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Abstract
This article reflect on the extent to which contract of employment, legislative provisions and collective bargaining assist in protecting employees in the modern labour relations. Contract of employment has traditionally been known as a vital document holistically regulating the symbiotic employer-employee relationship. However, its common law perspective perpetuates inequalities as it fails to accommodate and resolve the inequalities of bargaining power between these parties. It also regards the parties as master (employer) and servant (employee). It is aloof to collective regulation of the employment relationship, meaning that it does not embrace collective bargaining. It was against this backdrop that countries including South Africa, promulgated laws entrenching protection of workers’ labour rights. Thus, the statutory provisions are a workable framework in protecting employees as rights to associate and bargain freely got entrenched. These trends have alienated a huge net of workers from statutory protection. Because, the modern standard model of employment is of inherent variability, it is high time that our legislative authorities, courts and competent tribunals innovate effective responses towards expanding labour legislative boundaries to benefit those in desperate need. This is achievable through strategic interpretation of the Constitution to augment its transformative ideals of advancing social justice.

Keywords: contract of employment, employee, employment relationship, informalization, exploitation.

Introduction
Work has changed and is continuously changing for both better and worse.1 Whereas, this has created options for employees, it has correspondingly put numerous employees under a workplace pressure while others also got displaced into more precarious and less-rewarded jobs.2 The central subject of this article is to reflect on the meaningful role played by a contract of employment and statutory provisions in drawing a distinctive line between work which is or should fall within the ambit of labour protective legislation. These (labour) statutory provisions gave effect to amongst others, the right to collective bargaining in South Africa’s pot-1994 democratic dispensation under the constitutional supremacy. The right to collective bargaining is recognized as being amongst the fundamental labour rights in contemporary labour relations. Hence, it is essential to study the interplay with regards to the impact of employment contract, statutory provisions and collective bargaining in protecting workers considerate of the dominant trends of employment.

The contemporary national and international developments in labour relations have notably evinced that, a contract of employment should be subjected to constant dialogue considerate of addressing challenges faced by workers. This is particularly essential with regards to studying its significance in fundamentally determining the nature and the extent of labour protection in employment relationships. The world community have adopted a firm stance on contracts of employment aimed at fostering the protection of parties, particularly employees, for equal bargaining power in the workplace. Today, many countries have promulgated legislation regulating employment relationships,3 and also conferring rights and duties of parties in an employment relationship. Yet, the modern employment relationship is styled on common law which provides protection against unlawfulness, and of course labour legislation that protects against unfairness.4 This suggests that a contract of employment has been made to be central to labour legislative protection. The notion of collective bargaining is also a significant aspect in contract of employment. It embraces an ideology of democratic governance in the workplace, wherein matters of common interests are resolved in a manner, not necessarily favourable to all, but agreed by all the parties. Therefore, central to the notions of employment contract and collective bargaining remain the issue of labour law provisions. These

2 Ibid.
statutory provisions are significant tools that strive to foster a sound labour relations and guide largely on how labour relations should be in the protection of workers’ rights.

For many decades, contract of employment have been premised on common law principle of locatio conductio operarum, recognising the employer as the master and an employee, as a servant. Common law provides less protection to employees as it does not acknowledge the inequalities of bargaining power between these parties. It frowns and is hostile to collective regulation of the employment relationship. It was against this background that South Africa and other worldwide countries such as Namibia, promulgated laws aimed at regulating modern employment relationships to protect employees against arbitrariness in the workplace.

