

APPLICABILITY OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN TERMINATION OF CONTRACT OF EMPLOYMENT DISPUTES: AN EXAMINATION OF NIGERIAN AND SOUTH AFRICAN EMPLOYMENT LAWS

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Abstract

ADR refers to a group of voluntary processes that seek to resolve a disagreement other than through court or employment tribunal proceedings. Employee-employer disputes, or even disputes between employees and their co-workers, are unavoidable in the workplace. The goal of any employment conflict resolution system should be to restore healthy employment relations through an effective, efficient, and fair settlement of workplace problems. This research intends to examine the application of ADR in the termination of contract of employment dispute within Nigeria and South African employment laws and aims to examine the application of Alternative Dispute Resolution (ADR) in Termination of Contract of Employment Disputes with focus on employment laws of both jurisdictions. The principal objective of this research is therefore to compare the ADR in termination of contract of employment disputes available in Nigeria and South Africa. The study adopted the doctrinal legal research and the research found that South Africa has a better legal framework on the application of ADR in the termination of contract of employment disputes than the Nigerian jurisdiction. Conclusively, Nigeria and South Africa have distinct legal systems; both countries recognize the importance of ADR in resolving employment disputes swiftly and equitably. This research recommended better integration of ADR into legal frameworks, especially the National Industrial Court.

Keywords: ADR, Nigeria, South Africa, Ubuntu, National Industrial Court, Termination of Contract of Employment Disputes.

1 Introduction

Dispute is unavoidable and thus not unusual in labour relations because it involves humans.¹ Trade disputes have become a widespread and recurring phenomenon in both the private and public sectors worldwide. Trade conflicts, as a hybrid of commercial issues, appear to be more straightforward than most criminal and civil proceedings.² Most industrialized and emerging states³ have identified with the formal abrupt response to reducing industrial unrest, and some developing states are following suit.⁴ Nigeria must not be left behind on the modern best practices of resolving trade disputes as it is obtained in other parts of the world. Because of the compelling need for work induced by the poor

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¹ E. Uwazie, *Alternative Dispute Resolution & Peace Building in Africa* (Cambridge Scholars Publishing, 2014)

² JD Peters, 'Alternative Disputes Resolution and the Resolution of Employment Disputes' in O D Amucheazi & B Atilola (ed) 'The National Industrial Court of Nigeria and Progressive Development of Labour and Employment Law in Nigeria: Essay in Honour of Hon. Justice Babatunde Adeniran Adejumo, OFR' (Nigeria, Hybrid Consult, 2019) 190.

³ Some other countries that have established specialized labour or industrial courts are South Africa, Ghana, Kenya, Tanzania, America, India, Ireland Trinidad and Tobago.

⁴ PD Dahida & AJ Adeshola, 'A Comparative Analysis of Trade Disputes Settlement in Nigeria Public and Private Universities', *Journal of Law, Policy and Globalization* (2013) (18) 60.

Socio-economic conditions, the employee, who is already in a vulnerable and competitive position, may take work with unfavorable terms.⁵

The conflict between employers and employees in their pursuit of improved services leads in a variety of issues cited as contributing to Nigeria's employment problems.⁶ These include theft, poor wages, nonpayment of salaries, protests against unfair working conditions,⁷ job insecurity, discriminatory employment policies, unenforceability of collective agreement, redundancy, Employee-employer disputes, or even disputes between employees and their coworkers, are unavoidable in the workplace. They can be caused by a variety of factors, including but not limited to simple misunderstandings or blunders, poor communication and decision making, tension or personal difficulties, violations of employment/law terms and conditions, infringements of human rights, and so on. Whatever the unique origins of the dispute, the results are frequently negative to both employers and employees.¹¹

The goal of any employment conflict resolution system should be to restore healthy employment relations through an effective, efficient, and fair settlement of workplace problems. The arrangement should be intended to establish a system of flexible governance and practice that will earn the trust of employers, employees, and trade unions alike.¹² Thus, the principles applying to any dispute resolution mechanism should focus on promoting good employment relationships; providing strong employment rights; effective mechanisms to prevent and resolve disputes; resolution of workplace disputes close to the point of origin; enhanced capability of all involved in the prevention and resolution of workplace disputes; statutory bodies that provide effective prevention and dispute resolution services to all those involved, while the National Industrial Court has incorporated Industrial Arbitration Panel in its rules of court the application of ADR in termination of contract of employment dispute in Nigeria, ADR applicability is still a challenge.

2 ADR Defined

Harvard Law School Library defines Alternative Disputes Resolution a system of methodologies that parties can use to resolve disputes without resorting to litigation. These include arbitration, mediation, negotiation, and more.¹⁴ Alternative Dispute Resolution (ADR) refers to the resolution of disputes outside the courts through amicable settlement, involving techniques where formal court proceedings are absent, and verdicts are not made by judges. Instead, a third party serves as a neutral or umpire to assist in resolving conflicts between the parties.¹⁵ ADR methods include arbitration, conciliation, mediation, and negotiations. These processes promote informality, clarity, and less complexity, often at a lower cost compared to traditional litigation.¹⁶

⁵ OVC Okene, *Labour Law and Industrial Relations in Nigeria* (4th Edn, Zubic Infinity Concept, 2019) p.288.

