

A Comparative Study of Minimum Employment Conditions in the Southern African Development Community (SADC)

1. Introduction

This is a comparative study of minimum conditions of employment in four SADC countries. The hope is that a general picture might be formed on the minimum employment conditions in the region from the four countries considered. Because of financial and time constraints, the study is not as detailed as it might be. It would have been better, for instance, not only to look at legislative instruments, but judgements on those instruments as well, in order to form a more complete picture.

The countries that will be considered are Botswana, Namibia, South Africa and Zambia. The study will be presented thematically, rather than country by country, and within that, draw the necessary comparisons.

2. Some Preliminary Observations

In South Africa there is a dedicated statute dealing with minimum employment conditions – namely, the *Basic Conditions of Employment Act*¹. South Africa deals with labour relations as such in a statute dedicated to that subject, namely the *Labour Relations Act*. Zambia has an extensive employment statute with several “chapters” which are also called Acts. One of these is *The Minimum Wages and Conditions of Employment Act*² -- this is Chapter 276 of the *Employment Act* and contains minimum employment conditions. Chapter 270, also called *The Employment (Special Provisions) Act*³, also has a bearing on the subject. In the case of Namibia, the *Labour Relations Act* has various “parts” and Part V deals with “Basic Conditions of Employment”. Botswana deals with basic conditions of employment (minimum employment conditions) in Chapter 47:01 of the *Employment Act*. Chapter 47:02 deals with the employment of non-citizens.

For the purposes of this study, bargaining rights and rights around freedom of association are left out of consideration.

¹ Act No 75 of 1997.

² Act No 25 of 1982.

³ Acts No 29 of 1966 and 13 of 1994.

3. Contract of Employment

Broadly speaking, the employment contract, like any other contract, is a matter for the common law. Rycroft and Jordaan say the individual employee's relationship with her employer is "founded on the common-law contract of employment" (Rycroft A & Jordaan B, 1992:8; 21 *et seq*). It is acknowledged that statutory law has more and more constricted the space in which the employer can extract the bargain she wishes from the employee – the notion of "minimum conditions of employment" would not arise without that constriction. At common law the employment contract can come into existence in various ways: it can be in writing, oral or even implied. (Rycroft A & Jordaan B, 1992:36)

The *Zambian Employment (Special Provisions) Act* sort of codifies this understanding and in *section 2* defines an employee as a person who has "entered into or works under a contract of service, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind". Our initial concern is with the manner of entering into the employment contract. Later we shall consider the other questions the definition throws up – i.e. the non-distinction between an employment contract and a contract of service; as well as the approach on the relevance or otherwise of the method of calculating remuneration to the question of whether one is an employee or not.

Botswana (*section 2 of Employment Act*) defines an employee as a person who has "entered into a contract of employment for the hire of his labour". It defines "a contract of employment" as an "agreement, whether oral or in writing, expressed or implied, whereby one person agrees for a wage or other benefit or both to let his labour to and to perform it under the orders of another person who agrees to hire it". Here too, there is a codification of the common law position about an employment contract. We shall discuss other issues around these definitions in due course.

The inclusion of the common law understanding of how an employment contract might be concluded has an educative import. It does not as such create any right which did not exist before, but it helps remove any doubt that might exist in the minds of the parties about whether in any given set of circumstances there's an employment contract or not.

4. Minimum Conditions of Employment

The purpose of introducing minimum employment conditions is to set a limit below which employers cannot sink in entering into employment agreements with employees. Rycroft and Jordaan formulate the matter in the following terms:

At common law the parties are in principle free to determine the terms and the form of their relationship. But, as we saw earlier, the individual employee's generally weak bargaining position effectively allows the employer to determine the content and the form of the relationship almost unilaterally.... (p 36)

There is an understanding that the purpose of such legislation is not to establish maximum conditions of employment. So, the Namibian statute states the matter very clearly in *section 25*: “The provisions of this Part shall not be construed as preventing an employer from agreeing to, or granting, any condition of employment which is more favourable to any employee than any condition of employment referred to in this Part”.

It is important to point out before we discuss the minimum conditions of employment embodied in these laws that not every employee is covered by them. Often government employees and other people who are involved in “essential” services are excluded from the scope of these laws. In the case of Zambia, there is the added stipulation in the *Labour Relations Amendment Act, section 4*, that:

An employee shall cease to be an eligible employee and become a member of management if the employee -

- (a) is empowered to make management decisions;
- (b) is entrusted with personnel management and industrial relations functions; or
- (c) reports directly to the Chief executive: Provided that where there is a disagreement on the point when an eligible employee becomes a member of management, the matter shall be referred to the Minister for resolution, subject to appeal to the Court.