This article focuses on the current labour law developments, particularly with regards to the efforts of working towards achieving the protection of workers labour rights that aim to aid the decent job agenda. The paper seeks to establish the manifested need to regulating the relationships between employers and employees through statutory enactments. These are geared towards protecting employees and providing mechanisms for joint and collective consultations between employer and employee. The paper also provides comparative examples using South Africa’s recent developments on contracts of employment and regulation of employment relationships. It uses Namibia and Zimbabwe as comparative examples with regards to these aspects. The rationale being that Namibia is amongst the countries that have noted a firm and robust stance in the protection of workers and regulation of the labour market. Namibia has also been under the administration of South Africa from 1915 to 1990, and a notable portion of its labour legislation is predominantly borrowed and bent from South Africa. On the other hand, Zimbabwe’s labour market and labour laws developments have largely been influenced by South Africa. Hence, this article will also establish Zimbabwean perspective on contracts of employment in the wake of global industrial revolution and the country’s noted state of economic challenges. This critical section of our labour relations will notably be highlighted through both, the developing labour legislation and respective jurisprudential experiences. What ascertains the strengths and weaknesses of these labour relation initiatives will be seen in the light of their roles in the modern employment relationships.

**Overview**

The common law’s typical disregard of workplace inequalities has led to a vast development of labour laws in the world, geared towards guaranteeing employee protection. This resulted in countries, from the industrial revolution to date, promulgating legislation to curb employers’ unlimited powers and the resultant arbitrariness in the workplace. The objective being, to address the deficiencies created by common law in labour relations and adequately cater for the needs of employees, necessarily providing mechanisms for collective bargaining giving effect to the constitutional ambition if having labour relations where employees have an opportunity to be heard and achieve social justice.

In South Africa, post-apartheid negotiations between organised labour, employers’ organisations and the state led to the adoption of Labour Relations Act (LRA), which heralded a new era in South African labour law. The Final Constitution was also adopted in 1996, providing employees’ fundamental rights, such as the right to strike, right to fair labour practice and freedom of association. The rationale was on permanently curbing arbitrariness in labour relations, as at common law. Further legislations were passed in conferring protection of the rights of employees. These legislations profoundly play a significant role in labour relations, particularly with regards to contract of employment and collective bargaining in the workplace.

Pre-independence, Namibia’s labour laws were racially discriminative and impeded the effectiveness of labour relations by confining contract of employment to common law. This encumbered the development of effective trade unions, employment contract and the importance of

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8 Ibid.
9 Ibid at p44.
12 Basson, A et al, ‘Labour Relations Act, 66 of 1995 – providing labour protection particularly on matters such as; Freedom of association, organisational rights, collective bargaining, right to strike, protection against unfair dismissal and so forth.
15 Ibid s23, read with s18.
collective bargaining. Post independence, Namibia adopted a new Constitution containing ‘Principles of State Policy’, embracing an idea of establishing trade unions to protect employees’ rights and interests, promoting a sound labour relations and fair employment practices. Namibia now has Labour Act 11 of 2007 which is central to issues of contract of employment and collective bargaining. In Zimbabwe, contract of employment is regarded as the foundation of employment relationship between the individual worker and the employer. On the other hand, collective bargaining is recognized as a legitimate and essential tool to counter the inequalities between individual employees and the employers, to curb industrial anarchy. It is discernible that the three countries have systems that regard contract of employment and collective bargaining, through protective legislations as central features in protecting employees’ rights, emphasizing on fairness in the workplace.

Defining Central Concepts

Contract of Employment
This entails an agreement between two or more parties in terms of which one party (employee) places labour potential at the disposal and under the control of the other party (employer) in exchange for some determined remuneration. Its cardinal features include exchange of labour for wages and exchange of mutual obligations for future performance. Amongst the issues with regards to this definition is whether it covers everyone in a working relationship or is destined only for those in standard employment. A question of who gets access to protective ambit of labour laws is determined in accordance with the definition of an ‘employee’. This is also the case in Namibia and Zimbabwe.

Who is an employee?
LRA defines an employee as:…(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

The other labour legislation, as indicated above (footnote 16) contains the same definition, which is also in line with s200A of LRA and s83A of BCEA. Namibia and Zimbabwe also carries the same definition. According to this definition, workers who are excluded have little or no legal protection.