⁶ Onyinyechi Gift Wosu, 'The Procedures for Settlement of Trade Disputes in Nigeria', *African Journal of Law and Human Rights* (2022) (6)(2) 45,46

⁷ H Collins, *Labour Law Text and Materials* (2nd Edn Hart Publishing, 2005)

⁸ OG Wosu, 'Rethinking the Legal Status of Temporary (Casual) Workers in Nigeria' *International Review of Law and Jurisprudence* (2022) (4)(1) 119.

⁹ S Agbi, Conflict Management and Collective Bargaining in the Workplace: A Case Study of the University of Abuja Teaching Hospital Gwagwalada Abuja, (Being a Paper Presented at Workshop on Labour Management Relations at the University of Abuja Teaching Hospital Conference Hall Held on 27th November, 2013)

¹⁰ RG. Silberman, SE. Murphy and SP. Adams 'Alternative Dispute Resolution of Employment Disanction claims', *La. L. Rev.* (1993) (54) 533.

¹¹ Mahmud Kayode Adebayo and Saka Olokooba, 'Employment Disputes and Industrial Relations in Nigeria: The Role of Alternative Dispute Resolution', *KIU Journal of Humanities* (2018) (3)(1) 123, 124

¹² *ibid*

¹³ *ibid*

¹⁴ Harvard Law School Library, 'Alternative Dispute Resolution Research' *Harvard Law School Library Research Services*, (2024) <<https://guides.library.harvard.edu/law/adr>> accessed 15 April 2024

¹⁵ *ibid*

¹⁶ N Akhtar, SA Nadeem, and RI Habib, 'Alternative Dispute Resolution' *Global Legal Studies Review*, (2023) (VIII) (II), 36-42. <[https://doi.org/10.31703/glsr.2023\(VIII-II\).05](https://doi.org/10.31703/glsr.2023(VIII-II).05)> accessed 15 April, 2024

ADR is a process for resolving legal disputes outside of traditional courtroom settings. It encompasses various methods such as early neutral evaluation, minitrial, negotiations, expert determination, mediation, conciliation, and arbitration. ADR emerged due to dissatisfaction with traditional adjudicatory litigation procedures, driven by factors such as increasing awareness of the time and cost involved in litigation. The advantages of ADR include lower dispute resolution costs, shorter resolution times, improved relations between disputants, a binding decision, and a win-win outcome for all parties involved.¹⁷

Alternative dispute resolution (ADR) includes a variety of methods outside going to court to resolve legal disputes. It's a beginning point for doing anything other than going through the drawn-out, costly, and time-consuming court system to settle a disagreement. This encompasses matters of commercial law, family law, criminal law, and more.¹⁸ Conflict resolution outside of the court system is permitted by the Constitution of the Federal Republic of Nigeria.¹⁹ Section 19(d) of the Constitution recognizes arbitration, conciliation, mediation, negotiation, and adjudication as methods of alternative conflict resolution. However, it is crucial to note that this section is part of Chapter II of the Constitution, which outlines the Fundamental Objectives and Directive Principles of State Policy. These provisions generally provide broad guidelines for governance rather than enforceable rights. Consequently, Section 19(d) broadly endorses ADR without specifying its application to either domestic or international disputes, leaving the scope open to interpretation based on the context in which these methods are employed.

Methods of Alternative Dispute Resolution

Flowing from the above, the following are the main methods of alternative dispute resolution available for settling disputes in Nigeria, particularly in the context of the termination of employment contracts.

Negotiation:

Negotiation is a problem-solving process where disputing parties meet face-to-face, or through representatives, to discuss their differences and reach a consensual resolution. Unlike other ADR methods, negotiation does not involve a neutral third party, allowing parties to control the process and the outcome directly.²⁰ In the context of employment disputes, negotiation can be an effective first step, particularly where the employer and employee have an ongoing relationship they wish to preserve. It serves as a preventative measure, addressing disagreements before they escalate into more significant conflicts, and is often favored for its flexibility and informality.²¹

Mediation:

Mediation involves a neutral third party, the mediator, who facilitates discussions between the parties and helps them explore potential solutions.²² While the mediator does not impose a decision, they play a critical role in guiding the process and enhancing communication. Mediation is particularly suitable for employment disputes where maintaining a professional relationship or reaching a

¹⁷SO Ojo, 'Alternative Dispute Resolution (ADR): A Suitable Broad Based Dispute Resolution Model in Nigeria; Challenges and Prospects,' *International Journal of Conflict Management*, (2023) (4) (1) 50–62. <<https://doi.org/10.47941/ijcm.1253>> accessed 15 April 2024

¹⁸S Dinah, 'Where I Sit and Where I Stand' *Women in International Law Interest Group Luncheon American Society of International Law Proceedings*, (2010) 104, 157-160

¹⁹The Constitution of Federal Republic of Nigerian 1999, as amended Cap23, LFN 2004

²⁰Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria,' *Journal of Law and Conflict Resolution* (2017) (9) (3) 26

²¹Samuel Olugbenga, 'Alternative Dispute Resolution (ADR): A Suitable Broad Based Dispute Resolution Model in Nigeria; Challenges and Prospects,' *International Journal of Conflict Management* (2023) (14) 50.