4.1 The Meaning of “Employee”

Often it becomes necessary in applying the law to determine whether the person is an employee within the meaning of the relevant law in order to establish whether that law holds in relation to him/her. In discussing the contract of employment above, we hinted that there are some issues that are thrown up by the way an employee is defined in Zambian law.

That law, we may recall, speaks about a “contract of service” when it defines an employee. The Namibian legislation states in *section 1*:

"employee" means any natural person:

- (a) who is employed by, or working for, any employer and who is receiving, or entitled to receive, any remuneration; or
- (b) who in any manner assists in the carrying on or the conducting of the business of an employer.

Botswana legislation, on the other hand, distinguishes between an employee and a contractor. Firstly, when it defines a contract of employment, it stipulates that the employee must work “under the orders” of the employer. Second, it defines a contractor as “a person who contracts

with a principal to supply labour or to carry out the whole or any part of any work undertaken by the principal in the course of or for the purposes of the principal's trade or business.”

The Basic Conditions of Employment Act (SA) defines an employee in *section 1* as “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 any other person who in any manner assists in carrying on or conducting the business of an employer...” South Africa thus distinguishes between a contract of employment and a contract for services. Rycroft and Jordaan formulate the matter in the following words:

The run-of-the-mill employment contract is relatively easy to identify: the employee ... devotes his or her full time to the employer's business under the latter's supervision or control; works at a set place; has regular working hours, etc.... (p 40)

South Africa also occasionally employs what is called the “dominant impression test” if there is doubt about whether we deal with an employment contract or a contract for services. This means one must look at how the working environment is organised and then ask: “what is the overall impression one gets from what one sees?” The application of this might in the final analysis wind down to an appreciation of the factors pointed out above – i.e. if a person devotes his or her full time to the employer's business; functions under the direction or control of the employer; and has set hours of work, the dominant impression that emerges is one of an employer-employee relationship even if the contract of engagement says what it is establishing is a contract for services.

It would appear, on analysis, that South Africa and Botswana's positions on the question are similar and that Namibia and Zambia's are similar. The consequences are very different, depending on which of the two positions one takes. Further, the consequences would manifest on a much wider sphere than might interest us for the purposes of the current study. What is relevant for our purpose is that it would appear that the minimum conditions of employment we are investigating would have wider application in Zambia and Namibia than they might in Botswana and South Africa.

But it would be instructive to study how the courts have dealt with this in Namibia and Zambia, since intuition suggests that some of the minimum employment conditions we shall consider would be hard or impossible to extend beyond an employee as it is defined in Botswana and South African legislation. How, for instance, would the annual leave provisions legislated in Zambian and Namibian laws apply to a consultant, even if it is a “natural person”? Given the similarity in the wording between the Namibian and the South African statutes in defining an employee (bar the fact that SA explicitly excludes contractors for services), it would not be unsafe to surmise that Namibian courts might attach to their statute a meaning similar to SA.

4.2 Hours of Work

Section 26 of the **Namibian** statute regulates hours of work. It provides that the ordinary hours of work shall not exceed 45 per week for all employees falling within the scope of the statute, unless they are security guards or guards, in which case the outer weekly limit is 60 hours. The section then regulates how those hours might be spread over the week. It stipulates that any time taken for meals breaks shall be included in the hours worked if we deal with security guards or guards, but that it shall be excluded in respect of other employees. The calculation of weekly hours is affected by two other sections of the statute, namely *sections 30(2)* and *33(2)*. *Section 30(2)* reads:

The provisions of subsection (1) shall not apply in respect of an employee while he or she performs emergency work or work connected with the arrival, departure, provisioning, loading or unloading of a ship or aircraft used for the transportation of passengers or goods, or the arrival, departure, provisioning, loading or unloading of a truck or other heavy vehicle used for the transportation of passengers, livestock or perishable goods.

Subsection 1, referred to in the citation, stipulates that “No employer shall require or permit an employee to work for a spreadover of more than 12 hours.” The effect of *subsection 2* is that in the cases it lists, an employer may require or permit an employee to work more than 12 hours in any given day.