Collective Bargaining
Collective Bargaining on the other hand entails a process by which employers (or employers’ organizations) and trade unions (usually representing employees) or employees seek to reconcile their conflicting interests through mutual accommodation. It is an instrument used in curbing a unilateral decision making by the employer and overcoming a weak bargaining position of individual employees, and is very essential in the fixing of wages, terms and conditions of employment between employees and management. The Labour Relations Act provides for the establishment of bargaining councils to facilitate this process.

Contemporary forms of engagement
The modern world of work has drastically shifted from a paradigm of standard employment, the focus of protective labour laws. This is such that we need to ask ourselves whether contract of employment still provide a workable mechanism in protecting the employees or workers labour rights, in regard of the purpose of labour law. Today, non-standard and atypical employment have become dominant through processes such as; casualisation (the process of shaping employment relations to deprive workers, particularly vulnerable workers, of their basic statutory rights as employees) and externalisation (the process whereby employers make use of workers of labour brokers, employment agencies and subcontractors to perform work formerly performed by employees of the employer), which have created varying forms of triangular employment that pose a challenge to workers’ protection in Southern Africa. As these phenomena changed the nature of employment, they remove many workers from the ambit of labour law protection. Hence, the need to critique the strength and legitimacy of employment contract in protecting workers today.

References

18 ibid at p10.
21 ibid.
24 LRA s213.
25 Labour Act of 2004, s1(1).
26 Labour Act in Zimbabwe s2 and also s12(1) defining contract of employment.
29 Definition founded on Article 2 of ILO Collective Bargaining Convention 154 .
30 LRA s27.
32 ibid.
Contract Of Employment

Subsequent to South Africa’s post-1994 democratic Constitution, there has been a significant shift in the development of labour laws primarily aimed at protecting employees against abuse of power by employers and other challenges in the workplace. This finds expression from the Constitution which has entrenched core labour rights, particularly in respect of labour relations. Contract of employment and collective bargaining have been central in employees’ statutory protective labour rights. These notions link directly with the purpose of labour development of labour laws primarily aimed at protecting employees against abuse of power by employers and other challenges in the workplace. This finds expression from the Constitution which has entrenched core labour rights, particularly in respect of labour relations. Contract of employment and collective bargaining have been central in employees’ statutory protective labour rights. These notions link directly with the purpose of labour development of labour laws primarily aimed at protecting employees against abuse of power by employers and other challenges in the workplace. This finds expression from the Constitution which has entrenched core labour rights, particularly in respect of labour relations. Contract of employment and collective bargaining have been central in employees’ statutory protective labour rights. These notions link directly with the purpose of labour development of labour laws primarily aimed at protecting employees against abuse of power by employers and other challenges in the workplace. This finds expression from the Constitution which has entrenched core labour rights, particularly in respect of labour relations.

The basis of employment contract in labour relations

Contract of employment has traditionally been known as a vital document holistically regulating the symbiotic relationship between the employer and an employee. In South Africa, legislation which directly regulates the basic terms and conditions in an employment contract is BCGA. It requires employers to provide employees with a written contract not later than the first day of commencement of employment. A Zimbabwean perspective requires same but, it stipulate that upon engaging an employee. Any failure to provide such a contract in that regard constitutes a punishable offence. Nonetheless, employment contract may be concluded orally or in writing and expressly or by implication.

Notwithstanding the decline in its importance for protecting employees, the recent courts decisions indicate that employment contract is still a valid and active source of legal rules and legal remedies. At least, it also forms the basis for the employment relationship and contains the rights and duties of the employment relationship.

A Zimbabwean perspective recognises employment contract as the basis on which employment is established. Contract of employment mostly cannot enjoy the right to join a trade union. In South Africa, a legally enforceable ‘duty to bargain’ to promote collective bargaining is achieved through entrenched organisational rights and a protected right to strike. The basic terms and conditions provided for in any contract of employment are regulated more immediately by the BCGA, and are mostly a product of collective bargaining too.