²²Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria' *Journal of law and Conflict Resolution* (2017) (9) (3) 26.

mutually acceptable resolution is important.²³ Given its confidential and voluntary nature, mediation is often preferred for resolving disputes over termination, as it allows parties to reach an agreement without the adversarial nature of litigation.

Conciliation:

Conciliation, governed by the Arbitration and Conciliation Act,²⁴ involves a neutral third party who assists disputing parties in reaching a mutually acceptable resolution.²⁵ The conciliator takes a more active role than a mediator, offering advice and suggesting settlement terms. In employment disputes, particularly those involving complex issues or power imbalances, conciliation can be a valuable tool, providing structured guidance towards a fair settlement.²⁶ However, the process remains non-binding unless both parties agree to the proposed terms.²⁷

Arbitration:

The starting point for the achievement of balance between the interests of employers and employees is the development and promotion of social dialogue or arbitration.²⁸ As per ILO studies, when the scope of collective bargaining and/or resolution is restricted, the outcome has a detrimental effect on industrial relations as the employees become more defensive of their rights, which impedes cooperation.²⁹ In employment disputes, especially those involving contractual obligations or where an arbitration clause exists, arbitration provides a binding resolution. Governed by the Arbitration and Conciliation Act and the Lagos State Arbitration Law, arbitration in Nigeria offers a private alternative to court proceedings.³⁰ For disputes over the termination of employment contracts, arbitration ensures a definitive outcome, with the arbitrator's award being final and enforceable.

3 Application of ADR in Termination of Employment Disputes in Nigeria

The 1999 Nigerian Constitution is the principal law when it comes to employment provision and the security thereof for the Nigerian workers, however, the same constitution did not place positive obligation on the Nigerian government to provide work in favor of the Nigerian Workers.³¹ In Nigeria, mediation is the primary ADR option used to resolve commercial disputes if the parties do not explore internal dispute resolution procedures.³² The parties are expected to fill out the trade dispute form, which permits them to officially declare a trade dispute.³³ In Nigeria, mediation takes precedence over conciliation and arbitration processes. This is because it allows conflicting parties to re-evaluate their difficulties and seek the assistance of a neutral third-party facilitator, such as a mediator.³⁴

²³ Ernest Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' *Africa Security Brief*, (2011) (16)1.

²⁴ Arbitration and Conciliation Act 1988 (the "Old Act") was repealed and replaced by the Arbitration and Mediation Act 2023 (the "New Act") following presidential assent on 26 May 2023.

²⁵ Samuel Dike, 'Transforming Mediation and Conciliation Practices for Effective Dispute Resolution in Nigeria' *Journal of Property Law and Contemporary Issues* (2020) (12) 230

²⁶ Gaius Ezejiolor, *The Law of Arbitration in Nigeria* (Longman, 1997) 7

²⁷ Law Reform Commission of Ireland, Consultation Paper Alternative Dispute Resolution, 2008.

²⁸ Aibar Seidimbek, Muslim Khassenov and Marat Alenov, 'Providing a balance between employer and employee interests through the development of a procedural mechanism for protecting their rights' [2023] *Access to Justice in Eastern Europe* 109

²⁹ Igor Guardiancich and Oscar Molina, 'The Effectiveness of National Social Dialogue Institutions: From Theory to Evidence' (International Labour Organization (ILO) Working Papers, 26 November 2020)

³⁰ SO Ojo, 'Alternative Dispute Resolution (ADR): A Suitable Broad Based Dispute Resolution Model in Nigeria; Challenges and Prospects,' *International Journal of Conflict Management*, (2023) (4) (1) 50–62. <<https://doi.org/10.47941/ijcm.1253>> accessed 15 April 2024.

³¹ Prince Pius Imiera, 'Job Security and Insecurity in Nigeria's Workspaces in a Post-COVID-19 Pandemic: A Myth or Reality?' *Journal of the Department of Jurisprudence and International Law* (2024) (1) (11) 143-144.