Subsection 33(2) reads:

The provisions of subsection (1) shall not apply to an employer who employs an employee for purposes of:

- (a) performing any work referred to in section 30(2);
- (b) carrying on business on a Sunday or public holiday in a shop, hotel, boarding house or hostel, which he or she lawfully keeps open on a Sunday or public holiday;
- (c) performing any work in domestic service in a private household;
- (d) performing, in the course of any farming operations, any essential work which is required to be performed on a Sunday or public holiday;
- (e) with the approval of the Permanent Secretary granted by notice in writing generally or in every particular case with the concurrence of the employee or employees concerned upon an application made to the Permanent Secretary by such employer in such form as may be determined by the Permanent Secretary, performing any other work specified in such notice;
- (f) performing any work, in the course of operations in any industry, which in the opinion of the Minister is, by reason of the nature of such work, required to be performed continuously and declared by notice in the *Gazette* by the Minister to be work to which the provisions of subsection

(1) shall, subject to such conditions, if any, as may be determined by the Minister and specified in such notice, not apply.

Subsection 1, referred to in the citation, stipulates that “No employer shall require or permit an employee to perform any work on a Sunday or public holiday”. Employees who are mentioned above are however not covered by this ban. If, now, we read *sections 26, 30(2) & 33(2)* together, the effect is that if employees who are mentioned in the last two sections work on a Sunday, such work is not taken into account in determining their weekly spread-over and therefore they may work for more than 12 hours in a given day. Further, any overtime worked in terms of the statute, is not taken into account in determining the spread-over.

In terms of *section 29 (Extension of ordinary working hours)* an employee who works in or in connection with a shop, and who is required to attend to a customer, may be required to work up 15 minutes per day or per shift after completion of the ordinary working hours, as the case may be, but in the aggregate may not exceed one hour during any week.

Section 95(1) of the **Botswana** statute limits working hours to a maximum of 48 per week and the spread-over to 8 hours per day. The statute commands that an employee must not work for more than five consecutive hours without a break of at least thirty minutes.

Section 95(2) provides that the limit in working hours referred to above can be increased in the case of:

- (a) An accident, actual or threatened;
- (b) Work, the performance of which is essential for the life of the community;
- (c) Work essential for national defence or security;
- (d) Urgent work to be done to machinery or plant;
- (e) An interruption of work which it was not reasonably possible to foresee; or
- (f) Work to be performed by employees in any industrial undertaking considered by the Minister to be vital to the economy of Botswana or in any service declared by the Minister ... to be essential for the purposes of this Part.

These exceptions are subject to the proviso that “where an employee is required to work during a rest period, he shall be granted a similar rest period in substitution ... before the next ... rest period is due”.

Section 94 stipulates that where an employee works during a rest period, whether by mutual agreement or in terms of *section 95*, she must be paid at least double the pay she would receive if the work were done during ordinary working hours. Alternatively, she should be granted a day or days off, but this option can only be triggered by the election of the employee.

Section 93 commands that an employee must have a rest period of 24 consecutive hours and that this period must be or include Sunday. If the employee does shift work, the rest period is 30 consecutive hours, and such period does not have to be or include Sunday. In terms of *subsection 4*, contravening the provisions of *section 93* is a criminal offence.

Section 95(3) states that respecting work which, by its nature, must be carried out continuously by a succession of shifts, employees may be required to work during the rest period provided for in *section 93*. However the Commissioner of Labour may rule that the work in issue is not of such a nature that it must be carried out continuously, in which case *section 93* kicks in.

No employee may be required or permitted to work overtime that exceeds 14 hours in any week, but the Minister may exempt an industry from this restriction by notice in the Gazette.

The **Zambian Minimum Wages and Conditions of Employment (Shop Workers) Order**⁴ provides in *paragraph 3* that:

- (1) No person shall employ an employee, other than a manager –
 - (a) For more than forty-five hours in a week excluding meal hours;
 - (b) For more than eight and one-half hours in a day, excluding meal hours, except in the case of butcheries, bakeries, and dairies, who shall complete within ten and one-half hours of commencement of such employee's work;
 - (c) For more than five hours without an interval of at least one hour for a meal;
 - (d) To work after 14 hours for more than five days in a week;
 - (e) Under sixteen but not below fifteen years of age for more than seven hours in a day confined within a period of ten hours; or
 - (f) On Sunday or public holiday.
- (2) For the purpose of stock-taking or the sale of perishable food-stuff or other emergency work which cannot be carried out during normal working hours, an employee may be employed on a Sunday or public holiday or beyond the hours prescribed in subsection (1).
- (3) Weekly hours for a watchman shall be sixty, spread over six days, and any hour worked in excess shall be paid as provided in paragraph 4 of this Schedule.