Essentially, there are notable functions that an employment contract serves. First, It stipulates what the employer will provide in terms of benefits, and in terms of labour legislation. Second, it specifies what the employee is entitled to receive in terms of company policy, company benefits, and labour legislation. Third, it regulates the behaviour of the employee in the workplace - because all company policies and procedures, along with disciplinary code, form part of an employment contract. Contracts of employment may vary according to the nature and the demand of the work. There a variety of contracts of employment; namely – contract of permanent employment, fixed term employment contract, temporary employment contract and project employment

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35 Munyaradzi Gwisai, ‘Labour and Employment Law in Zimbabwe’ at p3.
37 BCEA s29 (1) and (2).
38 Lloyd, P ‘Labour legislation in Zimbabwe’ 2nd Ed. 2006 at p34. Also in s12(2) of Labour Act.
39 BCEA s93 & schedule 2.
42 Ibid at p23.
45 Benjamin, P ‘A Review of Labour Market in South Africa: Labour Market Regulation; International and SA Perspectives’ HSRC October 2005 p25. See also s23 of the Constitution and s64 of LRA.
46 Ibid.
contract. Amongst central significances of employment contract includes those relating to circumstances under which the employment relationship may terminate, issues of dismissals as regulated by statutes, how the work is to be carried out, commencements and so forth. Thus, employment contract primarily serves an important aspect of providing avenues for redress in employment relationships. Its strength lies in the creation of legal certainty as a basis for the social and economic uplifting of an employee. However, the contemporary challenges have put this to test and has had it shaken.

Common law & legislative position on employment contract & collective bargaining

A common law employment is noted to have been and still remains amongst notable sources of labour law. However, its strength in the protection of workers labour rights has notably declined in the contemporary world of work. This is considerate of the fundamental role played by the Constitution and the current labour legislation aimed purely at protecting employees. Fundamentally, the Constitution and labour legislation should supplant common law as they are founded on a normative framework destined on transformative ideals. At common law, a contract of employment could precisely be viewed as a basis for perpetuating inherent inequalities between employers and employees. Common law does not promote participative management on decisions taking, even though it directly affects employees’ working conditions and legitimate interest. It also provides no protection for employees’ job security. This means that employers can terminate employment contract any time they so wish. Hence, the common law slavery-like arrangement of employment contract is worth subjugated by progressive labour legislation for the protection of vulnerable workers that desperately need interventions. As legislative measures developed, it became ostensible that common law would be a subsidiary in regulating employment relationships due to its failure to provide the desired protection of employees today. Unlike common law, statutory provisions prioritize protecting employees’ labour rights, and make a provision for collective bargaining. This particularly regards on matters of common interest between parties to an employment relationship. In addressing these inherent inequalities, which are arguably created by common law, legislative initiatives first impose minimum conditions of employment for employees, promote the notion of collective bargaining and develop specific tribunals to create equitable principles for the workplace.

It is therefore submitted that the provisioning of collective bargaining remains amongst the most responsive mechanisms in curbing employers’ arbitrariness or disregard towards employees’ weak positions. Amongst its strengths, collective bargaining serves a variety of functions, and this is inclusive of a rule making function whereby what is agreed in collective bargaining becomes part of individual employment contract. It also serves as a conflict resolution device and a regulatory device in which relationships between the employer and trade unions are defined.

Deficiencies of Employment Contract

Acknowledged as the foundation for the existence of employment relationship, employment contract however appear to lack standards required for achieving a complete protection of workers labour rights in the modern world of work. The reluctance of employment contract in intervening to protect vulnerable workers in workplace relations strongly led to the development of collective bargaining and legislation focused at employees’ rights. This is seen in the light of recent jurisprudential and legislative developments, which resonances a determination of protecting workers against various forms of maltreatment by employers, confining regulation of employment relations within the ambit of these legislations.