³² Olufunke Yemi Anuwe, 'Nigerian Institute of Advance Legal Studies (NIALS), Alternative Dispute Management and Negotiation Skills Training Course' [2019] Being a paper presented at the Nigerian Institute of Advance Legal Study 3

³³ IA Yemisi, 'Alternative Dispute Resolution and Collective Conciliation in Nigeria: A Review of Contemporary Literature' *International Journal of Business and Management* (2017) (12) (8) 261

Section 3 (1) of the Trade Disputes Act specifies the method for resolving disputes. It states that if there is an agreed-upon method of resolving disagreements, the parties involved must first endeavor to resolve the dispute through that method, if no dispute resolution method exists, Section 3(2) requires the parties to meet under the presidency of a mutually agreed-upon mediator in order to reach an amicable settlement of the matter, section 4 of the Act authorizes the Minister of Labour and Productivity to investigate a trade dispute, appoint a conciliator, or send the matter to the Industrial Arbitration Panel.³⁵ National Industrial Courts or Employment Tribunals provide a legal forum for resolving workplace disputes under employment legislation. The National Industrial Court is made up of a legally competent judge who specializes in employment relations. The Court has broad authority to obtain evidence and interrogate witnesses, and it will make a legal decision at the conclusion of the proceedings. Claimants and respondents have the option of representing themselves or hiring a lawyer.³⁶

Alternative dispute resolution involves both parties agreeing to their case being heard and determined by a neutral third party. Hearings are quick and confidential, the remedies available to the parties are the same as at an industrial court/tribunal, and the arbitrator's decision is binding. The process is designed to help both parties better understand their position and the prospects of their case from the outset. Current ADR processes are carried out very much on a voluntary basis; it is a process that must be agreed to by both parties in the full knowledge that it is so. Note that parties are not required to use ADR and there are no penalties if they do not, other than the cost expended with a missed opportunity to resolve the disputes.³⁷ Some argue that more needs to be done to encourage parties to seriously engage with ADR processes. Some even go so far as to suggest that ADR should be mandatory, that parties should be required to attempt it before any tribunal claim can proceed. This approach has its supporters, but it is in the minority, and critics have pointed out that it risks turning ADR from a useful process to a procedural obstacle. ADR is intended to solve problems, not create them. Parties that did not object to ADR would attend a meeting conducted by someone with extensive employment relations and ADR experience. The independent individual would try to broker a settlement between the parties using a variety of ADR approaches such as conciliation, direct mediation, and early neutral review.³⁸

ADR offers a solution to the triple problem by encouraging the most appropriate procedures for handling grievances and discipline and, by extension, improving management practices and behaviors. It also provides a conducive environment where management and trade unions, or other representatives, meet to seek to resolve individual disputes. A conciliator or mediator may be involved at this stage, depending on preference.³⁹ The number of disputes brought before the courts, the length of the proceedings, and the costs incurred by such proceedings are all increasing. The provision empowers Nigeria's National Industrial Court to establish an Alternative Dispute Resolution Centre on its premises. These provisions lend credence to alternative approaches to the peaceful resolution of labor, employment, and industrial disputes.⁴⁰

³⁴ Olufunke Yemi Anuwe, *Employment Dispute Mediation*, (The Workshop Organized by Nigerian Institute of Advance Legal Studies (NIALS), Alternative Dispute Management and Negotiation Skills Training Course 23rd of October, 2019), 7-8

³⁵ *Trade Disputes Act, Cap T8 LFN 2004*

³⁶ *ibid*

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ Gideon Nelson Obabor and Cynthia Ifeoma Benson, 'The Role of National Industrial Court in the Settlement of Labour Disputes in Nigeria', *Socialscientia Journal of the Social Sciences and Humanities* (2023) (8) (2)25

Order 4 of the National Industrial Court of Nigeria Alternative Dispute Resolution Centre Instrument 2015 specifically provides that: shall amongst other things be the application of mediation or conciliation technique in the settlement of disputes between or amongst parties, 1). To enhance and facilitate quick, efficient and equitable resolution of certain employment, labour and industrial relations disputes within the jurisdiction of the Court; 2). To minimize, reduce, mitigate and eliminate stress, cost and delays in justice delivery by providing a standard ADR framework for fair, efficient, fast and amicable settlement of disputes; 3). To assist disputants in the resolution of their disputes without acrimony.

By Order 2(2) of the National Industrial Court of Nigeria (NICN) Alternative Dispute Resolution (ADR) Centre Rules, 2015, ADR Centre means the Alternative Dispute Resolution Centre. Article 2(1) of this National Industrial Court of Nigeria (NICN) ADR Centre Instrument, 2015. Conciliation means bringing two opposing sides together to attempt settling the matter without proceeding to trial. It is also a process of an amicable settlement of disputes in a friendly and win-win situation.⁴¹

The NICN ADR Centre's legal foundations are in Section 1 (2) (a) and Section 20 of the NIC Act, which give the president of the court broad authority to run the court and promote and apply ADR in the court to settle commercial disputes. The mission of the NICN ADR Centre is to reduce, mitigate, and ultimately eliminate the stress, cost, and delays associated with the delivery of justice by facilitating the prompt, efficient, and equitable resolution of specific employment, labor, and industrial relations disputes that fall under the purview of the court. To do this, it employs conciliation and/or mediation.⁴²

Walk-in cases are not accepted at the NICN ADR Centre unless a formal court case has already been filed. Together, Article 4(4)(a) of the Instrument and Order 3 Rule 2 of the Rules establish that matters can only be brought to the center by the parties or by referral at the discretion of the president of the court or the Judge presiding over the matter. Further, upon filing an action in court, either party may request that the dispute be referred to alternative dispute resolution (ADR) by submitting a written request to the president of the court; if both parties to a dispute make this request, the judge of the court with jurisdiction over the case shall refer the case to the ADR center. Important to note is that only mediation and/or conciliation are offered as alternative dispute resolution processes in the center. In essence, the hub does not support arbitration.⁴³

