that one party tries to avoid its contractual obligations, then the state intervenes to enforce the parties deal as an unexecuted contract. According to Makaramba, (2012), arbitration is a consensual dispute resolution mechanism by a private third party intervention outside of the courts.

This theory received widespread criticism for the simple reason that an arbitrator cannot really be an agent of either of the two parties to the dispute. The law of agency stipulates that an agent has to capacity to perform tasks that his principal could not possibly perform. The other criticism according to Sklenytre, (2003, p 13), is that the parties to the dispute cannot settle the dispute between themselves as they are not impartial themselves on the merits of the dispute. The other criticism was that in a real sense the arbitrator has a duty to make unbiased decisions on the substance of the dispute whilst the agent has an obligation to conform to the wishes or further the interests of the principal and that's why it will never be incompatible with an arbitrator's obligations Sklenytre, (2003, p 13). The other criticism of this theory is that the arbitrator's authority could be made irrevocable unlike the agent's authority Barraclough and Waincymer (2005, p 6).

### 2.3.2 Jurisdictional Theory

Barraclough and Waincymer (2005, p 6) argue that the salient feature of the jurisdictional theory is its emphasis on national sovereignty. In essence, every activity that occurs within a territory of a state is necessarily subject to its jurisdiction. According to Sklenytre, (2003, p 14), the jurisdictional theory is based on the argument that the task of arbitrator was to judge and the award he produces, was consequently, to be treated as an act of jurisdiction. The argument in favour of the jurisdictional theory is cemented by the argument that all aspects of arbitration from the setting up arbitral tribunals by the Minister of Public Service, powers conferred upon the arbitrators, arbitral awards they issue out the enforcement of the awards are all regulated by local country laws and regulations which is the Labour Act as read together with the Arbitration Act. The net effect is that in determining the merits of a case, arbitrators naturally have to behave like judges and have recourse to national legislation like what is provided for under section 98 (1) of the Labour Act.

This theory has been discredited by various authors. The theory is criticised by Sklenytre (2003, 14) for its reference to an arbitrator as a judge. The argument proffered by Sklenytre being that the reference to a judge is untenable for the reason that to hold such a position, the arbitrator needs to have the position conferred by the state but that it is not possible since the arbitrator cannot hold powers of the state and derives his authority from the parties' agreement. The arbitral award thus cannot be seen as court judgment in the strictest sense as it is not seen as state judgment. This argument is without merit as there appears to be confusion on the nature of the act of "judging" with the source of that authority. Having regard to the provisions of the Labour Act, it can be argued that arbitrators are indeed judges and the arbitral awards they issue out are jurisdictional acts (Sklenytre, 2003 P 14).

According to Barraclough and Waincymer (2005, p 7) the other criticism of the jurisdictional theory is the scope of the arbitrator's authority which remains limited by the parties' agreement and that the parties can revoke the arbitrator's powers by consent at any time. Thus arbitrators are not totally free, because they need to follow procedure agreed by the parties in so far as it accords within whatever is the relevant law, otherwise parties can refuse to accept the award on the grounds of article V (1)(d) of the 1958 New York Convention. This is particularly true in Zimbabwe as the

arbitrator's scope is limited to the terms of reference decided upon by the labour officer in referring the matter to him for arbitration.

### 2.3.3 Hybrid Theory

There is no doubt that given the form of arbitration as either contractual or jurisdictional, it is clear that neither of the two theories presents a complete picture of what arbitration is all about as the two theories seem to complement each other. According to Barraclough and Waincymer (2005, p 8) in reality, arbitration depends upon elements from both theories in that it is contractual in that the parties obviously control certain aspects of the arbitral process such as the terms of reference and the timelines within which to complete the arbitral proceedings, but jurisdictional in the sense that arbitration exists at the pleasure of the state which can deny its citizens arbitrability at will. It is there now widely accepted that arbitration is a hybrid of the both the contractual and jurisdictional theories. Okezie Chukwumerije, (1994) further argued that the reality is that an understanding of the concept of arbitration must as a matter of fact acknowledge the interaction of both its consensual basis and the legitimacy and support conferred on the process by national legal systems. The same view is shared by Julian Lew (2003) who recognised that while the arbitration agreement can be defined as a contract and must be treated as such, the arbitration proceedings remain subject to some domestic laws.

Deriving from the hybrid theory, Maitireyi & Duve (2010, p 144) concluded that theoretically, the concept of labour arbitration derives from the concept called "social semi autonomy" which in essence deals with the operation of social and quasi legal processes with some degree of autonomy from the state's judicial institutions. This view led to the criticism of the hybrid theory as the closest to the actual nature of arbitration. This view then led to the development of the autonomous theory.

### 2.3.4 Autonomous theory

Barraclough and Waincymer (2005, p 17) argue that the theory looks beyond the structure of the institution to arbitration, social and economic context. The main argument being that arbitration as a matter of fact must be recognised as totally autonomous by its nature. According to the autonomous theory, by its very nature, arbitration has jurisdictional and contractual features, but that these are so interconnected to each other such that it is undesirable to separate the procedural

and contractual parts of the institution. The version of the hybrid theory was rejected (Sklenytre, 2003 P 15) on the basis that in simply accepting the presence of both contractual and jurisdictional aspects of arbitration, the theories did not indicate the type of rules that should be applied to the mixed arbitration institution. In analyzing the concept of arbitration, it should therefore be seen a whole unit rather than by its description of jurisdictional and contractual features. The nature of arbitration must be explained in the context of the arbitration goal than on the structure.

Hong-Lin (1998) took an extreme position and argued against any of the four theories proffered. He suggested that all the four theories fail to "provide a satisfactory explanation covering current developments and all the different aspects of international commercial arbitration". In explaining the rationale behind his rejection of the four theories of arbitration, he however seemed to embrace the hybrid theory when he postulated that different aspects of arbitration, such as the triangular relationship between parties, arbitrators and states can only be satisfactorily explained by a theory that comprises both the jurisdictional and contractual elements. For all intents and purposes Barraclough and Waincymer (2005) propose that all attention should be drawn to real nature of arbitration not the nature of structure of arbitration as arbitration is a process through which private individuals acting within the permissible legal framework determine a dispute submitted to them by agreement of the parties. It is therefore in this context that labour arbitration in Zimbabwe will be conceived.

## 2.4 Nature of Arbitration

### 2.4.1 Private Nature

Arbitration should naturally be seen as a private mechanism for resolution of disputes in general (Hill, 1998). Arbitrators derive their powers from the parties' contractual agreement and that proceedings are held in private. Within the sphere of industrial relations in Zimbabwe, labour arbitration is the result of an agreement between the parties through the Labour Act which makes it mandatory for labour disputes to be resolved through arbitration in terms section 93 (5) as read together with section 98 which in essence obliges a labour officer to refer to arbitration any labour dispute or unfair labour practice after issuing out a certificate of no settlements. Thus it is a private arrangement in that the parties to the employment relationship which is

consensual agrees to have their dispute resolved through arbitration but legal in nature because of the need for legal enforcement of the arbitral award.

### 2.4.3 Legal Nature

Hill (1998) further postulates that though arbitration is a private arrangement between the parties to the employment relationship, it needs the support of the public legal system in order to be effective. In general arbitral awards are enforced through the courts in the event of non compliance. In terms of section 98 (14) of the Labour Act, either party to arbitration proceedings is entitled to approach any court with appropriate jurisdiction and submit an arbitral award for registration and once so registered, the arbitral award becomes an order of the court under section 98 (15) which can be enforced through the traditional enforcement mechanisms.

## 2.5 Structure of an arbitration system

The success of any arbitration system hinges upon the specific features of the system, essential principles that any arbitration system should have and the framework that guarantees its application. According to Tannock (2008, p 72) Zimbabwe stands in contrast to most African countries in the sophistication of its legal infrastructure relating to arbitration. It would appear however that the use of the arbitration system is now at risk the adjudicatory courts system are now acting as court of appeals from arbitral awards as concluded by Justice Kamocha in the case of *Origen Corporation v Delta Operations* (Tannock, 2008, 78).

### 2.5.1 Expertise

According to Sklenytre, (2003, p 7) arbitrators to a dispute can be chosen according to criteria that can be tailored to the particular dispute so as to ensure that they possess the necessary expertise to understand and evaluate the matter at hand. It has also been argued that whereas in litigation, parties hire their own experts at considerable expense to impose their interpretations on the court, in arbitration the parties can select an expert as their arbitrator (Padis, 2013). Maitireyi and Duve (2010, p 146) aptly captured this key feature of an arbitration system by defining expertise as the competency of the actors in the arbitration process. The authors further argued that the principal actors presiding over the process should be unquestionably competent and experienced in the field in which they operate. The

authors further argued that as cited in Bishop and Reed (1988), the principal actors should be disinterested and neutral parties. According to Skanes (2011, p 987), parties to a dispute are able to choose an arbitrator who understands the normal dealings, vocabulary and customs of the industry, which makes the arbitrator better suited to decide an issue rather than a court judge. In essence, for sports disputes, experts in sports are selected as arbitrators. Instead of hoping for the appointment of a good and qualified judge within the adjudicatory system or they are able to select a favourable jury in countries that rely on the jury system, parties to an industrial labour dispute may select an expert in the area with desirable cultural and gender sensitivity (George Padis, 2013). The spirit of the labour arbitration system is such that the decisions of the arbitrators must not only be seen as being reasonable in the circumstances but must also be seen to be fair and meeting the aspirations of the parties to the dispute which is always a fair and amicable resolution of their dispute.

Sklenytre (2003, p 7) postulates that in adjudicatory court systems, a complicated matter may lead to lengthy proceedings to permit the judge to acquire the appropriate knowledge. Agreeing to arbitration proceedings permits a reduction of these difficulties by selecting experts in the particular fields as arbitrators. Maitireyi and Duve (2010, 146) argues that it is however the judiciousness of a decision that determines whether the parties accept the arbitral award and therefore any appeal against an arbitral award is directly related to their perception of its judiciousness. According to the authors, a decision which is perceived to be unjust and unfair is likely to be appealed against, which therefore tend to prolong the dispute which explains why an arbitration structure should have high levels of competency, skill and expertise on the arbitrators. In Zimbabwe, parties to an industrial dispute do not necessarily select an arbitrator of their choice. The appointment of arbitrators is governed by section 98 (5) (6) of the Labour Act where the Labour Officer is empowered to select from a list of arbitrators appointed by the Minister in consultation with the Senior President of the Labour Court. According to Madhuku (2012 p 15) there is no readily available central registry of arbitrators in Zimbabwe despite claims by officials at the Ministry that the list is readily available.

Under section 3 (a) of the Labour (Arbitration) Regulations, 2012, in order to be considered for appointment as an arbitrator, the advisory council is now required to ensure that each applicant has a minimum qualification of a university degree with at

least two years experience in the human resources field or industrial relations field, a diploma in the field of personal management, conciliation and arbitration or industrial relations. This is an attempt to ensure that arbitrators have expertise in the area of industrial dispute or workplace disputes.

### 2.5.2 Confidentiality and goodwill

Arbitration unlike the adjudicatory system allows confidentiality to be maintained with respect to the context, the outcome and even the existence of the dispute (Sklenytre, 2003 p 7). The traditional adjudicatory system have an adversary nature such that any dispute is brought about in the vicinity of the public to an extent that the parties to the dispute will never be able to work together again. Frederic Bachand (2011) postulates that arbitration being private in nature, the principle of publicizing decisions, which is generally the rule of the courts of law, is not applied in arbitration and more often than not, parties to the dispute always agree to keep confidential any information about an arbitration dispute including the decision to be rendered by the arbitrator. In addition, arbitration allows parties to the dispute confidentiality of disputes, out of sight of their business partners, the media and other undesirable stakeholders. Confidentiality can be very important in certain situations to prevent damaging the parties' reputation.

Sklenytre (2003 p 7) argues that arbitration hearings are usually held in private and in a less adversarial setting where the parties to the dispute feel that an amicable business solution is going to be reached. She views a more friendly nature of arbitration as a form of insurance against loss of goodwill and if handled by experienced arbitrators often enables the parties to continue after the hearing to have a good relationship. The Zimbabwean arbitration system provides for confidentiality under 7 (1) (a) of the Arbitration Regulations of 2012 which deals with arbitrators Code of Conduct. What is also key however is that in terms of section 13 of the Labour Act, at the conclusion of the arbitration, the arbitrator shall submit sufficient certified copies of the arbitral award to the two parties affected by it. The award does not become a matter of public record but is only given to the two parties only. The extent to which arbitrator can have the same powers as the Labour Court judges is not clearly spelt out in the Labour Act. It is therefore not clear whether the labour arbitration system in Zimbabwe affords the parties to the dispute the key feature of confidentiality and goodwill.