Employment contract only confers protection to those employees or workers covered in terms of the LRA and BCEA. It literally protects only those employees who are in a standard employment. It is therefore apparent that employment contract fails to acknowledge the increasing informalisation of labour market wherein many people become a part of workforce without labour protection. Those workers further become invisible for recruitment into joining trade unions or for protection through labour law enforcement even though most of these employment relationships are still driven, supposedly at least, by a contract of employment. Hence, it is asserted that contract of employment somehow maintains the common law arrangements, subjecting employ-
ees or workers to both physical and economic exploitation. It further does not cover work in the conduct of an independent business or professional service, excluding workers not working under contract of employment, but who are semi-dependant without labour laws protection.59

Overriding positions of statutory provisions, employment contract & collective bargaining

First and foremost, these notions remain central imperatives in ensuring the provision and protection of workers labour rights. However, it is important to establish the extent to which statutory provisions supersede the understanding that employment contract is the sole basis for establishing employment relationship. It is argued that, this has happened purely because contract of employment, as derived from common law, fails to provide necessary intervention and address the social and economic realities impacting on the workplace relations, rights and obligations in the modern world of work.60

Contract of employment only confer protection to those in legal relationship, mostly in standard employment, and who have concluded such a contract.61 On the other hand, the legislative provisions seek to provide protection to ‘everyone who works for another’.62 Indeed, the legislative position and scope of coverage is wide enough to extend the desired protection the vulnerable workers. This is undoubtedly in regard of the continuing labour market trends of informalisation, where many workers remain uncovered by labour legislative protection.

The labour legislative initiative is therefore premised on promoting collective bargaining in the workplace by supporting the establishment of trade unions (for employees), employers’ organisations63 and bargaining councils.64 These statutory provisions spells out in clear terms, rights and duties of parties to employment and further serve to protect employees against common workplace unrests such as unfair labour practices and unfair dismissals65 including automatically unfair dismissals.66 The labour legislation therefore enables our courts to pierce the contractual veil and establish the real nature of relationships67 thereby determining whether labour protection is due or not. This aids the transformative ideals of South Africa’s Constitution.

Contract of employment & statutory provisions for protecting workers

Most importantly, common law contract of employment require that a contract be valid for an employee or worker to receive labour protection. Within the same context, legislative provisions (SA, Namibia & Zimbabwe) do not expressly require the existence of a valid and enforceable contract in order for employees to be entitled to statutory labour protection. It is worth noting that employees and workers’ protection is presently leaning on the universal notion of employment relationship, based on a distinction between dependant and independent workers.68 All these occur either through contract of employment or contract of work/service. Labour legislation has been developed, resultant to employment contract’s ineffectiveness in protecting employees. In Namibia, this has resulted in the banning of labour broking,69 where the court argued that labour hire/broking creates an unacceptable interposition of a third party in the employer-employee relationship, which has no basis in law.70 The South African government, supported by trade unions like COSATU and FEDUSA, also noted the need to ban the practice, which most people still await for. The question therefore remains whether the perceived incompatibility of employment contract with statutory provisions are harmonisable in the modern informalised world of work, and whether the move to ban tripartite forms of engagements such as labour broking will bring a solution to the problem. Both employment contract and legislative initiatives aim at conferring protection at the workplace. Although, the former entitles protection limited to employees in standard employment while the latter, by literal interpretation, seeks to protect all those in employment environment. This is therefore notwithstanding the nature of the work involved and the status of the worker in question. Of course, this is subject only to limitation by the law of general application, but the courts remain activist and continues to safeguard and advance the course of protecting the vulnerable members of the society using the law.