4 Examining employment laws in South Africa

4.1 The Constitution of the Republic of South Africa 1996

South Africa (herein after SA) is a jurisdiction with so many policies⁴⁴ and laws, particularly as it relates to laws which provides for equal work opportunities for all South Africans.⁴⁵ For instance, The SA Constitution forbids⁴⁶ discrimination against any person in respect to employment on grounds of disability or otherwise.⁴⁷ In addition, the Constitution further states that:

⁴¹ National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre Rules, 2015.

⁴² *ibid*

⁴³ *ibid* Order 1 rule 2

⁴⁴ Zamokuhle Mbandlwa, 'Socioeconomic Impact of Policy-Making in South Africa,' *Journal of Law and Sustainable Development* (2023) (11) (10)1

Angus Bowmaker-Falconer, Frank Horwitz and Simon Taggar, 'Employment Equality Programmes in South Africa: Current Trends,' *Industrial Relation Journal* (1998) (29) (3)3

⁴⁶ Constitution of the Republic of South Africa, 1996.

⁴⁷ Constitution of South Africa Article 9(3).4.

“Every citizen has the right to choose their trade, occupation, or profession freely⁴⁸ and that the state must 'respect, protect, promote and fulfil' the rights which are contained in the Bill of Rights, including the right to work and employment.”⁴⁹

The above South African Constitution provision may be interpreted to be impliedly creating a duty on the South African state to put positive measures in place similar to Article 27 of the United Nation Convention on the Rights of Person with Disabilities (CRPD) of 2006, which South Africa ratified in 2007.⁵⁰ Additionally, the South African Constitution places obligation on employers to provide an open, inclusive and accessible environment, as a result, the section dealing with labour relations in the SA Constitution protects the rights of workers to form and join a trade union⁵¹ as well as the right to strike.⁵²

4.2 The South African Employment Equity Act (EEA)

The principal objective of the EEA⁵³ is to achieve equity in all South African workplaces⁵⁴ by:

1. Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination;⁵⁵ and;
2. Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups.⁵⁶

Moreover, the EEA applies to all employees in South Africa with the exception of the following categories of workers:

1. The National Defense Force;
2. The National Intelligence Agency and;
3. The South African Secret Service.⁵⁷

The EEA prohibits unfair discrimination on grounds of disability, race, sex and education.⁵⁸ It places a duty on employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.⁵⁹ Again, this is similar to article 27 of the UN Convention on the Rights of Person with Disabilities.

Furthermore, part III of the EEA makes provision for affirmative action measures, to the effect that:

“Measure should be designed to ensure that suitably-qualified people from designated groups have equal employment opportunities in SA and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”⁶⁰

⁴⁸Constitution of South Africa Article 22.

⁴⁹ Article 7(2) of the SA Constitution 1996.

⁵⁰The Right to Work And Employment In Southern Africa: A Commentary On How Selected Employment Laws Fare Against Article 27 of the CRPD (Regional Developments) [2016] ADRY 14.

⁵¹Constitution of South Africa Article 23(2)(a).

⁵²Constitution of South Africa Article 23(2)

⁵³ *Employment Equity Act, 1998.*

⁵⁴ *Employment Equity Act, 1998 section 2.*

⁵⁵ *Section 2(a): Employment Equity Act, 1998*

⁵⁶ *Section 2(b): Employment Equity Act, 1998*

⁵⁷ *Section 2(4): Employment Equity Act, 1998*

⁵⁸ *Section 6(1): Employment Equity Act, 1998*

⁵⁹ *Section (5): Employment Equity Act, 1998*

⁶⁰ Section 15(1)Employment Equity Act, 1998

The import of the EEA is to redress past injustices by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups to ensure their equitable representation in all occupational categories and levels in the workforce in South Africa.⁶¹ In addition, the EEA is, therefore, closely related to the South African Constitution and the Basic Conditions of Employment Act (BCEA).

4.3 Labor Relations Act 66 of 1995 (LRA)

The LRA provides for the creation of an open, inclusive and accessible working environment for South African workers;⁶² the Act further provides for rights to join a trade union.⁶³ In addition, the LRA placed a duty on the employer to accommodate in relation to situations where employees are injured in the workplace.⁶⁴

4.4 Basic Conditions of Employment Act 75 (BCEA)

The BCEA deals with matters such as: the regulation of working time; leave; remuneration; and; termination of employment amongst others. The BCEA is made applicable to all employees and employers of labor in South Africa.⁶⁵

4.5 Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value

The above Code of Good Practice was put in place in terms of the EEA⁶⁶ as enumerated previously. The objectives of the Code are: To provide practical guidance to employers and employees on how to apply the principle of equal pay/remuneration for work of equal value in their workplaces in SA; to overcome the disadvantages which have been suffered by historically-marginalized groups, including persons with disabilities, in the workplace in SA;⁶⁷ and the Code states that a difference in pay/remuneration will only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other listed or on any other arbitrary ground in SA.⁶⁸