Paragraph 4 states:

- (1) Any employee who works in excess of forty-five hours in a week shall be paid at one and half times the employee's hourly rate of pay.
- (2) An employee shall be paid for work done on Sunday or public holiday by an employer at an hourly rate of not less than double the employee's actual hourly rate of pay.
- (3) To calculate the hourly rate of pay in a month, the actual amount received by the employee in basic wages for that month shall be divided by one hundred and ninety-five hours.

The **South African Basic Conditions of Employment Act** provides in *section 9* that:

- (1) ... [An] employer may not require or permit an employee to work more than:

⁴ *Statutory Instrument* 120 of 1997.

- (a) 45 hours in any week; and
 - (b) Nine hours in any day if the employee works for five days or fewer in a week; or
 - (c) Eight hours in any day if the employee works on more than five days in a week.
- (2) An employee's ordinary hours of work ... may by agreement be extended up to 15 minutes in a day but not more than 60 minutes in a week to enable an employee whose duties include serving members of the public to continue performing those duties after the completion of ordinary hours of work.

Section 10 reads:

- (1) ... [An] employer may not require or permit an employee to work –
- (a) Overtime except in accordance with an agreement;
 - (b) More than ten hours' overtime a week.
- (1A) An agreement in terms of subsection (1) may not require or permit an employee to work more than 12 hours on any day.
- (2) An employer must pay an employee at least one and one-half times the employee's wage for overtime worked.
- (3) Despite subsection (2), an agreement may provide for an employer to –
- (a) Pay an employee not less than the employee's ordinary wage for overtime worked and grant the employee at least 30 minutes' time off for every hour of overtime worked; or
 - (b) Grant the employee at least 90 minutes' paid time off for each hour of overtime worked.

In Namibia, Zambia and South Africa the norm is therefore that a working week comprises 45 hours. In Botswana a working week is 48 hours. It is up to the employer in all four instances how the prescribed number of hours are spread over the week, provided only that it complies with the restriction that it cannot require or allow an employee to work for longer than 10 or 12 hours as the case might be in any given day.

In all the four countries considered, employees may do overtime and compensated as indicated. In Botswana, Namibia and Zambia it would seem that overtime might not necessarily be a matter for agreement: the law sets out the conditions in which it is allowed and it would seem that if those conditions are fulfilled the employer might without further ado require an employee to work overtime. In South Africa, on the other hand, the legal texts suggest that overtime is pretty much a matter for agreement and even then, the terms of the agreement are carefully circumscribed. The rate of remunerating an employee for overtime appears to be common across the four countries.

A matter, however, which invites comment, appears to be Zambia's method of computing the hourly rate for the purpose of paying overtime. The *Order* states that the rate is arrived at by dividing the actual amount received by the employee in basic wages for that month by 195 hours. Say an employee was absent from work for a reason that might justify the employer deducting the pay for that day from her income for the month. The **actual** amount the employee would receive in that month would be less a day's income. If the employee worked overtime in that month, his hourly rate for that overtime would be calculated on a figure that is reduced by a day's income.

This seems clearly inequitable. The employee has already atoned, as it were, for the sin of absence from work by not receiving pay for that day. Why should she pay yet another price by having her hourly rate calculated on a lower base? It seems that a more equitable calculation would be one based on the employee's basic wage rather than what she **actually** received by way of a basic wage. Alternatively, if the **actual** amount of money she received must be used as a basis for the computation then, perhaps, the scales must be balanced by using, as a divider, the **actual** normal hours the employee got paid her basic wage for in that month.

4.3 Annual Leave

The *Minimum Wages and Conditions of Employment Order of Zambia* states in paragraph 5:

- (1) An employer shall grant leave of absence on full pay to an employee, other than a part-time employee, at the rate of two days per month to an employee who has completed six months continuous service subject to and in accordance with the following conditions:
 - (a) In computing the period of leave, Sundays and Public Holidays shall be excluded;
 - (b) Part-time employees shall be given leave of absence on full pay as set out in sub-paragraph (1) based on the proportion that their number of hours worked per month bears to one hundred and ninety-five hours; and
 - (c) The employer shall give reasonable consideration to the exigencies and interests of the business of the employer in agreeing to the date when an employee may take leave.
- (2) An employee, the journey to whose home in Zambia necessarily involves travelling over two hundred and eighty kilometres from his place of employment and who accumulates sixty days leave, shall be granted travelling time at the rate of one day (on both the homeward and return journey) for each two hundred and eighty kilometres of the distance travelled.
- (3) When proceeding on leave, all money due to the employee, including holiday allowances, shall be paid immediately prior to proceeding on such leave.