### 2.5.3 Finality and Rapidity

According to Mcilwrath and Schroeder, (2008, p 5). Successful businesses revolve around good planning and business leaders value resolution because it allows them to plan against known outcomes rather than operating under a cloud of uncertainty. Litigation entails significant uncertainty and this uncertainty is anathema to most businesses. The authors further argue that while business leaders also expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision. According to Sklenytre (2003, p 7), an important feature of an arbitration system is that in most situations the award made by the arbitral tribunal is final and binding on the parties either because the parties have agreed expressly to have the provision in their arbitration agreement or because the arbitration rules exclude any appeal against the arbitral award. Sklenytre (2003) further argues that by excluding the possibility retrying the case in an appeal, the length of the proceedings is considerably reduced as compared to proceedings before the courts. It appears that this near guarantee that the decision will settle the dispute once and for all constitutes the major advantage. It is the norm in most jurisdictions that an arbitral award becomes effective after being registered as an order of the court. Sklenytre (2003) further argues that arbitration ensures that the dispute is solved rather quickly as opposed to proceedings before the courts of law, which in some jurisdictions may last many years due to overloaded judges and bureaucratic proceedings.

In Zimbabwe, an arbitral award as opposed to being final can still be appealed against to the Labour Court but the appeal is only limited to a question of law to prevent frivolous and vexatious appeals in terms of section 98 (10) of the Labour Act. Alternatively, an arbitral award can still be appealed against by filing an application for review at the High Court of Zimbabwe under the provisions of the Model law of arbitration. In addition, this arbitral award can still be registered as court judgment in terms of section 98 (14) and when it is so registered under this section it has the effect of a civil judgment for the appropriate court for enforcement purposes. As concluded by Tannock (2008, p 73) the arbitration system is now at risk as the adjudicatory courts system are now acting as court of appeals from arbitral awards as observed by Justice Kamocha in the case of *Origen Corporation v Delta Operations*. Even if there is a clear distinction definition of arbitral awards that may be appealed against, Madhuku (2012, p 17) argues that in practice there are more appeals than

warranted and appears that the Labour Courts readily accepts these appeals without really ascertaining whether the appeals raises a question of law or not and therefore many labour disputes take many years to resolve because of this avenue to appeal to the labour court and the situation is made much worse by Labour Court judges who sometimes fail to appreciate the consequences of entertaining frivolous and vexatious appeals under the guise of a “question of law”.

### 2.5.4 Speed

It is a well known fact that disputes that go to courts can last for a very long time. The parties to the disputes face intermittent delays ranging from postponement of hearing dates, the long duration set aside for conclusion of hearings to the length of the actual deliberations. According to Maitireyi & Duve (2010, p 145) speed with which a system operates in dispensing with justice is a paramount feature of justice delivery system and a key feature of any arbitration system. Trudeau (2002) argues that the system of dispute resolution should not be cumbersome at all and that it should allow for expeditious resolution of disputes by not lengthening the dispute resolution process. McIlwraith and Schroeder (2008, p 4), agree that there is no need to explain why businesses in general like speed and is often impatient with delays as the duration of a dispute can have direct economic consequences in addition to having an impact on the cost of the arbitration process. Sklenytre (2003) further argues that arbitration ensures that the disputes are solved rather quickly as opposed to proceedings before the courts of law, which in some jurisdictions may last many years due to overloaded judges and bureaucratic proceedings. According to Skanes (2011, p 987) arbitration can be less time consuming than litigation. She argued that the absence of pre-arbitration discovery and motion practice is the most important factor in reducing the length of the time it takes to conduct arbitration proceedings. Skanes (2011) reckoned that because arbitration is expedited by the absence of discovery, parties are forced to come to an arbitration proceeding much earlier than they would under litigation and as a result are most likely to reach settlements much faster (Archibald Cox et al, 2006)

The arbitration system in Zimbabwe does not specific time periods within which arbitration matters are supposed to dispose. Section 7 (1) (g) simply provides that arbitrators shall make all reasonable efforts to prevent delaying tactics by either parties to the arbitration process but it is not clear how the arbitrators enforces that

provision as there are no rules of procedure that governs arbitration processes in Zimbabwe.

### 2.5.5 Flexibility

Arbitrators are not bound legal rules and may craft arbitral awards without concern for precedent which can be a positive factor in the arbitration system. The United States Supreme Court, in the case of *Allied-Bruce Terminix Co, Inc v Dobson 513 US 265* (1995, p 265) noted that arbitration, "...can have simpler procedural and evidentiary rules which normally minimizes hostility and is less disruptive of ongoing and future business dealings amongst the parties...". Section 90 A (1) of the Labour Act provides that the labour court shall not be bound by strict rules of evidence and the court is allowed to ascertain any relevant facts by any means which the presiding officers thinks fit and which is not unfair or unjust to either party and that this evidence maybe adduced either orally or in writing.

Section 98 (9) further provides evidence that in determining labour disputes, arbitrators shall have the same powers as the Labour Courts, which powers are enunciated under section 90 A (1) which in essence means that in determining labour disputes, arbitrators are not bound by strict rules of evidence and procedure but how consistent do the arbitrators become in determining matters. In adjudicatory court systems, judges are bound by procedure and rules of evidence and precedent which ensures a consistent body of the law. The arbitration Regulations under section 7 (1) (h) made an attempt to align this problem by demanding that in the discharge of duties, arbitrators should not be influenced by any partisan interests or public clamour, family, personal, social political or other interests.

### 2.5.6 Costs

Undoubtedly, one of the major advantages of the arbitration system over litigation is that in most cases it is brief and cost effective. The absence of strict rules on evidence implies less time for the proceedings which also tend to reduce legal fees as the parties might have the necessity to hire legal practitioners. The cost of arbitration in Zimbabwe at one point was exorbitant but this has since been rectify through the Labour (Arbitrators) Regulations, 2012 by capping the fees payable in arbitration under section 6 (1) where the maximum amount payable for an arbitration matter is US$500.

## 2.6 Criteria for arbitration effectiveness

Maitireyi and Duve (2010, p 145) postulated that scholars have not come up with a single unified criterion for measuring the effectiveness of an arbitral system and the chief reason why this is the case is because different scholars place emphasis to different parameters and these parameters differ from one jurisdiction to the other. The authors further argue that traditionally there was a tendency to place more emphasis on a statistical measurement based the number of cases going through the arbitration system, the number of cases being disposed within a month and the number of cases being won by the employees. This criterion seems to have been discarded by various authors as Maitireyi and Duve (2010, p 145) concluded that scholars such as Trudeau (2002) have come up with a much more robust, acceptable and non statistical framework. The scholars came up with a framework that uses three factors that can be used as yardsticks in determining effectiveness of a system. The three factors are accessibility, speed and expertise. The framework proposed by Maitireyi and Duve also appear to be flawed as it overlooked cost and finality which are essential pillars on a arbitration system as identified in the structure of an arbitration system.

### 2.6.1 Accessibility

A labour arbitration system has to be accessible to the majority of workers if it to be deemed effective. It entails parties to the employment relationship having the full knowledge of the system components such as how the facilities can be accessed, knowledge of the procedures, the language used in the proceedings and generally the atmosphere during the proceedings. Maitireyi and Duve (2010, p 145) further argue that an enabling legislation plays a significant part in making the system accessible. The enabling legislation in Zimbabwe is the Labour Act and the Arbitration Act as read together with the provisions of the Model Law. The Labour Act contains fairly straight forward provisions relating to accessing labour arbitration under section 98. Any employee whose dispute with an employer goes through a labour officer who issues a certificate of no settlement will be entitled to have the dispute resolved through arbitration and the employer cannot opt out of arbitral proceedings.

The challenge with accessibility from a Zimbabwean perspective is the absence of a properly functioning registry system where even ordinary members of the public can go and enquire about procedures. The absence of registry affects a lot of issues under labour arbitration. This problem manifested itself in the case of *Portnet Holdings (Pvt) Limited v Muchaneta Maliseni* where there was confusion as to where documents were supposed to be sent for the parties to attend arbitration proceedings.

### 2.6.2 Speed

Within the Zimbabwean arbitration system, the most attractive feature of the system is brevity. Labour arbitration by its very nature consumes less time than the normal litigation route and as Maitireyi and Dive (2010, p 144) concluded, the speed within which a system operates in dispensing justice is a paramount feature of any justice delivery system and a key feature of its effectiveness. According to Trudeau (2002) the system of dispute resolution should not be cumbersome in that it should allow for expeditious resolution of disputes by not lengthening the dispute resolution process.

The Labour Act under section 98 does not define labour arbitration but regardless of the scope of arbitration, there are no known guidelines as to how the process must be conducted. The practice in the industry is that each arbitrator conducts arbitration in their own ways and this resultantly impacts negatively on the effectiveness of the system as a whole. Similar to conciliation, Madhuku (2012, p 30) cited the following as glaring examples which retards the effectiveness of the system in Zimbabwe; absence of prescribed rules regarding service of documents, particularly service of documents between the parties themselves to prevent parties hiding behind technicalities associated with service of documents as in many instances it is common for parties to allege lack of knowledge of the need to submit certain documentation within specific periods.

A trend has developed in the Labour Arbitration system which impacts on the speed within which matters are disposed of. Officials at the Ministry have created a distinction between what they term as arbitration by labour officers which is free and ‘independent arbitration’ which is paid for. This distinction has no basis at law as section 98 only recognizes compulsory arbitration. The tendency has been for the more powerful party to allege incapacity to pay for ‘independent arbitration” opting for

ordinary arbitration which takes ages to set down owing to the huge back log of cases waiting to be heard. According to Madhuku (2012) this approach negates the essence of compulsory arbitration and that there should not be that distinction between arbitration by a labour officer and one by an ‘independent arbitrator”.

### 2.6.3 Expertise

Undeniably arbitrators must be chosen on the basis of their experience or competency in a particular area which affords the parties an opportunity to appear before an expert. The arbitrator should be disinterested and neutral to the dispute at hand (Bishop and Reed, 1998). The arbitrators are able to grasp salient issues more quickly than judges and should not end at merely being reasonable but should further satisfy the requirement of fairness (Maitireyi and Duve, 2010).

The Labour Act requires the Minister to keep a panel of arbitrators who are readily available to arbitrate on labour matters from whom labour officers can pick in terms of section 98. The Labour (Arbitration) Regulations, 2012 provides that these arbitrators shall have a minimum educational qualification of a university degree with a further two years experience in the human resources or industrial relations field, whilst a diploma in the field of personal management, conciliation, arbitration or industrial relations would be an added advantage. It is not clear what informed these minimum qualifications and whether in practice this is being applied consistently. In any event, any labour arbitration system worth talking about should have expertise in labour law as a pre-requisite for appointment as an arbitrator which is a fundamental weakness in our current system. It is not in the best interest of the labour arbitration to limit the Minister’s choice to this tiny group of individuals who could very well be incompetent.

It’s also not clear from the Labour Act how these labour arbitrators are allocated to a dispute and the system appears to be chaotic. The Labour Act nor the Regulations did not prescribe the allocation process of arbitrators in terms of section 98 which renders the whole system susceptible to corruption. According to Madhuku (2012, p 38) it is not uncommon to find some arbitrators on the panel making frequent visits to the Ministry of Labour to “campaign” for allocations.

### 2.6.4 Cost

There is no need to explain why businesses are impatient with delay and abhor unnecessary cost. The duration of a dispute can have direct economic consequences and time has a direct and negative impact on the cost of the adjudication process as businesses are aware that the longer it takes to resolve a dispute, the more effort and resources that will inevitably be expended on it (Mcilwarth and Schroeder, 2008, p 3). Naturally, businessman prefers arbitration because it is usually brief and cost effective (Rawlins, 1997).

Just like the unlawful distinction drawn between labour officer arbitration and independent arbitration, another unlawful practice relates to sharing of costs in our arbitration system. A trend has developed in our labour jurisdiction wherein labour officers have created an impression that arbitration costs are supposed to be shared 50% each between the parties to the dispute and resultantly, a dismissed worker has to foot half the costs of arbitration which were arbitrary before the promulgation of the Arbitration Regulations of 2012. This is clearly contrary to what the Labour Act provides, as it is clear that the labour officer has discretion to determine the share of costs of arbitration to be borne by the parties in terms of section 98 (7). According to Madhuku (2012, p 39) that discretion must be exercised having regard to equity and this requires taking into account the ability to pay. Thus a 50-50% contribution, imposed without considering all the factors is contrary to law and in appropriate cases, one party must be made to pay more than the other. Madhuku's proposal which the researcher agrees with is that in the spirit of encouraging settlements, the party which is grossly unreasonable in rejecting a settlement proposal which is just and appropriate should be ordered to shoulder a greater burden of the costs of arbitration. The cost of arbitration was pegged at USD$ 500 in the recently promulgated Arbitration Regulations (2012).