62 Interpreting s23(1) of South African Constitution, s213 of LRA defining an employee and s200A, and s83A of BCEA in line with Namibian and Zimbabwean definitions.
63 LRA s1 – s26.
64 Ibid s27 – s38.
65 Ibid s185.
66 Ibid s187.
Literal interpretation of employment contract and statutory provisions depicts that the right to fair labour practice (and other protective measures) only apply to employees, employers and their organisations. It is unfortunate because employment is no longer dependant on the existence of a valid contract of employment, rather the nature of the relationship. This finds proponent from the case of SITA (Pty) Ltd v CCMA & Other. This case laid a precedent to the effect that an absolute reliance on the statutory provisions to cover even those in vulnerable situations is indispensable. A similar proponent was also expressed from a dictum in White v Pan Palladium SA (Pty) Ltd where Oosthuizen AJ remarked that;

“…the existence of an employment relationship is therefore not dependant solely upon the conclusion of a contract recognized at common law as a valid and enforceable. Further that someone who works for another, assists that other person in his business and receives remuneration may, under the statutory definition, qualify as employee even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship.”

The developments of labour laws have notably seen a shift from the traditional model of employment into that which caters largely for the interests of the majority of workers. In this regard, ensuring that labour protection reaches those it has been destined for is fundamental. This is done in accordance with a question of who is an employee. Consequently, courts have noted the need to protect vulnerable workers and are today less concerned with finding a valid contract between the parties as opposed to discerning the existence of an employment relationship, as alluded in Rumbles v Kwa Bat Marketing (Pty) Ltd. While employment contract confers protection only to employees in formal employment to the exclusion of the majority workers, statutory initiatives on the other hand seek to provide protection to ‘everyone’ or ‘anyone who works for another’, also strengthening the notion of collective bargaining in the workplace. It is argued that taken from the legislative provisions (defining employee and presumption of an employee), statutory provisions sought to expand protection to cover the majority of vulnerable workers drawn into informal sector through externalisation and casualisation. These definitions (also in Namibia and Zimbabwe) are open to expansionary interpretation, though the courts have opted interpreting them conservatively, notably to safeguard the good morals of the society against a variety of social ills. In Namibia, the traditional model of employment based on common law has been made obsolete and therefore unreliable in terms of protecting the vulnerable workers. This was propounded in APS v Government of Namibia, that third party (labour hire) cannot be a party to employment, as it constituted letting or hiring of persons as if they are chattels… and also smacks of the hiring of slave by his slave-master to another person.

The impact of validity or invalidity of employment contract on workers labour rights

A contract of employment may be invalid due to, first, the nature of the work carried out or non-conformity with the law and second, the status of the worker involved. It is worth noting that statutory provisions in the modern world of work supplant the ordinary common law position of employment contract. This necessitates the need to establish whether statutory provisions mandate that a contract be valid for employees or workers to receive labour protection. This matter finds clarity from the two South African leading cases of Kylie and Discovery Health Ltd. Indubitably, these cases illustrates that the existence of employment relationship is more paramount than establishing the nature of employment contract. A critical question is whether the parties had protection in terms of contract of employment and/or statutory provisions.

The Kylie matter involved a prostitute who brought a claim of unfair dismissal contending that LRA apply to all employment relationships irrespective of whether they are underpinned by enforceable contracts or not. Kylie undoubtedly had an employment relationship, even though it was illegal in terms of Sexual Offences Act. At the Labour Court, Cheadle AJ found against Kylie, invoking a fundamental constitutional value of the rule of law that courts ought not to sanction or seem to encourage illegal acts. This is in consideration of the purpose of Sexual Offences Act and the mischief it sought to address and on the basis that prostitution and brothel keepers are not protected by the law in the practice of prostitution. This was with reference to S v Jordan &
Others.\(^82\) The decision of Cheadle AJ was overturned in May 2010 by the Labour Appeal Court, as per Davies JA, Jappie JA and Zondo JA, to the effect that sex workers can now claim protection under the LRA, Constitution and other conforming legislation. The Labour Appeal Court in Kylie v CCMA & others,\(^83\) had to grapple with the question of whether the definition of an employee extends to persons engaged in unlawful activities.