The deduction from the Code is to the effect that, it protects all categories of workers in SA from being discriminated against in relation to pay/remuneration. In SA there is no single piece of law which alone meets the needs of the South Africa workforce. To this end, the combined effect of the different pieces of statute in combination can be said to meet the desires of the South African employees

5 Application of ADR in Labor Dispute in SA: Case Law⁶⁹

In *CUSA v Tao Ying Metal Industries and Others* (2008), the Constitutional Court of South Africa addressed a labor dispute concerning whether Tao Ying Metal Industries was required to pay minimum wages as stipulated in the 1998 Main Agreement of the Metal and Engineering Industries Bargaining Council. The Commercial Workers Union of South Africa (CUSA), representing the workers, argued that the exemptions previously granted to the employer under a 1980 Industrial

⁶¹ S Grete Bosch, 'Restitution or discrimination? Lessons from affirmative action from South African Employment Law' [2007] (4) Web Journal of Current Legal Issues 4

⁶² Labor Relations Act 66 of 1995.

⁶³ Labor Relations Act 66 of 1995 section 4(1)(b).

⁶⁴ Reference Is Made To The Duty To Accommodate In Secs 10(4), 10(1) And 11(B)(ii) LRA- Dealing With Cases Of Dismissal Arising From Ill Health Or Injury.

⁶⁵ Basic Conditions of Employment Act 75 1997.

⁶⁶ The Right to Work and Employment In Southern Africa: A Commentary On How Selected Employment Laws Fare Against Article 27 of the CRPD (Regional Developments) [2016] ADRY 14.

⁶⁷ Code of Good Practice on Equal Pay, section 1(1.1).

⁶⁸ Code of Good Practice on Equal Pay, section (4)(6).

⁶⁹ *CUSA v Tao Ying Metal Industries* CCT 40/07 [2008] ZACC15.

Council agreement had expired, and thus, the company was obligated to comply with the 1998 wage provisions. Tao Ying contended it was still exempt. The dispute was initially arbitrated by the Commission for Conciliation, Mediation and Arbitration (CCMA), which ruled that the exemptions had lapsed, ordering the employer to pay the minimum wages.

The Labour Court and Labour Appeal Court upheld this decision. On appeal, the Supreme Court of Appeal's ruling prompted CUSA to seek leave to appeal to the Constitutional Court, raising issues about the CCMA's jurisdiction and the interpretation of the exemptions. The Constitutional Court, in a majority judgment by Justice Ngcobo, upheld the CCMA's decision, affirming its jurisdiction to determine the validity of the exemptions and finding that the employer's exemptions had indeed expired by August 1998. The court emphasized the importance of fair labor practices and the constitutional right to collective bargaining under Section 23(5) of the South African Constitution, ruling that Tao Ying was bound to pay the minimum wages as per the 1998 agreement.

The facts of this case revealed that the employer, by the name and style of Tao Ying Metal Industries was a going concern who did business in a jurisdiction previously under the apartheid legal order.⁷⁰ Preceding the enactment of the Labour Relation Act,⁷¹ labor relations in SA was regulated by the 1956 LRA⁷² and pursuant to the provision of section 51 of the said 1956 LRA, power to grant exemptions to workers by the employer was taken from the industrial council agreements.⁷³ As a result of the power conferred upon the employer by the industrial council agreement, employers usually offer its employees' wages and conditions of employment which were not too agreeable and favorable to workers as contained in the bargaining council agreements put in place in accordance to the 1995 LRA.⁷⁴

The seventh Schedule to the 1995 LRA provides that the 1956 LRA should be transited to the new scheme of 1995.⁷⁵ To this end, the industrial council agreement established under the 1956 LRA is the valid bargaining council agreement under 1995 LRA.⁷⁶ This means that the industrial agreement which was binding before the coming into force of the 1995 LRA remains in force for about eighteen months after the commencement of the 1995 Labor Relations Act.⁷⁷

In the case under consideration, the employees claimed that the company was under a duty to comply with the nascent agreement; on the other hand, the company maintained that the exemptions granted to it under the industrial council main agreement still applied to and was operational under the new main agreement.⁷⁸ Since the matter falls under the jurisdiction and function of the Commissioner for Conciliation, Mediation and Arbitration (CCMA), the commissioner in settling labor disputes and that of the courts in monitoring the arbitration process,⁷⁹ the commissioner: *"found that the exemptions relied upon by the employer expired when the industrial council main agreement terminated."*⁸⁰

⁷⁰ Night Tafadzwa Rwodz, 'The Use of Alternative Dispute Resolution Mechanisms In Labor Relations In The Workplace In South Africa' (Unpublished Master Of Laws Theses Submitted To The Faculty Of Law At The University of Fort Hare South Africa. 2012) 89.

⁷¹ Act 66 of 1995.

⁷² Act 28 of 1956.