### 2.6.5 Finality of arbitral awards

In terms of section 98 (10), in the case of a labour dispute referred to compulsory arbitration, a party is allowed to appeal to the Labour Court on "a question of law" under section 98 (10). According to Madhuku (2012), there have been more appeals than warranted and the Labour Court itself has allowed a situation where they accept these appeals without really determining whether they raise a "question of law".

According to Maitireyi and Duve (2010, p 142), the phrase “question of law’ was not defined in the Labour Act itself but the Supreme Court in the case of Muzuva v United Bottlers defined it as a question which the law has authoritatively answered to the exclusion of the right of the tribunal or court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter, a question as to what the law is, a question which is within the province of the judge instead of the jury, misdirection on the facts or evidence before the arbitrator that is so ‘outrageous in their defiance of logic as to amount to serious misdirection or a case where the making of an award is in violation of grounds specified under article 34 of the Model Law (Gwisai, 2007). The worrying trend as identified by Madhuku (2012, p 27) is that Labour Court judges do not seem to understand the implications of hearing frivolous appeals brought under the guise of a “question of law’ and he concluded that the court needs to develop a jurisprudence similar to that of ordinary courts with a view to ensuring more finality of arbitral awards in compulsory arbitration.

The labour law in Zimbabwe draws a distinction between compulsory arbitration and voluntary arbitration regarding finality of arbitral awards. Whilst the Labour Court has no jurisdiction to hear an appeal from voluntary arbitration, the Labour Act allows an appeal from compulsory arbitration. In the case of *Zimbabwe Educational, Scientific, Social, Cultural Workers Union v Welfare Educational Institutions Employers Association,* the court held that the Labour Court by virtue of provisions of section 98 (10) of the Labour Act had the power to entertain an appeal from compulsory arbitration as that right is enshrined under the same Act whilst the same cannot be said of voluntary arbitration. This position by the Supreme Court was a clear departure from the misconception generally held by the Labour Court itself as held by the Supreme Court in the case of *National Railways of Zimbabwe v Zimbabwe Railways Artisans Unions and Ors* where Justice Ziyambi stated that;

“There is, I think judging from the cases which have come before us, a misconception generally held by the Labour Court namely, that it is, in terms of the section 98 of the Act, endowed with jurisdiction to entertain all applications brought before it”.

That distinction in our law is superfluous as parties to arbitration proceedings enjoy different rights of appeal. The approach relating to voluntary labour arbitration is proposed as the most ideal scenario.

The author adopted the above framework in analyzing the effectiveness of the labour arbitration system in Zimbabwe by using the above five factors as a barometer for assessment.

### 2.6 Labour dispute resolution in other jurisdictions

Methods of resolving labour disputes vary greatly across the United States and countries belonging to the European Union (Block, 2003). What is certain however is that national legal regimes must provide for the effective resolution of disputes in order to promote global economic stability. According Silverstein (2011, p 102), an ineffective legal regime risks undermining the ability of companies to remain competitive and viable in an increasingly cutthroat, international market place.

#### 2.6.1 Labour arbitration in the United States

In the United States, either statutory or the common law permits voluntary arbitration and it fits into three categories. There are general statutes used in commercial arbitration but often adaptable to labour disputes. This is very much like the Zimbabwean system where section where section 98 provides that the provisions of the Arbitration Act shall be applicable to all arbitration proceedings being held in terms of the Labour Act. In the United States, there are statutes specifically designed for labour arbitration and those statutes designed to encourage state officials to its use. In the case of *United Steelworkers of Am v Warrior and Gulf Navigation Co 363 U.S 574 (1960)*, the United States Supreme Court recommended the use of labour arbitration to resolve labour disputes when stating that commercial arbitration is a "...substitute for litigation...labour arbitration is the substitute for industrial strife". The position in the United States was aptly captured by the Office of the Solicitor, Department of Labour, Labour Arbitration under State Statute (1943) where it held that, "Common law arbitration rest upon the voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement may be oral and may be revoked anytime before the rendering of the award. The Tribunal, permanent or temporary...must be free from bias and interest in the subject matter, and may not be related by affinity or consanguinity to either party". This position is no different from the Zimbabwean system but perhaps the difference will lie in the manner in which the framework is embedded within the jurisdiction.

According to Silverstein (2011, p 109), the parties to an arbitration process in the United States must be given adequate notice of hearings and are entitled to be present when all evidence is received but the arbitrators just like in Zimbabwe have no powers to subpoena witnesses or records. Where the award is in writing, then it should be signed by all the parties to the dispute. In the United States, the arbitrator acts in such proceedings as a quasi judge and interprets and applies provisions of the parties' contract without adding to or deleting the terms. The decisions of the arbitrator are binding unless the arbitrator outside of the scope of his or her contractual authority or that the award runs contrary to public policy. This position is exactly the same as the argument relating to the appeal on a 'question of law' within the Zimbabwean context.

### 2.6.2 Labour arbitration in the European Union.

According to Silverstein (2011), members of the European Union frequently have their own unique legislative rules or policies that provide for labour dispute resolution. Despite these differences, the International Labour Organization has attempted to bring uniformity to the approaches EU countries take to resolve their labour disputes. Arbitration exists in about twenty four of the twenty six E.U member states, although it is not widely used as compared to mediation and conciliation.

According to Silverstein (2011), in Denmark for example, their law does not allow for arbitration to resolve labour disputes in whatever case. According to Hasselbalch and Jacobson (1999) Danish law does not provide for the resolution of collective interest disputes through arbitration as the law allow them to resort to resolving labour disputes through strikes and lockouts due to their desire to preserve their right to free bargaining and a belief that all trade disputes must be resolved by negotiation through mediation between the organizations involved. Danish law only allows labour arbitration in a situation where mediation efforts described above have failed to yield any positive settlement and an interest dispute would then serve as a legitimate basis for industrial action and labour arbitration only comes in when the parties fail to resolve the dispute after a prolonged strike or lockout.

In Bulgaria, labour arbitration is only permitted where other modes such as mediation and conciliation fail to resolve a labour dispute and this can only be a negotiated settlement between the parties. The arbitrator is obliged to listen to both parties

presentations but however even before the hearing has been concluded, parties to the dispute are free to sign an agreement which has the same legal effect as an arbitral award to settle their dispute (Silverstein, 2011, p 109).

In the Czech Republic, parties to an industrial dispute are legally obliged to try and settle the matter through mediation, before mutually agreeing to arbitration to resolve the dispute. If the dispute is an interest dispute, the arbitrator's decision amounts to the conclusion of a collective agreement and is not subject to appeal. In the case of a rights dispute, the parties may appeal the decision of the arbitrator, which can be reviewed by a court at the request of one of the parties. It is imperative to note that under Czech law, under the above explained arbitration, neither the union nor the employer pays to use the arbitration process. It is the Ministry of Labour and Social Affairs which pays for the costs of arbitration and mediation in order to make these options more economically advantageous compared to pursuing a strike or lockout (Silverstein, 2011),. The system in the Czech Republic is quite different from what we have in Zimbabwe in the sense that our system does not differentiate between the types of disputes to be settled through arbitration. All disputes for as long as they have gone through a labour officer should be settled through arbitration.

In Lithuania, arbitration is handled by what they term as a "Third Party Court". This court is presided over by a district court Judge and six arbitrators appointed by the parties to the dispute. This court is quite different from a host of other conventional courts and that it is not a permanent court. It is an ad hoc body where each of the parties appoints one or several arbitrators who then resolve the dispute. Such a system is alien in the Zimbabwean jurisdiction.

### 2.6.3 Arbitration Case Study: Agricultural Bank of Zimbabwe Limited t/a Agribank v Menias Cheza: Before Honourable Caleb Mucheche 2011

Menias Cheza was a long standing employee of the bank having joined in 1981 when the bank was still known as Agricultural Finance Corporation. He joined as a non clerical staff and rose through the ranks to become an Assistant Accountant (Assets) within the Finance Department and at the time of the dispute in 2011 was in category B (5) under the Patterson job grading system which was a non managerial position. Cheza was also Chairman of the Workers Committee, a position he had held for close to a decade. The bank carried out a job rationalization exercise and Cheza was

“promoted’ to the position of Accountant (Assets) within the same department and placed in C (3) grade which was a managerial position and the net effect of this appointment was that he had to relinquish his chairmanship role since he had become a manager.

Cheza accepted the “promotion” but refused to relinquish the Chairmanship role arguing that nothing had changed within his scope of work and therefore saw no reason why he should consider himself to be a managerial employee. He had no subordinates which meant that he supervised no one and played no managerial functions. The bank regarded the refusal as insubordination and wrote him a letter of warning. Cheza duly exercised his right in terms of the Labour Act by filing an unfair labour practice claim against the bank to a labour officer. The issues being raised by Cheza were too numerous ranging from unfair treatment, low salary, job description, working environment and a host of other issues. The dispute was referred to conciliation in terms of section 93 of the Labour Court and as expected, no settlement was reached forcing the labour officer to issue a certificate of no settlement and the matter was referred to compulsory arbitration. The labour officer in terms of section 98 (4) determined with the parties the arbitrator’s terms of reference to narrow down the issues. The parties agreed that the only issue for determination by the arbitration was couched along the following lines;

“Whether or not, the appellant should be declared to be a managerial employee taking into account the nature of his duties”

The parties arrived at this term of reference having realised that all other issues were dependent on whether the appellant was a managerial employee or not and therefore there was no need to labour the arbitrator with making a determination on the dependent variables. In any event, the Labour Act, explains in full the definition of a managerial employee and the issue for determination was whether Cheza’s duties qualified to recognized as managerial. The matter was referred to Honourable Arbitrator, Mr Caleb Mucheche. Both parties had no idea as to how the labour officer chose Mr Mucheche but it was acknowledged that he was a better choice as an arbitrator since he is a well known labour lawyer in Harare. It took a period of about three months for that appointment to be made and in the meantime, unrest at the bank was increasing as the Cheza case was being seen as a test case in which a large majority of staff were also affected. If Cheza was to be declared a managerial

employee whilst in C (3) grade it meant that the whole C category from C (1) to C (5) were automatically non managerial. The bank did not want such a scenario as that ruling was likely to empower the Workers body as most of their professionals were in that category.

A pre-arbitration hearing was held where the arbitrator indicated that costs were to be shared on 50% basis between the parties. Timelines for submission of documents was agreed between the parties. Workers documents were submitted on time to the arbitrator but the bank's papers were late but the bank was not penalized. The arbitration was finally held where the parties gave oral evidence. A ruling was done in favour of Cheza and he was declared a non managerial employee. The bank without really considering the arbitral award, simply decided to appeal to the Labour Court. The bank later withdrew the appeal after a year had gone without the matter being set down for hearing.

The case study brought to the fore challenges surrounding the arbitration system from the conciliation stage right up to the Labour Court.

# CHAPTER 3

## Research Methodology

### 3.0 Introduction

This chapter covers methodology used in the research and will discuss three main issues namely, research design, data collection methods and data analysis. The study was aimed at investigating the effectiveness of the labour arbitration system in Zimbabwe. In particular, it sought to investigate why matters handled through the arbitration system invariably end up being resolved through the formal adjudicatory courts. The major research question of this study is how effective is the current arbitration system as a dispute resolution mechanism in Zimbabwe. The study itself was premised on the research proposition that as currently constituted the labour arbitration system in Zimbabwe is not effective. Saunders et al, (2003) argues that research itself requires a systematic approach to finding answers to research problems. It can safely therefore be concluded that the credibility of any research findings depends on the appropriateness and reliability of the methods used in data collection and analysis.

### 3.1 Research design

According to Yin (2003), the research design is the logical sequence that connects the empirical data to the study's initial research questions and ultimately to its conclusions. It is the tool that guides the researcher in the process of collecting, analyzing and interpreting observations, allowing the researcher to draw inferences concerning casual relations among the variables under investigation. In order to answer the research question and achieve the objectives of the study, an intensive investigation of a single unit study design was employed. According to Yin (2003), the defining characteristic of a case study is its emphasis on an individual unit. The interaction of the unit of study with its context was a significant part of the investigation. Yin (2003), further argues that one of the five rationales for a single case study design is when a case is representative. The arbitration system is representative of dispute resolution mechanisms in Zimbabwe such as conciliation and mediation.

## 3.2 Research Philosophy

There are four main categories of research philosophies namely positivism, realism, interpretivism and pragmatism. This particular research was based on the phenomenological approach.

### 3.2.1 Interpretive Approach (Phenomenological Approach)

This approach is based on the assumption that human phenomena are fundamentally distinct from natural phenomena (Babbie and Mouton, 2012 p 270). Some of the critical differences refer to the inherent symbolic nature and the historicity of all aspects of human behaviour. In general, it implies that one aims at interpreting or understanding human behaviour rather than explaining or predicting it. Saunders and Cornet (1997), postulated that the approach is based on the way people experience social phenomena in the world they live in, focusing on the meanings that the research subject attaches to social phenomena. This is an approach by the researcher to understand what is happening and why it is happening at a particular moment.