- (4) The holiday allowance referred to in sub-paragraph (3) shall be calculated at the rate of three hundred and fifty kwacha per day up to a maximum of thirty days.

These stipulations convey that:

- Employees who are not employed on a part-time basis earn annual leave at the rate of 2 working days per month;
- The leave becomes due after they have worked continuously for 6 months. Presumably, though, it would be possible to take leave on a *pro rata* basis if the employee has worked for a shorter period;
- Part-time employees are entitled to annual leave on the same basis as those who are full-time if, notwithstanding the part-time nature of their engagement, they work for the same number of hours as full-time employees;
- It is the employer's prerogative to approve the timing of the taking of leave, in line with the interests of the business;
- If an employee's home is in Zambia, and she travels more than 280 kilometres from the place of work to go home, and she has accumulated 60 days annual leave, such an employee must be granted, over and above her leave days, travel time. The travel time to be granted is 1 day on a return trip for every 280 kilometres.

(There are some interesting considerations that can be explored here. Presumably the employee would not be entitled to the travel time if she does not **actually** go home. Where an employee's home is, say, 400 kilometres from the workplace, it would be interesting to inquire what her allowance by way of travel time might be. Would the time be calculated as if the *Order* said the employee is entitled to 1 day travel time for every 280 kilometres **or part thereof**, or would the calculation be prorated in respect of the difference between 280 and 400 kilometres? Further, if two routes are open to the employee, one of which is shorter than 280 kilometres and the other not, does such an employee have an election as to the route she might take? It would appear that the reason the *Order* uses the term *necessarily* is to bar the employee from choosing a longer route if it is possible to go home using a shorter one.)

Section 39 of the **Namibian** statute provides as follows:

- (1) (a) An employer shall grant an employee at least 24 consecutive days' leave of absence on full remuneration in respect of each period of 12 consecutive months for which the employee is employed by him or her...: Provided that the period of leave may be reduced by the number of days on which the employee was during the relevant leave cycle granted occasional leave on full remuneration at his or her request;

- (b) No employer shall during an employee's leave referred to in paragraph (a) require or permit that employee to perform any work as his or her employee.
- (2) The leave referred to in subsection (1)(a):
- (a) Shall be granted by the employer as from a date determined by him or her, but not later than four months after the expiration of the leave cycle concerned: Provided that if an employee has agreed thereto in writing before the expiration of the said period of four months, his or her employer may grant such leave to him or her as from a date not later than two months after the expiration of the said period of four months;
- (b) Shall not be granted by the employer to be concurrent with any period of sick leave granted in terms of section 40 or maternity leave granted in terms of section 41 or with a period of notice of termination of the contract of employment;
- (c) Shall for each public holiday which falls within the employee's period of leave and which falls on a day which otherwise would have been an ordinary working day for such employee, be extended by one working day with full remuneration.
- (3) An employer shall pay an employee to whom leave is granted in terms of subsection (1), the remuneration in respect of his or her leave not later than the last working day of the employee before the commencement of his or her leave, or, at the written request of the employee, not later than the first pay-day for such employee after the expiration of his or her leave.

The import of these stipulations can be summarised thus:

- Employees are entitled to 24 consecutive days paid annual leave per leave cycle. If the employee has asked for and received paid leave in the intervening period, her annual leave may be reduced by the number of days already granted him/her. On the face of the stipulation, it would seem that if the leave in the intervening period was at the instance of the employer, her annual leave cannot be reduced on account of it.
- An employee who is on leave cannot work for her employer during that period.
- Annual leave cannot overlap with any other leave authorized by the statute or a public holiday.
- The employee's wages for the period when she is on leave must be paid in advance, unless she requests in writing that it must be paid on a later date, in which case it must be paid no later than her first pay day after the leave.
- The employer has discretion about the timing of leave, but cannot refuse a leave application more than four months after the expiry of the cycle to which the leave refers.