⁷³ CUSA v Tao Ying Metal Industries, par. 7.

⁷⁴ CUSA v Tao Ying Metal Industries, par. 15.

⁷⁵ CUSA v Tao Ying Metal Industries, par. 8.

⁷⁶ CUSA v Tao Ying Metal Industries, par. 8.

⁷⁷ CUSA v Tao Ying Metal Industries, par. 8..

⁷⁸ CUSA v Tao Ying Metal Industries, par. 21.

⁷⁹ CUSA v Tao Ying Metal Industries, par. 1.

⁸⁰ CUSA v Tao Ying Metal Industries, par. 27.

In addition, the commissioner opined that the industrial council main agreement ended on the fourteenth of April 1998, which was the date the bargaining council major agreement came into force.⁸¹ The CCMA accordingly made an award in favor of the workers ordering the company to comply with applicable bargaining council agreement and pay its workers favorable wages and conditions of employment.⁸²

6 Application of the *Ubuntu* concept into employment termination disputes in Nigeria and SA

The Ubuntu concept does not have a perfect and accurate definition or description; the concept derives its meaning from a word of Nguni origin,⁸³ so Ubuntu could mean humanity, humanness, humanism, social solidarity, fairness and being human.⁸⁴ It is recalled that Ubuntu as a concept, is part of sub-Saharan African culture,⁸⁵ folklore and jurisprudence right from the ancient Africa time and the concept has been applied to several issues, employment disputes inclusive.⁸⁶

The ontology of Ubuntu is found in the adage: 'I am because we are, and since we are, therefore I am.'⁸⁷ Ubuntu, therefore, emphasizes the interconnectedness and of humanity irrespective of race, color or creed.⁸⁸ Ubuntu as a concept is the understanding and recognition that: "I can only be better if you are better; and this concept has been applied in different areas of human endeavors. Ubuntu signifies collectivism. The questions therefore are, can the employers be without the employees, can the employees be without the employers;⁹⁰ the employers can only be better if both the employees and the employers are better, and which is the essence of collective bargaining.⁹¹ In this connection, the application of Ubuntu philosophy into employment termination disputes in Nigeria and South Africa, will bring both parties into a cohesive, working group relationships that results in greater personal satisfaction while yielding an improved, overall collective achievements.

The idea of applying ADR and Ubuntu philosophy in termination of employment disputes in both jurisdictions, corroborates the expression: "*the whole is greater than the sum of its parts,*" or "*a rising tide lifts all boats.*" In other words, the employers and the employees are better when both are better.⁹² This is Ubuntu and ADR, it is better to jaw-jaw than to war-war,⁹³ hence the application of ADR into employment disputes. Both employers and the employees can achieve more when they work as a

⁸¹ CUSA v Tao Ying Metal Industries, par. 27.

⁸² CUSA v Tao Ying Metal Industries, par. 21.

⁸³ Lupenga Mphande and Themba Moyo, 'Naming in Nguni Languages: The Case of Ngoni in Northern Malawi,' *A Journal of Contemporary Research* (2008) (5) (1) 105.

⁸⁴ Robert Kudakwashe Chigangaidze, Anesu Aggrey Matanga, and Tafadzwa Roniah Katsuro, 'Ubuntu Philosophy as a Humanistic–Existential Framework for the Fight against the COVID-19 Pandemic' *Journal of Humanistic Psychology* (2022) (62) (3) 319.

⁸⁵ James Fieser and Bradley Dowden, *Hunhu/Ubuntu* in the Traditional Thought of Southern Africa' Internet Encyclopedia of Philosophy (2023) 1.

⁸⁶ Tembeka Ngcukaitobi, *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (Penguin Books 2018) 73-74.

⁸⁷ John Mbiti, 'I am because WE are and, since we are, therefore I am – meaning'

⁸⁸ Fidelis Oghenero Ejegbavwo and Anthony Adeh Adoga, 'Ubuntu and Human Rights in Africa in a Global Community: Rethinking African Concept of Justice' *Ochendo: An African Journal of Innovative Studies* (2023) (4) (4) 31

⁸⁹ Mugumbate, Jacoba and Nyanguru, Andrew, 'Exploring African Philosophy: The Value of Ubuntu in Social Work' *African Journal of Social Work* (2013) (3) (1) 83.

⁹⁰ Emuobo Emudainohwo, 'Analyzing the Duties of Employer and Employee in the Nigerian Law' *Beijing Law Review* (2021) (12) 305.

⁹¹ Jovana M. Misaliovi, 'Collective Bargaining with Special Reference to the Law of Germany and Republic of Serbia' *Strani Pravni Zivot* (2019) (63) (4) 115.

⁹² Richard Hannis Ansah, Jane Osei, Shahryar Sorooshian and Daniel Aikhuele, 'Importance of Employer-Employee Relationship Towards The Growth of a Business' (2018) (19) *Quality - Access to Success* 42-48.