An interpretive paradigm uses qualitative research methods such as discourse analysis, unstructured interviews to investigate perceptions and construction of reality by such “actors” in organisations as employees and shareholders (Saunders, 2007). De Vos et al, (2013, p 317), on the other hand argue that this approach maintains that all human beings are engaged in the process of making sense of their worlds and continuously interpret, create, give meaning, define, justify and rationalise daily actions.

## 3.3 Research Approach

There are two well known and recognized approaches to research namely the qualitative and the quantitative paradigms (AS de Vos, et al, 2012, p 63). According to White (2000), research can be carried out by either using the qualitative or quantitative approaches. Silverman (2000), argues however that these two approaches are often evaluated differently and quantitative approach is more superior because it is value free. Research can however be carried out by using a combination of the two approaches.

### 3.3.1 Qualitative approach

Leedy and Ormrod (2005, p 140), postulates that a qualitative approach is basically used to answer questions about the complex nature of phenomena, with the purpose of describing and understanding the phenomena from the participants' point of view. Wilson (2006), defines the qualitative approach as an unstructured research methodology that is carried out using a small number of carefully selected individuals to produce non quantifiable insights into behaviour, motivations and attitudes. Kumar (2005) views the qualitative approach as unstructured because it allows flexibility in all the aspects of the research process. Qualitative researchers are concerned in their research with attempting to accurately describe, decode and interpret the meaning of phenomena occurring in their normal contexts (Fryer, 1991). According to Creswell (2007, p 57), qualitative researchers tend to collect data in the field at the site where the participants experience the issue or problem under study. The qualitative paradigm therefore stems from an antipositivistic, interpretative approach which is idiographic and thus holistic in nature and aims mainly to understand social life and the meaning that people attach to everyday life (McRoy, 1995). The qualitative researcher is therefore concerned with describing and understanding rather than explaining or predicting human behaviour (Babbie and Mouton, 2012, p 270). The authors were more emphatic regarding qualitative research when they held that rather than reverting to abstract theoretical constructs, qualitative researchers prefer to use categories and concepts used by the actors themselves as a further attempt to stay true to the meanings of the actors themselves.

### 3.3.2 Quantitative Approach

Leedy and Ormrod (2005, p 140) defined quantitative approach as a structured guideline that exists for conducting quantitative research. Quantitative researchers choose methods that allow them to objectively measure the variable(s) of interest and they also try to remain detached from the research participants so that they can draw unbiased conclusions (AS de Vos, et al, 2012, p 64). Denzin and Lincoln (2005, p 21-22) define quantitative research as a methodology that makes useful descriptions of observed phenomena and explains the possible relationships between descriptive surveys, longitudinal developments and ex post factors research designs. The main concerns of the quantitative paradigm are that the measurement is reliable, valid and generalisable in its clear prediction of cause and effect. According to White (2000)

quantitative research is an iterative process through which evidence is evaluated and theories and hypothesis are refined and tested. Denzin and Lincoln (2005) concluded that in quantitative research, measurement is usually regarded as the only means by which observations are numerically expressed in order to investigate casual relations or associations.

### 3.3.3 Selecting a suitable approach

Babbie and Mouton (2012, p 272), argues that whereas the quantitative researcher usually aims at analyzing variables and the relationships between them in isolation from the context or the setting, the qualitative researcher aim to describe and understand events within the concrete, natural context in which they occur. Denzin and Lincoln (2005) postulates that the main difference between qualitative and quantitative research is that qualitative research generates rich, detailed and valid data that contributes to an in depth understanding of the context while quantitative data generates reliable population based data that explains cause and effect relationships. The choice of whether to use quantitative or qualitative research depends on the type of information required, nature of the research, availability of resources and the context of the study. The researcher specifically chose qualitative approach because the case study methodology is qualitative in nature. The researcher used unstructured one to one interviews to gather information from five practising legal practitioners in Harare, three practising arbitrators in Harare, two Labour Court (Harare) Judges, a Senior Labour Officer based at Makombe Building and an Assistant Registrar at the Labour Court who use the arbitration system on a day to day basis which enabled the researcher to gain a deeper understanding of the overall effectiveness of the labour arbitration system in Zimbabwe. Time and financial resources was also a huge factor which influenced the choice of the qualitative approach.

### 3.3.4 Advantages of qualitative methods

According to Creswell (2007) the advantage of qualitative research is that it is a form of inquiry in which the researcher makes an interpretation of what they see, hear or understand. Qualitative researchers make many specific observations and then draw inferences about larger and more general phenomena (Leedy and Ormrod, 2005). Qualitative methods are flexible as compared to quantitative methods in that they

allow more spontaneity and adaptation of the interaction between the researcher and the respondent (Mark, et al, 2005) Qualitative methods use open ended questions which allows the respondents to respond in their own words and can thus provide more detailed information unlike the quantitative methods that are rigid and require respondents to choose from fixed responses. It is the basis upon which the researcher chose a qualitative approach for this research.

### 3.4 Research Strategy

There are several ways of doing research which includes case studies, experiments surveys, histories and analysis of archival information (Yin, 2003). Each of these strategies has peculiar advantages and disadvantages depending on three conditions namely; the type of research question, the control the investigator has over actual behavioural events and the focus on contemporary as opposed to historical phenomena.

#### 3.4.1 Experiments

A research design based on experiments is most frequently associated with structured science in general. Basically experiments involve taking action and observing the consequences of that action (Babbie and Mouton, 2013). Experiments are done when an investigator can manipulate behaviour directly, precisely and systematically (Yin, 2003). Experiments are well suited to research projects involving relatively limited and well defined concepts and propositions.

#### 3.4.2 Surveys

Surveys may be used for descriptive, explanatory and exploratory purposes. It is probably the best method available in collecting original data for describing a population too large to observe directly (Babbie and Mouton, 2013). Survey is a research strategy where a sample of subjects is drawn from a population and studied to make inferences about that population (Wilson 2006).

#### 3.4.3 Archival analysis

Yin (2003) postulates that archival analysis involves answering questions of who, what where, how many and how much research type of questions. Archival strategies describe the incidence or prevalence of a phenomenon.

### 3.4.4 History

Histories are the preferred strategies when there is virtually no access or control and the distinctive contribution of the historical method is in dealing with the dead past, when no relevant persons were alive to report what happened and the researcher has to rely on primary documents, secondary documents and cultural artefacts as the main sources of evidence (Yin, 2003).

### 3.4.5 Case Study

A case study design is more of a choice of what to study than a methodological one. This assumption is clear by looking at its ability to adapt to a wide range of methodological frameworks such life history, phenomenology, grounded theory, and ethnographic theory (AS de Vos, et al, 2012, p 320). According to Creswell (2007, p 73), a case study involves exploration of a “bounded system” or a single or multi case over a period of time through detailed in depth data collection involving multiple sources of information. The product of this research is an in depth description of a case or cases and case based themes. Babbie and Mouton (2013, p 280) concludes that case study researchers must therefore enter the field with knowledge of the relevant literature before conducting the field research. The researcher used the exploratory type of case study whose purpose is theory building and new knowledge which may inform policy development. It is however difficult in practice to stick to one specific type of research design as they often overlap (Tlou, 2006, p 39)

The study will focus on the effectiveness of the labour arbitration system in Zimbabwe and seeks to answer questions regarding the weaknesses of the system, why the labour courts is always flooded with appeals from arbitral processes and whether the Ministry of the Public Service Labour and Social Welfare has the capacity to administer the labour arbitration system.

The research itself involves a contemporary set of events, over which the researcher has little or no control over (Yin, 2003) hence the choice of the researcher to resort to a case study. The case study was chosen in this instance because it allowed the researcher to explore, in a holistic and current way the key research questions. The case study research strategy enabled the researcher to gain an in depth understanding of the labour arbitration system through qualitative means. The case study became the preferred strategy owing to limited time to carry out the research

and accessibility to research information. In addition, the case study strategy was chosen because the qualitative methods are capable of using open ended questions which allow the respondents to respond using their own words and can thus provide more information within which to make deductions.

### 3.4.6 Disadvantages of using case study

Case studies have been criticized because they provide little basis for scientific generalization as well as the extent to which casing can produce rigorous data and yield findings of high validity (Thomas, 2004). Deciding on a research design should not be seen as choosing from an array of available designs in much the same way as choosing a specific outfit (Flick, 2009).

## 3.6 Data Collection

### 3.6.1 Population

According to Salant and Dillman (1994), a population is a set of units (usually people, objects, transactions, or events) that we are interested in studying. It can also be defined as the full universe of people or things from which the sample is selected. Seaman (1987) described a population as “a total of persons or objects that meets the criteria established by the researcher”. According to Babbie and Mouton (2013), a study population is that aggregation of elements from which the sample is actually selected. In studying a population, focus should be on one or more characteristics or properties of the units in the population (McClave et. al, 2007). In this research, the target population was all registered and practising legal practitioners in Zimbabwe with a strong bias in labour law in which there are about 800 according to statistics from the Law Society of Zimbabwe, registered arbitrators in Zimbabwe but practising in Harare in where are around 48, Judges at the Labour Court and administrative staff who administer the arbitration system in Zimbabwe. The sample population constituted five legal practitioners, two Judges and three arbitrators with a strong bias in labour law. The reason for selecting the sample was because they are involved in the utilization of the labour arbitration system and therefore in a position to comment fully from an informed point of view whether there are positives or negatives in the manner in which the system is currently structured. It was also imperative to have a homogeneous group of people as a sample to ensure homogenous perceptions regarding the arbitration system. Ordinary people would have had difficulties

appreciating the technical nature of the arbitration system and hence were not part of the sample. The researcher was satisfied with the designation of the respondents because they were conversant with what was being asked for through the unstructured interviews.

### 3.6.2 Sampling Procedure

According to Denzin and Lincoln (2000, p 370) sampling procedures can be either probability or non probability sampling. In qualitative research, only a sample (a sub set) of a population is selected for any given study. A sample is a finite part of a statistical population whose properties are studied to gain information about the whole population (Saunders, 2007). The study's research objectives and the characteristics of the study population determine which and how many people to select (Bernard, 1995). Qualitative research methods by their nature use non probability type of sampling. The researcher selected a representative sample of a manageable size (Maitireyi and Duve, p 148). This includes convenience sampling, judgment sampling and quota sampling. Convenience sampling was used in the research.

### 3.6.3 Convenience sampling

Convenience is a non probability sampling method where the respondents are selected because of their accessibility and nearness to the researcher and is sometimes referred to as haphazard sampling. The subjects or the participants are self selected or selected on the basis of availability (Denzin and Lincoln, 2005). The downside to this method is that it does not lead to a selection of proper representatives of the population since the sample cases which were selected on the basis of accessibility in this case because they are known personally to the researcher. The sample may thus be biased and not be a true representative of the population. The advantages of this sampling method however far outweigh the disadvantages.

(a) The method is easy to use and administer
(b) The method delivers accurate results when the population is homogenous

### 3.6.4 Judgmental Sampling

The researcher also used judgmental sampling which involves selecting a group of people because of their particular traits which the researcher was interested in. Babbie and Mouton (2012, p 167) postulates that sometimes it is appropriate to select a sample on the basis of the researcher's knowledge of the population, its elements and the nature of the research aims. Judgmental sampling by the researcher involved choosing a sample of respondents based on their knowledge of the labour arbitration system in Zimbabwe. This choice of respondents was largely informed by the nature of the research questions.

### 3.6.5 Sampling frame

According to Babbie and Mouton (2013) a sampling frame is the actual list of sampling units from which the sample is selected. Sampling frame therefore is a list of the sampling units available for selection during the sampling process. In single case study sampling designs, the sampling frame is simply a list of the study population In this research, the sampling frame is the roaster kept by the Law Society of Zimbabwe of qualified, registered and practising lawyers in which a sample of seven legal practitioners and Judges were selected and who were able to answer the research questions that were pertinent to this research.

### 3.6.6 Data Sources

There are two types of data sources namely, primary and secondary. In this research, the researcher primary used both types of data.

**(a) Primary data**

This is data expressly collected for the purpose at hand. It is gathered directly from the elements of the population. Its advantage is that the exact information sought is obtained. Primary data on the effectiveness of the arbitration system was collected from practising legal practitioners, judges, arbitrators and administrative personal with a strong bias in labour law. The choice of this type of data was based on the fact that it was imperative to get first hand information from properly trained experts who are able to give an informed opinion on a technical subject such as the research question.

**(b) Secondary data**

Secondary data is data that is collected from records holding the primary data (Salant and Dillman, 1994). The main sources of secondary data for this study were textbooks, and various labour bulletins and websites. These sources of secondary data were useful in helping check the authenticity and relevance of data gathered, thus reducing bias in the process, oversimplification and unreliability associated with data gathering.