In Discovery Health Ltd v CCMA, Mr Lanzetta, an Argentinean national worked for Discovery Health without a work permit. CCMA contended that the employer cannot employ a foreign national without proper authorization, though pleaded lack of jurisdiction. On review, the Labour Court held that Mr Lanzetta had a valid and binding employment contract, save that his valid work permit had expired, was an employee in terms of LRA and as such, entitled to labour protection. The court further indicated that a contract of employment is not the sole ticket for admission into the golden circle reserved for employees.\(^84\) After ascertaining that employment relationship existed, certainly a person ought to get labour protection. The same approach was adopted in Chipenete v Carnmen Electrical CC & Another,\(^85\) where the LAC conferred legal remedies against unfair discrimination and exploitation of foreigners, with the aim of deterring employers from employing aliens without valid permits. The broader intention is to curb exploitation of the vulnerable workers.

It is for these reasons that civil remedies are essentially availed to the worker party to illegal contracts, however access to labour protective legislation is limited.\(^86\) It is ostensible that when defining an employee, statutory provisions manifest a flaw by not pronouncing on whether a valid contract of employment is peremptory for a worker to qualify for labour protection. This has led to Labour Courts and other tribunals being reluctant to widely interpret legislative provisions to eventually extend labour protection to the excluded majority of workers resultant to informalisation. It also entails that these excluded workers remain weakened in labour relations as they lack the right to collective bargaining as it only applies to employees, trade unions, employers and employers organisations (arrangements in standard employment). On the whole, the contemporary trends of employment have aided in highlighting that labour law has reached a critical point of diversification. This therefore requires that statutory provisions should be interpreted in a manner that will rhyme well with the post-liberal transformative ambitions of the Constitutions.

**Conclusion**

This article revealed the explicit modern challenges presented by the drastic growth of informalisation of work which has been clearly characterised by the super-exploitative arrangements/tendencies\(^87\) and the absence of workers legal protection. It is contended that this has been resultant to the employers’ tactics to evade compliance with labour legislation and the desire for high profits and cutting of costs. This has undoubtedly led to numerous concerns on whether contract of employment and collective bargaining should still be relied upon in the protection of workers rights. This is necessitated by the fact that the majority of workers do not have access to these instruments, as they are hired through agencies with little or no labour protection.

Of course, it is asserted that contract of employment is very foundational to employment relations. The collective bargaining is on the other hand, a force for stability in setting wages and terms of employment.\(^88\) However, these important features of labour relations are sadly made redundant by the modern dominant models of employment. This is seen in the light of the stance taken by Namibia in banning labour broking, which has seen support from a number of countries. The majority of workers find themselves in the informal economy, operated on the basis of contract of work than of employment, without rights such as to collective bargaining. Today, labour relations are regulated largely by the labour legislation, which supplant common law. This therefore suggests that for states to meet the demands in regard of the purpose of labour law, there should exists a system of laws which will be responsive to the realities of modern employment, to provide workers with the desired protection curbing super-exploitative arrangements presented by informalisation of work. It is asserted that, contract of employment and collective bargaining should remain foundational to employment relationship, however the statutory provisions (legislation) should prevail in appreciation of the challenges of the diverse modern labour relations. Protection on the basis of a contract should therefore extend coverage to the excluded majority working under contract of work. This will be in line with the statutory provisions, particularly on the definition of an employee, which determines who get labour protection, when and how. It is on that basis that statutory pro-

\(^82\) 2002 (6) SA 642 (CC) at parar69. See also 2005 (26) ILJ 794 (CCMA) at paras51 and 52.

\(^83\) ‘Kylie’, is a pseudonym, the name with which she was known to her employer’s clientele as she wanted her identity to be protected.

\(^84\) Discovery Health Ltd v CCMA, at para51.

\(^85\) (1998) 19 ILJ (LAC).


\(^87\) See Zwelinzima Vavi, COSATU General Secretary, his article published in The Times Business Report on the 29 March 2010 (Cosatu is the biggest Trade Union Federation in South Africa).

visions seek to advance, amongst others, social justice in labour relations by conferring protection to, in most instances, ‘everyone’ in an employment relationship.

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