⁹³ Tony Molloy and Toby Graham, 'Jaw Jaw is better than war war' *Trusts & Trustees* (2008) (14) (10) 674.

team instead of one of the parties trying to outshine the other either through termination or resignation. In the workplace, Ubuntu can create a true synergy,⁹⁴ through cooperation, individual employer and employee can come together to produce a collegiate effort that is greater than would have resulted if employer/employee were to work alone.

In summary therefore, by claiming that “I am because we are,” this idea challenges the opinion of individualism, a notion that places the individual over and above all considerations.⁹⁵ Rather, the Ubuntu promotes the idea that our identity and worth are derived from our relationships with others and our contributions to the larger community in our places of work which is the basic functions of the employers and the employees in a community. This encourages compassion, understanding, and a sense of responsibility towards the well-being of others, fostering social harmony and mutual respect between the employers and the employees. Lastly, it emphasizes the interconnectedness of human beings and the importance of community and social relationships in defining our identity and existence in our primary place of assignment. The idea of termination of contract of employment by the employer without considering the interconnectedness of both parties breaks the chain binding us together.⁹⁶

7 Conclusions

In conclusion, this research has delved into the significant role of Alternative Dispute Resolution (ADR) in the resolution of termination of employment disputes, with a focus on the comparative analysis of Nigerian and South African employment laws. Through exploring various ADR methods such as negotiation, mediation, and arbitration, it has become evident that ADR offers a more efficient, cost-effective, and amicable means of resolving employment disputes compared to traditional litigation.

Furthermore, the examination of employment laws in both Nigeria and South Africa has shed light on the legal frameworks governing termination of employment and the incorporation of ADR mechanisms within these frameworks. While Nigeria and South Africa have distinct legal systems, both countries recognize the importance of ADR in resolving employment disputes swiftly and equitably.

Moreover, the concept of Ubuntu, which originates from the Southern African region, including Malawi, underscores the cultural and philosophical underpinnings that influence dispute resolution in both Nigerian and South African contexts, particularly in employment termination disputes. By emphasizing principles of compassion, empathy, and community harmony, the Ubuntu philosophy promotes a more holistic approach to resolving conflicts in the workplace, fostering reconciliation and preserving relationships.

In essence, this paper advocates for the widespread adoption of ADR in addressing termination of employment disputes, drawing on the strengths of both Nigerian and South African legal systems and embracing cultural values such as Ubuntu. By promoting ADR mechanisms and integrating cultural sensitivities into dispute resolution processes, both employers and employees can navigate termination disputes more effectively, ultimately fostering a more harmonious and productive work environment.

⁹⁴ Heather Fuller, 'Ubuntu: Synergy in the Workplace' (General 2023) 1.

⁹⁵ Kelly-Ann Allen, Margaret Kern, Christopher Rozek, Dennis McInerney and George M. Slavich, 'Belonging: A Review of Conceptual Issues, an Integrative Framework, and Directions for Future Research' *Austria Journal of Psychology* (2021) (73) (1) 87.

⁹⁶ Mercy Babatunde, 'An Assessment of The Wrongful Termination of An Employment Contract Under the Nigerian Labor Law' (An Unpublished Thesis Submitted to The Faculty of Law, University of Ibadan, in Partial Fulfilment of The Requirements for The Award of The Degree of Bachelor of Laws 2021) 50.

8 Recommendations

The paper therefore recommends promotion of ADR awareness between both parties. Employers, employees, and legal practitioners in Nigeria and South Africa should be encouraged to increase awareness and understanding of ADR mechanisms. This can be achieved through educational workshops, training programs, and informational campaigns highlighting the benefits of ADR in resolving employment disputes. Additionally, integration of ADR provisions into legal frameworks should be advocated for within the existing legal frameworks governing employment law in both Nigeria and South Africa. This may involve legislative reforms or amendments to existing laws to mandate or incentivize the use of ADR methods in resolving termination disputes. On top of this, investment should be done in capacity building initiatives to enhance the skills and expertise of ADR practitioners, including mediators, arbitrators, and negotiators. Providing specialized training in employment law and dispute resolution techniques can ensure that ADR processes are conducted effectively and efficiently.

As a result of what has been said, the establishment of dedicated ADR centers or panels should be supported to aid specializing in employment disputes, equipped with experienced mediators and arbitrators familiar with the nuances of employment law. These centers can provide accessible, impartial, and efficient dispute resolution services to both employers and employees. Emphasis should be made on the importance of cultural sensitivity and inclusivity in ADR processes, particularly in diverse societies like Nigeria and South Africa. Cultural values and traditions, such as the Ubuntu philosophy should be incorporated into ADR practices to facilitate more meaningful and sustainable resolutions to employment disputes.

Furthermore, early intervention and proactive resolution of employment disputes should be encouraged through ADR mechanisms. Encouraging parties to engage in negotiation, mediation, or conciliation at the onset of a dispute can help prevent escalation and preserve working relationships; and finally, establish mechanisms for monitoring and evaluating the effectiveness of ADR in resolving termination of employment disputes. Collect data on case outcomes, satisfaction levels, and costs associated with ADR processes to identify areas for improvement and inform future policy decisions.