### 3.6.7 Questionnaires

A questionnaire is a list of carefully structured questions chosen after considerable testing, with a view to elicit reliable responses from a chosen sample. Questionnaires can be used to collect primary data. According to Salant and Dillman (1994) the use of questionnaires has the following advantages namely; anonymity, less expensive and possible to provide to a large number of people simultaneously. Questionnaires however have their own disadvantages namely; that the respondent may misread or misunderstand a question, the response rate may be very low if the respondents lack interest, the respondents may be interested in certain questions only. The researcher did not use questionnaires.

### 3.6.8 Interviews

Interviews are a popular method of collecting data in many researches. Instead of using questionnaires, face to face interviews can be carried out typically in a face to face encounter. AS de Vos, et al (2012, p 343) postulates that with interviewing, researchers obtain information through direct interchange with an individual or a group that is known or expected to possess the knowledge they seek (DePoy and Gilson, 2008, p108). According to Babbie and Mouton (2012, p 250) there are several advantages to having a questionnaire administered by an interviewer rather than the respondent. Interviews generally attract high response rates, respondents rarely turn down requests for an interview and the presence of the interviewer reduces the possibility of non responses in a questionnaire.

AS de Vos, et al (2012, p 343) identified challenges with interviews in qualitative research as including establishing rapport with the respondent in order to gain information, coping with unanticipated problems and rewards of interviewing in the

field as well as recording and managing the large volume of data generated by even relatively brief interviews (Morse, 1991, P 188).

In this research, the researcher employed unstructured interviews. An unstructured interview is defined as those organized around areas of particular interest whilst still allowing flexibility in scope and depth (Dicicco-Bloom and Crabtree, 2006, p 315). The one to one interviews were conducted with the aid of the researcher's prior knowledge in the industry and the researcher made use of an interview guide. According to Holstein and Gubrium (1995, p 76) a guide provide the researcher with a set of pre-determined questions that might be used as an appropriate instrument to engage the participant and designate the narrative terrain.

The researcher used open ended questions. According to Babbie and Mouton (2012, p 233) open ended questions must be coded before being analyzed. Babbie and Mouton (2012) held that, "This coding process often requires that the researcher interpret the meaning of responses, opening the possibility of misunderstanding and researcher bias.

### 3.8 Data analysis

There appears to be no standard format in data analysis in qualitative research (Neuman, 2006). The data obtained from the use of the interviews was coded by going through all the questions and establishing common themes, patterns and relationships. All the information gathered was analysed thoroughly against theory cited in the literature review and the appropriate inferences were made.

### 3.9 Conclusion

The research used predominately primary data. Secondary data was however collected and used in order to qualify observed trends in the primary data. In the next chapter, the researcher discusses and analyses the findings of the research.

# CHAPTER 4

## Results and Findings

### 4.0 Introduction

The purpose of this chapter is mainly to present the research findings from the one to one interviews that were carried out in Harare by the researcher. The researcher analyzed the results from these one to one interviews through the use of content analytic tables. The researcher adopted the approach of summarising the results from the interviews followed by an in-depth discussion of the responses and finally linking the results to the available body of knowledge discussed in the literature review.

### 4.1 Key Responses from the Respondents

The one to one interviews were carried out with twelve respondents. The respondents comprised of five practising legal practitioners in Harare with a strong bias in labour law, three arbitrators with a Human Resources background and working in the private sector in Harare, two Labour Court judges, a senior Labour Officer and an Assistant Registrar at the Labour Court. The five legal practitioners have been registered with the Law Society of Zimbabwe for more than fifteen years of which the majority of these years have been spent specializing in labour law. The arbitrators are employed in the private sector and each have a little over twenty years experience in the Human Resources field and have been registered arbitrators by the Ministry of Public Service, Labour and Social Welfare for the last twelve years. The Labour Court Judges interviewed are fairly new with just over two years experience in the Labour Court but were chosen as respondents because in their former life as legal practitioners, they specialized in labour law. The Senior Labour Officer and the Assistant Registrar of the Labour Court were chosen for their expertise in administrative handling of arbitration cases. The research questions which were used as a basis for the one to one interviews was conveniently divided into five sections namely, demographic, weaknesses of the current arbitration system, flooding of labour cases in the Labour Court, role of the Ministry of Public Service, Labour and Social Welfare.

### 4.1.1 Part A: Demographic Information

Table 4.1below summarises the demographic information of the respondents.

**Table 4.1 Demographic personal information of the respondents**

| Respondent | Age of Respondent | Professional Background | No of years in practice. | No of years in current position | Educational Background |
|---|---|---|---|---|---|
| Lawyer 1 | 40 - 45 | Legal | 19 | 14 | Degree |
| Lawyer 2 | 40 – 45 | Legal | 17 | 15 | Degree |
| Lawyer 3 | 25 - 30 | Legal | 6 | 3 | Degree |
| Lawyer 4 | 25 - 30 | Legal | 6 | 3 | Degree |
| Lawyer 5 | 25 - 30 | Legal | 3 | 3 | Masters |
| Arbitrator 1 | 50 – 55 | H.R | 30 | 12 | Masters |
| Arbitrator 2 | 40 - 45 | H.R | 25 | 15 | Masters |
| Arbitrator 3 | 40 – 45 | H.R | 12 | 13 | Degree |
| Judge 1 | 50 - 55 | Legal | 30 | 2 | Degree |
| Judge 2 | 40 - 45 | Legal | 24 | 2 | Degree |
| Labour Officer | 20 - 25 | Social Sciences | 3 | 2 | Degree |
| Assistant Register | 20 - 25 | Social Sciences | 2 | 2 | Diploma |

The demographic sections shows that the majority of the respondents are experienced labour practitioners having been in practice for an average of fifteen years. The respondents are specialist in labour law judging from the average period of seven years that they have been in their current positions. The respondents therefore satisfied the researcher because of the vast knowledge of the subject matter. From an administrative point of view, the responses from the Senior Labour Officer were key. The similarity in experience and field of expertise enabled the researchers to obtain valuable and rich information as these are the individuals who utilize the labour arbitration system more often than not and therefore are in a position to clearly articulate the current arbitration system.

### 4.2 Section B: Weaknesses of the Current Arbitration Structure

This section looks at the weaknesses inherent in the current labour arbitration system in Zimbabwe. The researcher was guided by the definition of arbitration given by Sklenyte (2003, p 6).

Table 4.2 below shows the responses given by the three respondents.

**Table 4.2 Control of the arbitration system by the Ministry of Public Service, Labour and Social Welfare**

| Respondent | Response |
|---|---|
| Lawyer 1 | Transfer either to the Ministry of Justice or Judicial Services Commission |
| Lawyer 2 | Justice Ministry or the Judicial Services Commission |
| Lawyer 3 | Ministry of Justice |
| Lawyer 4 | Ministry of Justice |
| Lawyer 5 | Process should run pararell with the ordinary courts. Ministry of Justice is therefore ideal |
| Arbitrator 1 | Current body which is Ministry of Public Service, Labour and Social Welfare is ideal |
| Arbitrator 2 | Ministry of Justice |
| Arbitrator 3 | Ministry of Justice |
| Judge 1 | Judicial Services Commission or the Justice Ministry |
| Judge 2 | Ministry of Justice |
| Labour Officer | Ministry of Public Service, Labour and Social Welfare is ideal |
| Assistant Registrar | Ministry of Public Service, Labour and Social Welfare is ideal |

Even though the arbitration system is fully entrenched in our law, it is under the direct control of the Ministry of Public Service, Labour and Social Welfare. 75% of the respondents are of the view that the Ministry of Public Service Labour and Social Welfare is not the ideal body to administer the labour arbitration system in Zimbabwe. The respondents cited the fact that labour arbitration by virtue of being a justice delivery system medium, should be controlled by a body with the requisite capabilities. The Ministry of Justice, Legal and Constitutional Affairs was given as an example of an institution with the necessary capabilities to administer the labour arbitration system. One arbitrator, the labour officer and the assistant registrar however felt that the Ministry of Public Service can still perform the role of administering the labour arbitration system but however conceded that the Ministry of Public Service has not done very well in administering the arbitration system and argued that what is needed is needed is to capacitate its functions rather than taking away the function. One practising legal practitioner concluded as follows;

*"For the simple reason that arbitration is a legal process itself, it should really be entrusted in the hands of institutions that deal directly with judicial matters which is*

*the Justice Ministry and the J.S.C. Unfortunately, the Ministry of Public Service is ill suited for the this role".*

All the respondents agreed that even though arbitration is a private arrangement, state institutions play a pivotal role as concluded by Chukwumerije (1994) in explaining the Hybrid theory in which he stated that in reality, an understanding of arbitration must acknowledge the interaction of both its consensual basis and the legitimacy and support conferred on the process by national legal systems. The study concluded that within the realm of labour arbitration, state apparatus play a pivotal role but however the Ministry of Public Service should not administer the system and rather it should be done by bodies with the necessary capacity such the Justice Ministry.

Table 4.3 summarises respondent's views on accessibility of the labour arbitration system.

**Table 4.3: Accessibility of the Arbitration System**

| Respondent | Response |
|---|---|
| Lawyer 1 | Arbitration system fully entrenched in our laws. |
| Lawyer 2 | Labour Act contains clear and specific procedures for parties to follow. |
| Lawyer 3 | Arbitration procedures exists in our law but doubts a clear understanding of the procedures by members of the public |
| Lawyer 4 | Arbitration procedures are employed to resolve labour disputes in our law |
| Lawyer 5 | Arbitration laws fully entrenched even though they need to be strengthened. |
| Arbitrator 1 | Arbitration readily accessible to the public |
| Arbitrator 2 | Readily accessible and utilized in most cases |
| Arbitrator 3 | Arbitration system procedures fully entrenched in our law and are the most utilized system to settle disputes. |
| Judge 1 | The Act contains clear arbitration procedures |
| Judge 2 | Readily accessible as anyone can make use of arbitration system to settle labour disputes |
| Labour Officer | Arbitration system fully available and easy to administer. |
| Assistant Registrar | Readily available to parties to a labour dispute. |

The responses in table 4.3 show that all the respondents acknowledged the existence of labour arbitration procedures in our Labour law. The respondents pointed to sections 93 and 98 of the Labour Act as the basis for the applicability of labour arbitration system in Zimbabwe and that most labour disputes are settled

through the arbitration system. 17% of the respondents however felt that even though arbitration procedures are fully entrenched in our law, they casted doubt on the ability of the public to understand the procedures thereby negatively impacting upon accessibility. As outlined in Chapter 1, the background information revealed that arbitration laws have become fully entrenched in our law. One lawyer aptly summed up the aspect of accessibility in our law when he stated that;

*"Our arbitration laws have undergone a significant facelift over the years, but none so more important than the enactment of section 93 and 98 in our Labour Act which compels labour officers to refer labour disputes for resolution through the arbitration system. The arbitration system cannot therefore be regarded as elitist as it can generally be accessed by anyone in the country. The procedures as outlined in the Act are so simple and easy to administer".*

The finding from the interviews is that arbitration system is readily accessible in our law. The finding resonates with the conclusion made by Maitireyi and Duve (2010, p145) who argued that an enabling legislation plays a significant part in making the arbitration system accessible. The enabling legislation in Zimbabwe is the Labour Act complimented by the provisions of the New York, UNICTRAL Rules and the Arbitration Act.

Table 4.4 summarises whether the arbitration procedures enshrined in our legislation enable quick and speedy resolution of disputes.

**Table 4.4 Speed within which labour disputes are settled**

| Respondent | Response |
|---|---|
| Lawyer 1 | Satisfied with the speed with which labour matters are disposed of by arbitrators. |
| Lawyer 2 | Procedures provides for speedy resolution of labour disputes. |
| Lawyer 3 | Process is speedy even though timeframes are not legislated. |
| Lawyer 4 | Matters are speedily resolved but timeframes must be known in advance. |
| Lawyer 5 | Generally happy with the speed with which matters are concluded. |
| Arbitrator 1 | Matters resolved quickly |
| Arbitrator 2 | Process provide for quick resolution of labour dispute through arbitrators. |
| Arbitrator 3 | Have no problems with the timeframes within which to conclude a matter |
| Judge 1 | Quick enough and within acceptable and reasonable time periods |
| Judge 2 | Happy with the quick resolution of labour matters even though time frames are not clearly specified. |

| | |
|---|---|
| Labour Officer | Very fast indeed |
| Assistant Registrar | It does not take time to resolve labour disputes through the arbitration system. |

All the respondents concurred that they are happy with the speed with which labour disputes are resolved within our arbitration system but 25% of the respondents argued that the procedures must however specify clear timelines which must be followed in order to resolve labour disputes within our arbitration framework. It can therefore be inferred from these findings that notwithstanding satisfaction with the speed within which disputes are resolved specific time frames must be known in advance for the benefit of the parties. One Judge had this to say regarding speed;

*"No doubt, speed is always a significant factor in the resolution of labour disputes and in our system we have seen arbitrators quickly disposing of labour matters but again you will always find that odd case that takes ages to conclude. You cannot blame the arbitrators as there are no specific timeline within which matters must be concluded".*

The finding from the research is that the stakeholders are satisfied with the time taken to conclude labour cases under arbitration which is somewhat surprising given that the Labour Act, the Model Law and the Arbitration Act do not contain specific provisions relating to time frames. The findings are contrary to the conclusion reached by Madhuku (2012, p 30) who bemoaned the absence of guidelines to the arbitration process and cited it as one reason why the arbitration system is limping. The findings are confirmation of the conclusion drawn by Tradeau (2002) that any system of dispute resolution should not be cumbersome and that it should allow for expeditious resolution of disputes by not lengthening the dispute resolution process. Specifically introducing timelines has the potential of complicating the arbitration system.

Table 4.5 below contains summarised responses regarding expertise and qualifications of arbitrators;

**Table 4.5 Expertise and Qualifications of Arbitrators**

| Respondent | Response |
|---|---|
| Lawyer 1 | Expertise is questionable. Recommend law degree as a minimum qualification. |
| Lawyer 2 | Grasp of basic labour concept is nonexistent and law degree should be a minimum qualification |

| | |
|---|---|
| Lawyer 3 | Judgments are suspect and the minimum qualification should be a law degree |
| Lawyer 4 | Always find arbitral awards amusing and recommends only lawyers to be arbitrators |
| Lawyer 5 | Satisfied with the competency of arbitrators. Any degree qualification is required save that every candidate must have basic grasp of labour issues |
| Arbitrator 1 | Arbitrators are competent. A minimum degree in any of the following fields.<br>-Law<br>-Human Resources<br>- Industrial Relations<br>- Psychology<br>- Social Work |
| Arbitrator 2 | Expertise is good. Minimum qualification should be Industrial Relations degree or a Law degree |
| Arbitrator 3 | Expertise is good. Human Resources as a minimum qualification. |
| Judge 1 | Finds arbitral awards pathetic. Only lawyers must be arbitrators |
| Judge 2 | Expertise is not encouraging. Law degree minimum qualification. |
| Labour Officer | Expertise of arbitrators still lagging behind. Law degree should be the minimum qualification. |
| Assistant Registrar | Arbitral awards most of the times very confusing. Advocates for lawyers only to be appointed arbitrators |

Undoubtedly, for the labour arbitration system to function effectively, arbitrators should have the necessary competency to handle labour disputes. 67% of the respondents agreed that the competency of current arbitrators was questionable as shown by their arbitral awards which were described as confusing, pathetic, amusing, suspect and questionable. 33% of the respondents were however satisfied with the levels of expertise shown by arbitrators in discharging their duties. The majority of the respondents concurred that the arbitrators must have relevant competency in the area of labour law and 67% highlighted that the minimum qualification should be a law degree. 33% argued that any other degree should be acceptable but half of them concurred that a law degree is an acceptable alternative. One lawyer stated that;

*"Arbitration is a judicial process which must be left in the hands of the lawyers. Arbitrators should have the necessary competency to dispense justice and therefore we cannot have a situation where somebody without a legal background purporting to sit as a judicial officer pronouncing judgements with far reaching consequences to the parties involved".*

The research findings confirms to the available body knowledge which according to Sklenytre, (2003, p 7) concluded that arbitrators to a dispute should be chosen according to a criteria that can be tailored to the particular dispute so as to ensure

that they possess the necessary expertise to understand and evaluate the matter at hand whilst Maitireyi and Duve (2010, p 146) held that the key feature of an arbitration system is the competency of the actors in the arbitration process. The current structure in terms of the Labour (Arbitration) Regulations which provides that arbitrators should have a minimum qualification of a university degree with a further two years experience in the human resources or industrial relations field should be revised. Labour dispute resolution is a judicial process which requires lawyers who have the necessary expertise to preside over arbitration matters.

Table 4.6 summarises the respondent's feelings regarding costs of arbitration.

**Table 4.6 Costs of arbitration**

| Respondent | Response |
|---|---|
| Lawyer 1 | Capping of fees at US$500 is not good as some matters are more complex than others |
| Lawyer 2 | The move to cap fees at US$ 500 was ill considered as cases differ depending on the circumstances |
| Lawyer 3 | US$ 500 is unsustainable |
| Lawyer 4 | Would rather decline appointments than to charge US$ 500 |
| Lawyer 5 | US$ 500 is unsustainable |
| Arbitrator 1 | The government need to revisit the regulations on fees payable pegged at an unreasonable limit of US$ 500. |
| Arbitrator 2 | An ill considered move to peg fees at US$ 500 |
| Arbitrator 3 | US$ 500 will kill the arbitration system |
| Judge 1 | Complexity of the case should determine fees payable |
| Judge 2 | No to capping of fees payable |
| Labour Officer | Figure is reasonable as there is need to protect the public |
| Assistant Registrar | Limit is fine to make the system more accessible to the majority of the public who utilize the system. |

The effectiveness of the labour arbitration system can also be determined by the number of people who access the system without the barrier of costs but this factor has to be balanced with the amount of fees that arbitrators should charge for services rendered. The majority of the respondents agreed that the move by the Ministry of Public Service, Labour and Social Welfare to gazette the fees at a limit of US$500 per case is not in the interests of the labour arbitration system and urged an urgent revision of the decision. The lawyers particularly argued that fees should be determined by the complexity of the case as well as time spent. 17% of the respondents felt that the capping of fees was justified in order to protect the public

from high tariffs charged for services rendered. One Lawyer summed it up for the other respondents who argued against the capping when he said that;

*"Market forces should simply determine the fees payable. The Ministry should take a cue from the Law Society of Zimbabwe and peg fees payable in accordance with the time and resources spent on a particular case".*

The research finding points to dissatisfaction with the cost structure of the current arbitration system. Whilst the cost limit imposed by law might suit parties to the dispute, effectiveness of the system might be hindered as very few arbitrators would be willing to handle cases where the reward is too low. The research findings resonates with Madhuku's conclusion (2012, p 39) that in terms of the Labour Act, the labour officer has discretion to determine the share of costs of arbitration to be borne by the parties and that discretion must be exercised having regard to equity. Indeed, arbitrators must be guided by the same equity in coming up with fees payable even in the absence of a tariff.

Table 4.7 summarises responses regarding the whole arbitration framework as given under section 93 and 98 of the Labour Act.

**Table 4.7: Arbitration Framework in the Labour Act (Chapter 28:01)**

| Respondent | Response |
|---|---|
| Lawyer 1 | • Compulsory arbitration is unnecessary<br>• Labour officer has no role to play in the determination of terms of reference<br>• Awards require registration at the High Court. |
| Lawyer 2 | • Parties should determine their terms of reference<br>• No distinction between compulsory arbitration and independent arbitration<br>• One cannot do much with an unregistered arbitral award |
| Lawyer 3 | • Distinction of compulsory and independent arbitration not healthy.<br>• Appointment of arbitrators procedure is hazy<br>• No powers to execute arbitral judgments<br>• No role for determination of terms by the labour officer |
| Lawyer 4 | • No distinction between independent arbitration and compulsory arbitration<br>• Who appoints arbitrators and based on what criterion<br>• Arbitral award cannot be enforced |
| Lawyer 5 | • Award cannot be executed, needs High Court intervention<br>• Appointment of arbitrators procedure is shaky<br>• Have never been able to differentiate between compulsory and independent arbitration |
| Arbitrator 1 | • Would rather prefer voluntary arbitration<br>• Parties must decide their terms of reference<br>• Arbitrators appointment is very clear<br>• Awards are meaningless at times |
| Arbitrator 2 | • Distinction between different types of arbitration must be done away with.<br>• Parties must decide terms of reference |

| | |
|---|---|
| | • Arbitral awards must be executable |
| Arbitrator 3 | • Disband distinction between compulsory and voluntary arbitration<br>• No problem with arbitrators appointment<br>• Arbitral awards must be executable<br>• Terms must be agreed upon by the parties |
| Judge 1 | • Arbitral awards must be executable<br>• Labour Officer should have no role to play<br>• Appointment of arbitrators needs strengthening |
| Judge 2 | • Appointment of arbitrators needs strengthening<br>• Arbitral awards must be executable<br>• Do away with labour officer determining terms of reference<br>• Do away with different types of arbitration |
| Labour Officer | • The system is efficient<br>• Unscrupulous lawyers denting the image of the system through malpractices |
| Assistant Registrar | • Nothing wrong with the system as it is currently structured |

The labour arbitration system should have a robust institutional and administrative framework in order for the system to function properly. The majority of the respondents agree that the legal framework as currently structured under section 93 and 98 of the Labour Act has structural deficiencies and hence is not sufficient for the smooth running of an arbitration system.

75% of the respondents agreed that labour officers should have no role to play in the determination of the arbitrator's terms of reference as such task should be the responsibility of the parties to the dispute whilst 25% agreed that it is necessary. The study finding resonates with the conclusion by Hill (1988) who argued that arbitration should really be seen as a private mechanism for resolution of disputes in general. The parties understand the nature of their dispute other than an outsider.

75% of the respondents were against the distinction already developed in our labour jurisprudence between voluntary arbitration and compulsory arbitration and indicated that voluntary arbitration is preferable. 25% of the respondents would still stick with the distinction currently existing. The Labour Act draws such a distinction but whilst it does not allow an appeal from a voluntary arbitration process, it allows an appeal from compulsory arbitration process hence the respondents feeling that the distinction must be done away with.

67% of the respondents generally agreed the list of arbitrators supposedly prepared and kept by the Minister of Public Service, Labour and Social Welfare is shrouded in secrecy. 33% of the respondents agreed that the selection process is transparent as anyone willing to be appointed as such is free to apply to the Minister for appointment. One lawyer aptly captured the mood of the respondents not in favour

of the existing legal framework under section 93 and 98 of the Labour Act by stating that;

*"The legal framework is worrisome. We appreciate that the Labour Act was crafted as a compromise document after independence and has undergone major amendment since then. However, I wonder why section 93 and 98 has come this far without major amendments as it seems to be the basis of our troubles with the arbitration system.*

The research findings from the study is that the framework as contained under section 93 and 98 is weak and confirms the study by Maitireyi and Duve (2010, 146) that it is the judiciousness of a decision that determines whether the parties accept the arbitral award and therefore any appeal against an arbitral award is directly related to their perception of its judiciousness.

Table 4.8 summarises the additional institutional framework required.

**Table 4.8 Additional Institutional Framework**

| Respondent | Response |
|---|---|
| Lawyer 1 | Establishment of a registry to accept all arbitration processes, establishment of rules of procedure, confidentiality, ethical considerations |
| Lawyer 2 | Rules of procedure, confidentiality of proceedings, registry to regulate process , ethics |
| Lawyer 3 | Establishment of rules just like the Magistrates, Labour Court, High Court and Supreme Court Rules, ethics confidentiality to the process, registry is important |
| Lawyer 4 | Registry department, rules of procedure |
| Lawyer 5 | Rules of procedure and registry |
| Arbitrator 1 | Confidentiality of process, rules of procedure, registry |
| Arbitrator 2 | Registry, Rules of procedure and confidentiality |
| Arbitrator 3 | Procedural rules, registry and confidentiality provisions |
| Judge 1 | Registry to administer movement of process and rules of procedure to bring more clarity |
| Judge 2 | Establishment of a registry to accept all arbitration processes just like what lawyers do, establishment of rules of procedure, confidentiality, ethics for stakeholders |
| Labour Officer | Ethical standards to curb corruption, confidentiality |
| Assistant Registrar | Rules of procedure and confidentiality of proceedings |

From the responses gathered, the additional framework was coded into four different themes namely, registry system, confidentiality, rules of procedure and ethics.

The responses in Table 4.8 show that 83% of the respondents were in agreement that a registry system was required. Lack of rules of procedure was wrecking havoc with the arbitration system and thereby negatively affecting uniformity and ultimately leading to appeals. 17% of the respondents were quite comfortable with the absence of a registry system. Similar to conciliation, Madhuku (2012, p 30) cited absence of prescribed rules regarding service which requires a registry system for it to function properly.

The responses also reveal that 62% of the respondents cited confidentiality of proceedings as one of the pillars of the arbitration framework. Frederic Bachand (2011) concluded that the principle of publicizing decisions, which is generally the rule of the courts of law, is not applied in arbitration and more often than not, parties to the dispute always agree to keep confidential any information about the arbitration process.

58% of the respondents were not convinced that ethical considerations could be said to be a pillar of the arbitration system.

97% of the respondents agreed that rules of procedure were a necessity if the arbitration system was to be effective. Madhuku (2012, p 30) in discussing conciliation process cited absence of prescribed rules of procedure as hampering the conciliation process and the same can also apply to the arbitration system. One Judge concluded that;

*"If the Magistrates Court, Labour Court, High Court and Supreme Court all have rules, then there is absolutely no reason why arbitration system should not have its own rules and procedure to make the system more robust. Linked to the rules is the need for a fully fledged registry system which should also guarantee confidentiality to both parties".*

The study finding is that the arbitration system requires additional framework for it to function properly and prevent appeals clogging the labour court.

**Section C: Flooding of Arbitral Appeals in the Labour Court**

This section looks at the reason why the Labour Court is always flooded with appeals from labour arbitration processes yet the labour arbitration system is supposed to provide finality and avoid formal adjudicatory courts.

Table 4.9 below summarizes responses as to why the Labour Court is always flooded with appeals;

**Table 4.9 Flooding of Appeals in the Labour Court**

| Respondent | Response |
|---|---|
| Lawyer 1 | • The Judges do not quite understand the concept of a "Question of Law"<br>• 89 (1) of the Labour Act which is misconstrued by the Judges<br>• Judges erroneously think that section 89 (6) grants the Labour Court exclusive jurisdiction on any matter brought before it.<br>• There is no thorough analysis to see if an appeal raises a question of law.<br>• Judges forget that the whole essence of arbitration is finality. |
| Lawyer 2 | • The concept of the 'Question of law" itself is confusing.<br>• Labour Court Judges shy away from being asked to justify why anyone appeal can be turned down on the basis that it does not raise a question of law.<br>• Section 89 (1) is also problematic |
| Lawyer 3 | • The concept of question of law is not clear and Labour Court judges shy away from explaining why an appeal can be turned down on the basis of it not raising a question of law. |
| Lawyer 4 | • Question of law hazy<br>• Section 98 (1) is too cluttered<br>• Labour Court has no exclusive jurisdiction to hear any matter |
| Lawyer 5 | • Judges think that section 89 (6) grants the Labour Court exclusive jurisdiction on any matter brought before it.<br>• There is no thorough analysis to see if an appeal raises a question of law or not.<br>• The essence of arbitration is finality. |
| Arbitrator 1 | • Question of law is hazy<br>• Propensity to appeal<br>• Section 98 (1) is hazy |
| Arbitrator 2 | • Question of law is where the problem is<br>• Labour court should not entertain any application they must determine what to hear and what not to hear.<br>• Propensity to appeal |
| Arbitrator 3 | • Propensity to appeal<br>• Question of law is not clear |
| Judge 1 | • Biased arbitral awards |
| Judge 2 | • Biased arbitral awards and simplistic question of law concept |
| Labour Officer | • Propensity to appeal, question of law |
| Assistant Registrar | • Absence of monetary values to lodge an appeal<br>• Question of law is too simplistic |

The responses were coded in three different themes namely, question of law concept, section 89 (1) of the Labour Act and propensity to appeal.

To avoid frivolous and vexatious appeals, the law must clearly lay out the basis of an appeal. 84% of the respondents concurred that the Labour Act itself left the concept a

"question of law" a bit vague by failing to explain what it is in its definitions. Resultantly, Labour Court judges appear to have no appreciation of the concept and more often than not, accept appeals from arbitral processes in an effort to shy away from being asked to justify why an appeal can be turned down on the basis of not raising a question of law.

58% of the respondents however contend that the failure to understand the "question of law" concept has its roots in the provisions of section 89 (1) which purport to give the Labour Court exclusive jurisdiction to hear and determine all matters and it is the Judges themselves who created this unnecessary controversy. Madhuku (2012, p 27) concluded that Labour Court judges do not seem to understand the implications of hearing frivolous appeals brought under the guise of a "question of law' and he concluded that the court needs to develop a jurisprudence similar to that of ordinary courts with a view to ensuring more finality of arbitral awards in compulsory arbitration. One lawyer had this to say during the interview;

*"The genesis of the failure by the Judges to understand the concept of "question of law" can be traced back to the provisions of section 89 (1) which Judges misconstrue as giving them jurisdiction to entertain any matter in terms of the Labour Act or any other enactment. The implication is that any appeal to the Labour Court would constitute "any matter" referred to it and therefore there is no need to ascertain whether the appeal raises a question of law or not".*

The study finding that the Labour Court is flooded with appeals resonates with the studies done by Madhuku (2012) who contended that there have been more appeals than warranted and the Labour Court itself has allowed a situation where they accept these appeals without really determining whether they raise a "question of law". According to Maitireyi and Duve (2010, p 142), the Labour Court itself left the "question of law' concept hanging in the air.

Table 4.10 summarises the factors motivating appeals to the Labour Court.

**Table 4.10 Factors motivating appeals to the Labour Court.**

| Respondent | Response |
|---|---|
| Lawyer 1 | • No confidence in arbitral awards.<br>• Delay proceedings<br>• Genuine desire to appeal against an unjust award. |

| | |
|---|---|
| Lawyer 2 | • Biased and unsound awards.<br>• Corruption.<br>• Delay. |
| Lawyer 3 | • Biased and unsound awards.<br>• Corruption.<br>• Delay. |
| Lawyer 4 | • Biased and unbalanced arbitral awards.<br>• Corruption.<br>• Delaying proceedings |
| Lawyer 5 | • Biased and unsound awards.<br>• Corruption.<br>• Delay. |
| Arbitrator 1 | • Genuine desire to have justice.<br>• Delay the case.<br>• Parties are simply litigious. |
| Arbitrator 2 | • Propensity to appeal<br>• Delay the case. |
| Arbitrator 3 | • Propensity to appeal<br>• Delay process |
| Judge 1 | • Biased arbitral awards<br>• Propensity to appeal<br>• Delay cases |
| Judge 2 | • Biased and unbalanced awards<br>• Litigious parties |
| Labour Officer | • Propensity to appeal<br>• Delay proceedings |
| Assistant Registrar | • Propensity to appeal<br>• Delay proceedings |

There are various reasons as to why litigants launch appeal especially to the labour court from arbitral processes. 58% of the respondents reckons the major reasons why the courts are flooded by appeals is due biased and unsound judgments coming out of the arbitration proceeding. This finding resonates with the study findings in qualification of arbitrators.

92% of the respondents however also feel that the appeals to the labour court are just down to parties simply wanting to delay the process and hence appeals are instituted just to delay the process of finality. The parties simply have a propensity to appeal which clogs the appeals process.

33% of the respondents however felt that at times the appeals are instituted in good faith for the purpose of seeking justice. One Judge had this to say about the factors motivating appeals to the Labour Court;

*“In my experience as a lawyer and being a Judge at the same time and having interacted with clients on both sides, there are several factors which motivates an*

*appeal but judging from the number of appeals to the Labour Court from arbitration proceedings one cannot help but notice the trend that appeals are mostly motivated by biased and shallow arbitral awards as well as the need to delay the inevitable for as long as it is necessary"*

The study findings confirms the study by Bishop and Reed (1998) who concluded that an arbitrator should be disinterested and neutral to the dispute at hand to be able to render a balanced award. The arbitrators should be able to grasp salient issues more quickly than judges and should not end at merely being reasonable but should further satisfy the requirement of fairness (Maitireyi and Duve, 2010). In that case, appeals to the Labour Court would be less.

**Section D: Role of the Ministry of Public Service Labour and Social Welfare**

This section looks at the role of the Ministry of Public Service, Labour and Social Welfare to ascertain whether its participation in the labour arbitration system promotes the effectiveness of the labour arbitration system.

Table 4.11 summarises responses relating to the registration of arbitrators in Zimbabwe.

**Table 4.11 Registration of arbitrators**

| Respondent | Response |
|---|---|
| Lawyer 1 | Ministry of Public Service is ill suited to perform this task. |
| Lawyer 2 | Justice Ministry |
| Lawyer 3 | Ministry of Public Service is not doing a job |
| Lawyer 4 | Ministry of Public Service, Labour and Social Welfare is ill suited to perform this task. |
| Lawyer 5 | No to the public service |
| Arbitrator 1 | No problem with the Public Service |
| Arbitrator 2 | Public Service is still the ideal body |
| Arbitrator 3 | No problem with the Public Service Ministry |
| Judge 1 | Problems with the system emanate from the registration of arbitrators by the Ministry of Public Service |
| Judge 2 | Ministry of Public Service ill suited |
| Labour Officer | Ministry of Public Service not ideal |
| Assistant Registrar | Ministry of Public Service, Labour and Social Welfare is ill suited to perform this task. |

For the arbitration system to effectively function, it should be administered by a suitable body. 75% of the respondents interviewed are simply not in favour of maintaining the status quo of having the Ministry of Public Service selecting and registering arbitrators. The Judges felt that the ministry has no capabilities to select and register arbitrators. 25% of the respondent who were all arbitrators maintained that the current scenario was watertight and advocated maintaining the status quo. One lawyer was even blunt in his assessment of the current scenario when he said that;

*"Let's be honest with ourselves. The mere fact that you might have read a lot of law textbooks does not make one a lawyer. The fact that one gets to understand key legal concepts through the study of industrial relations does not make one a lawyer and therefore legal issues must be left to the lawyers. The Ministry of Public Service must not have a role to play in the labour arbitration system. The Justice Ministry must take its rightful position to select and register arbitrators".*

The study results does conform to the study done by Madhuku (2012, p 38) who concluded that it is not uncommon to find some arbitrators on the panel making frequent visits to the Ministry of Public Service, Labour and Social Welfare to "campaign" for allocations which is an indication that they are failing to manage the process.

**Question 2:** Table 4.12 below summarises the idea body to undertake registrations;

**Table 4.12 Ideal body to register arbitrators**

| Respondent | Response |
|---|---|
| Lawyer 1 | • Ministry of Justice, the J.S.C, and the Law Society of Zimbabwe. My preference would be the Ministry of Justice. |
| Lawyer 2 | • Ministry of Justice |
| Lawyer 3 | • Justice Ministry |
| Lawyer 4 | • Justice Ministry or Law Society of Zimbabwe |
| Lawyer 5 | • Ministry of Justice |
| Arbitrator 1 | • Public Service is still ideal but if you insists, Ministry of Justice is ideal |
| Arbitrator 2 | • No problem with Public Service but Ministry of Justice can be ideal |
| Arbitrator 3 | • Public Service is still ideal |
| Judge 1 | • Ministry of Justice |
| Judge 2 | • Ministry of Justice |

| | |
|---|---|
| Labour Officer | • Ministry of Justice |
| Assistant Registrar | • Ministry of Justice |

75% of the respondents save for the arbitrators agreed that the Ministry of Public Service is not the ideal body to register the arbitrators ostensibly because of their lack of knowledge of the legal industry and that the Ministry of Justice was better equipped to handle the registration process. They also argued that because they employ quite a large pool of professionals with a legal background, they have the capacity to recruit the best arbitrators unlike the Public Service, Labour and Social Welfare Ministry. One lawyer commented as follows;

*"There is no doubt that the Ministry of Justice should be the body to register all arbitrators in Zimbabwe".*

**Section E: Role of the respective parties in enhancing the effectiveness of the labour arbitration system.**

This section looks at the role of the respective parties to the labour disputes and in particular whether their conduct when a dispute arises enhances the effectiveness of the system.

Table 4.13 below summarizes responses relating to appeals lodged at the Labour court.

**Table 4.13 Appeals to the Labour Court at the instigation of the parties.**

| Respondent | Response |
|---|---|
| Lawyer 1 | • In almost all the cases |
| Lawyer 2 | • In all cases but one has to refuse such cases |
| Lawyer 3 | • Sometimes yes |
| Lawyer 4 | • All the times |
| Lawyer 5 | • In almost all appeals handled |
| Arbitrator 1 | • I'm reliably informed that appeals are just lodged without looking at the prospects of success |
| Arbitrator 2 | • No comments |
| Arbitrator 3 | • I hear litigants just lodge appeals for the sake of lodging appeals. |
| Judge 1 | • In my life as a lawyer it used to happen all the times |
| Judge 2 | • In almost every case I guess |

| | |
|---|---|
| Labour Officer | • No comment |
| Assistant Registrar | • No comments |

All the lawyers interviewed concurred that the parties more often than not brings the labour arbitration system into disrepute by insisting on appealing to the Labour Court even in cases where there are no prospects of success. The Judges indicated it was the case during time they practised law while an arbitrator indicated that he is reliably informed by his colleagues that the practice is rife in the arbitration system where appeals are merely launched even where the prospects of success on appeal are none existent. The respondents agreed that the proper thing to do is to be ethical and refuse to take up such assignments. One lawyer stated that;

*"You get a client who loses at arbitration and comes to you and say he wants to lodge an appeal to the Labour Court. You look at the file and realise that the prospects of success are nonexistent but the client insist that the appeal be lodged. Many lawyers have fallen victims to that but one needs to be ethical and avoid putting the arbitration system into disrepute and refuse such instructions"*

The research finding is that in most cases, it is the parties to the dispute who bring the arbitration system into disrepute through frivolous and vexatious appeals with no prospects of success.

### 4.4 Summary of Findings

**Weaknesses of the current labour arbitration system.**

The success of any labour arbitration system hinges upon an efficient institutional and administrative framework. The responses showed that the current labour arbitration system is fraught with serious institutional and administrative deficiencies. Ministry of Public Service is ill suited to administer the arbitration system. In arbitration, it is the judiciousness of a decision that determines whether the parties accept the arbitral award and therefore any appeal against an arbitral award is directly related to their perception of its judiciousness. The responses showed that even though attributes of an efficient arbitration system are present these are not institutionalized to ensure an efficient system.

### Flooding of Arbitration Appeals at the Labour Court

The mainstream judiciary system in Zimbabwe continues to be clogged with appeals from arbitration system. The responses shows that Labour Court judges do not seem to understand the implications of hearing frivolous appeals brought under the guise of a “question of law’ and that the court needs to develop a jurisprudence similar to that of ordinary courts with a view to ensuring more finality of arbitral awards in compulsory arbitration. The responses further showed that Labour Court judges misconstrue the requirement to determine and hear all matters referred to it as giving them exclusive jurisdiction to entertain all matters hence there is no analysis of whether any appeal raises a question of law or not. The responses also showed that amongst the factors contributing to the flooding of appeals are biased decisions coming from arbitrators.

### Role of the Ministry of Public Service, Labour and Social Welfare

Registration of arbitrators should be performed by an institution with the necessary capabilities. The results show that the Ministry of Public Service, Labour and Social Welfare does not have the necessary requisite skills to undertake registration of arbitrators.

### Role of the respective parties to the labour dispute

The results show that the arbitration system is being brought into disrepute by parties to the labour disputes as they usually put pressure on their legal practitioners to launch appeals in situations where are no absolutely no prospects of succeeding. This is mainly done to delay proceedings as much as possible.

## 4.5 Conclusion

The chapter presented the research findings and a discussion of the findings as well their link to literature read.

# CHAPTER 5

## Conclusions and Recommendations

### 5.1 Introduction

In this chapter the researcher draws inferences and conclusions of the research using the information obtained from the findings discussed in the previous chapter. This chapter is important in that it reflects the extent to which this dissertation achieved the objectives and aims set at the beginning. Recommendations and areas of further study will also be given in this chapter.

### 5.2 Conclusions

The conclusion drawn from this study is that the labour arbitration system in Zimbabwe is not effective as evidenced by the following conclusions from the research objectives.

#### 5.2.1 Weaknesses of the arbitration system

The findings in chapter four are a clear indication that the labour arbitration system as currently structured is fraught with structural and administrative weaknesses thereby negatively impacting upon the justice delivery system in particular by unnecessarily clogging the Labour Court with matters that should ordinarily have been settled at arbitration.

**(A)** Control of the labour arbitration system by the Ministry of Public Service Labour and Social Welfare.

The research concluded that the labour arbitration system must not be administered by the Ministry of Public Service Labour and Social Welfare as it does not have the requisite capabilities required to administer judicial dispensing systems such as the labour arbitration system. The chaotic manner in which the system is being administered has resulted in parties losing confidence in the process hence the ever increasing appeals to the Labour Court that are clogging the system. The research findings concluded that the Ministry of Justice, Legal and Constitutional Affairs is well positioned to undertake that role.

**(B)** Attributes of an efficient arbitration system.

I. Accessibility

The study research concluded that labour arbitration system is well entrenched in our labour law and the system is being utilized by members of the public to settle labour disputes. The laws in our Labour Act are well supported by the provisions of international instruments such as the New York Convention and UNICTRAL Rules.

II. Speed

The research concluded that in terms of disposing of matters that come for arbitration, the system is working well even in the absence of rules of procedure.

III. Expertise.

For a labour arbitration system to deliver, the arbitrators themselves need to have expertise in the field of labour. The study research concluded that the current set of arbitrators lack the required expertise to administer the system as shown by the poor quality of arbitral awards they render as well as the number of appeals to the Labour Court.

IV. Cost of arbitration

Arbitration fees to be paid to arbitrators are capped at a maximum amount of US$ 500 in the Labour (Arbitration) Regulations. The research concluded that this capping of fees is unsustainable as the amount of work each arbitrator does is determined by the complexity of the case at hand.

The net effect of these negative findings is loss of confidence by the public in the arbitration process leading to unnecessary appeals to the Labour Court.

### 5.2.2 Flooding of arbitral awards in the Labour Court

The research findings in chapter 4 are a clear indication that the main reason why the Labour Court is flooded with appeals also has its roots in the misconstruing of the provisions of the Labour Act wherein Labour Court Judges assume that the Act gives them absolute powers to determine any case brought before them. This is a fallacy.

The research study also concluded that the concept of the “question of law” is hazy which has resulted in the Labour Court accepting appeals lodged with it. If Judges are mandated to scrutinize all appeals to the Labour Court, many of them will fail the “question of law” test thus reducing the number of appeals to the Labour Court.

### 5.2.3 Role of the Ministry of Public Service, Labour and Social Welfare

The research concludes that selection and registration of arbitrators must not be undertaken by the Ministry of Public Service, Labour and Social Welfare as they do not have the capability to select capable arbitrators and the role is better suited to be played by the Ministry of Justice, Legal and Constitutional Affairs. The research concluded that the registration of arbitrators is riddled with corruption due to the absence of a clear process of their appointment which negatively impacts the labour arbitration system. The system of labour arbitration should allow a situation where a rigorous registration system where interviews are administered by experienced and qualified lawyers would be appointed as arbitrators which reduce the risk of low confidence in the system.

### 5.2.4 Role of the parties in ensuring an efficient labour arbitration system

The research concluded that the labour arbitration system is also being compromised by the respective parties to the dispute because of their propensity to appeal without really ascertaining whether they have prospects of success during the appeals process. Legislation around defining what constitutes an appeal based on a “question of law” should be tightened to ensure that the parties simply do not lodge appeals even in situations which do not warrant appeals thereby reducing the risk of appeals clogging the Labour Court.

## 5.3 Recommendations

In view of the findings cited above, this study makes the following recommendations to revamp the labour arbitration system in Zimbabwe.

(a) The Government urgently needs to transfer the administration of the labour arbitration system from the Ministry of Public Service, Labour and Social Welfare to the Ministry of Justice, Legal and Constitutional Affairs which has the necessary capabilities to administer such a system. The Ministry of Justice is in a

position to appreciate better the structural challenges the arbitration system is facing more than the Public Service Ministry.

(b) There is need for the government to craft an admission criterion for arbitrators that should ensure that only arbitrators with a legal background are admitted on to the list of arbitrators who are able to handle cases when disputes arise at the workplace. This will ensure that only arbitrators with a sound knowledge of the law act as quasi judges in labour issues thereby increasing confidence of the parties in the system since an effective arbitration must be underpinned by expertise from the arbitrators.

(c) The Government should take immediate steps and amend the Arbitration Regulations promulgated in 2012 in respect of arbitration fees payable as most experienced arbitrators are likely to shun handling cases because of the arbitrary fees imposed. The government should instead come up with a tariff to be used by arbitrators when charging for work done on a particular case and the tariff must allow for taxation of any such bill to ensure that members of the public are not unfairly prejudiced.

(d) There is need for the government to ensure that they craft rigorous rules of procedure to be adopted in arbitration proceedings. The rules of procedures should be modelled along the same lines as the Magistrates, Labour, High Court and the Supreme Court rules.

(e) The government should move in quickly and amend the Labour Act to remove the apparent reference to compulsory arbitration and simply refer it as voluntary arbitration as the reference to compulsory arbitration was creating an unnecessary confusion between compulsory arbitration and voluntary arbitration. In essence, the labour arbitration system should simply be held under voluntary arbitration which does not allow appeals.

(f) The government need to establish a separate registry system to be utilized in arbitration proceedings just like the registries that administer the Magistrate's court, Labour court, High court and the Supreme Court. The registry system reduces the risk of process failing to find its way to its intended recipient and also

coordinates the movement of arbitrators' thereby increasing confidence in the system.

(g) The Labour Act should be amended to repeal the requirement of appealing based on a "question of law' because it seems there is no clear understanding as to what the concept entails. Instead, the legislation must bar any appeal from a process of voluntary arbitration as recommended above.

If these recommendations are implemented, the new structure will guarantee continuity, professionalism and reduce the risk of clogging the Labour Court with appeals from the labour arbitration system thereby improving productivity at the workplace.

**5.4 Study Limitations and areas for further research**

The major time limitation in this research was the time limited frame within the researcher had to conduct the research. In addition, the researcher faced difficulties in obtaining information from some other respondents that had been identified for the research. The researcher intended to interview five arbitrators but two pulled out of the interview due to other pressing commitments. The researcher also wanted to interview the permanent secretaries in the Ministry of Justice and Public Service but could not secure appointments.

The research was a single case study which focused on the arbitration system as a single unit. The results maybe inconclusive since more inferences could be drawn by looking at other similar dispute resolution mechanisms such mediation, negotiation and conciliation which are available in Zimbabwe which also influence the clogging of the appeals process at the Labour Court. There is very limited literature in this area and the reasons why the arbitration system is not effective might not be exhaustive hence this study can be used as a basis for further research.

**INTERVIEW GUIDED QUESTIONS**

My name is Norman Fungai Chanaka and I'm studying for a Masters Degree in Business Administration at the University of Zimbabwe. I'm conducting a study on the effectiveness of the current labour arbitration system in Zimbabwe and would be grateful if you could take your time to answer the questions I have on the stated subject matter. I specifically chose you because of your experience and knowledge of the subject matter. Your input would be of use to the University of Zimbabwe, policy makers in Government and stakeholders in the legal industry. All information and data obtained from you will be treated as strictly confidentiality.

**SECTION "A" DEMOGRAPHICS**

1. Can you possibly state your age category?

   20 – 30  30 – 40  40 – 50  50 – 60  60 and above.

2. What is the name of the firm or organization you work for?

   .....

3. What position do you hold in this organization?

   .....

4. I would be grateful to know your professional background?

   .....

5. How long have you been in industry?

   .....

6. How long have you been in your current position?

   .....

**SECTION "B": WEAKNESSES OF THE CURRENT ARBITRATION SYSTEM**

1. Should the labour arbitration system by controlled by the Ministry of Public Service, Labour and Social Welfare?

   .....

   .....

   .....

   .....

2. Do you think the arbitration system is accessible to the majority of the citizen in the country?

   .....

   .....

3. How satisfied are you with the speed within which arbitration cases are being concluded by arbitrators?

   .....

   .....

   .....

4. What is your view regarding expertise of the current arbitrators and what minimum qualifications should arbitrators possess?

   .....

   .....

5. What do you think of the recent capping of arbitration fees and its impact on the effectiveness of the system?

   .....

   .....

   .....

6. Having regard to the arbitration legal framework under section 98 of the Labour Act, would you say the framework is sufficient for the smooth operation of the labour arbitration system in Zimbabwe?

   .....

   .....

   .....

7. In your view, apart from the obvious weaknesses you have pointed out in the existing framework, what additional institutional framework would you like to see added on?

.....

.....

.....

**SECTION "C": FLOODING OF THE LABOUR COURT WITH APPEALS FROM ARBITRATION**

1. Section 98 (10) of the Labour Act allows an appeal from arbitration processes only on a "question of law" which implies that the Labour Court is supposed to dismiss appeals which do not meet this criterion. What do you think of this provision vis-a-vis smooth operation of the arbitration system?

   .....

   .....

   .....

   .....

   .....

2. What factors really motivates parties to disputes to appeal to the Labour Court every other arbitral award?

   .....

   .....

   .....

**SECTION "D" ROLE OF THE MINISTRY OF PUBLIC SERVICE LABOUR AND SOCIAL WELFARE**

1. The Act simply provides that the Minister of Public Service shall keep a register of arbitrators on a panel. Do you think this scenario advances the effectiveness of the arbitration system?

   .....

   .....

   .....

2. If the Ministry of Public Service is ill suited to register arbitrator, who should carry out that task?

   .....

   .....

   .....

**SECTION “E” ROLE OF THE RESPECTIVE PARTIES TO THE LABOUR DISPUTE**

1. Have you ever been pressured by the parties to appeal to the Labour Court even on a matter where you feel, there are no reasonable prospects of success at the Labour Court?

   .....

   .....

   .....

**CONCLUSION**

1. Apart from what we have discussed, is there anything else that you would want to share with me which you think might be useful to my research?

   .....

   .....

   .....

***End of Questionnaire.***

***Thank you for your time and may God bless you.***

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