The *Basic Conditions of Employment Act* in **South Africa** provides in *section 20* as follows:

- (2) An employer must grant an employee at least –
 - (a) 21 consecutive days annual leave on full remuneration in respect of each leave cycle; or
 - (b) By agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid;
 - (c) By agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid.
- (3) An employee is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days.
- (4) An Employer must grant annual leave not later than six months after the end of the annual leave cycle.
- (5) An employer may not require or permit to take annual leave during –
 - (a) Any other period of leave to which the employee is entitled in terms of this Chapter; or
 - (b) Any period of notice of termination of employment.
- (6) Despite subsection (5), an employer must permit an employee, at the employee's written request, to take leave during a period of unpaid leave.
- (7) An employer may reduce an employee's entitlement to annual leave by the number of days of occasional leave on full remuneration granted to the employee at the employee's request in that leave cycle.
- (8) An employer must grant an employee an additional day of paid leave if a public holiday falls on a day during an employee's annual leave on which the employee would ordinarily have worked.
- (9) An employer may not require or permit an employee to work for the employer during any period of annual leave.
- (10) Annual leave must be taken –
 - (a) In accordance with an agreement between the employer and the employee; or
 - (b) If there is no agreement ... at a time determined by the employer in accordance with this section.
- (11) An employer may not pay an employee instead of granting paid leave in terms of this section except –
 - (a) On termination of employment; and
 - (b) In accordance with section 40 (b) and (c).⁵

The **Botswana** statute provides in *section 98* as follows:

- (1) Nothing in this section shall affect any law, award, custom or agreement between parties to a contract of employment providing for leave with pay no less favourable to the employee than that for which this section makes provision.

⁵ *Section 40(b)* makes a cross reference to *section 21(1)*. *Section 21(1)* stipulates that the minimum annual leave pay an employer can pay to an employee is equivalent to the amount the employee earned at the beginning of the period immediately before taking leave. And then *section 21* makes a cross reference to *section 35*, which last-mentioned section deals with the calculation of remuneration and wages.

- (2) Every employer shall grant to every employee employed by him leave with basic pay at the rate of not less than 1,25 days per month.
- (3) Of the 15 working days' leave earned in respect of any period of 12 months not less than eight working days shall be taken no later than six months immediately after the period in respect of which the leave was earned.
- (4) Any balance of leave not taken in accordance with subsection (3) may be accumulated, year by year; but such leave shall not be accumulated for longer than three years immediately after the end of the period in respect of which leave was first accumulated, and at the end of that three years' period all the accumulated leave together with all the leave earned in respect of the immediately preceding period of 12 months shall be taken.
- (5) The leave for which this section makes provision shall be in addition to any public holiday or weekly rest period in respect of which, by agreement or custom, the employee is not required to work under his contract of employment and any period during which the employee is absent from work owing to illness.
- (6) Where a contract of employment is terminated by either party to the contract, the employer shall pay to the employee his basic pay –
 - (a) In respect of any period of leave accumulated under subsection (4) or which has otherwise accrued to him but has not been granted before the termination of the contract of employment; and
 - (b) At a rate of 1,25 days in respect of every month or part of a month of continuous employment after he last became entitled to leave under subsection (2).

It seems clear from the stipulations cited that the Zambian dispensation is the most generous in terms of the minimum annual leave days. Not only do employees get 24 working days leave: they also, if they work more than 280 kilometres from their homes, are entitled to travel time calculated at the rate of 1 day per 280 kilometres on a return trip if they have accumulated 60 days annual leave. Although the initial stipulation refers to 24 consecutive, a subsequent stipulation states that Sundays and Public Holidays must not be factored into the 24 days. In the three other countries it is only public holidays that are counted out. It would therefore seem that “consecutive” as it is used in the statute means “unbroken”.

With reference to Namibia, the bar that an employer cannot require or permit an employee to work for him **as his employee** during that employee's period of annual leave raises the question whether the employee can work for the employer in another capacity in that period. An attempt has been made to distinguish, for instance, between an employment contract and a contract for services. The question which now arises is whether, given the language of the Namibian statute, an employee who is on annual leave in terms of that statute, could during that period consult for his employer.

4.4 Sick Leave

The **Zambian Order**⁶ states in *paragraph 6*:

- (1) An employee who is unable to execute normal duties due to illness or accident not occasioned by the default of the employee shall on production of medical certificate from a registered medical practitioner or medical institution designated by the employer, be granted paid sick leave at the following rates:
 - (a) At full pay during the first three months; and
 - (b) Thereafter at half pay for the next three months: Provided that if the employee has not recovered from illness or accident after six months ... the employer may on the recommendation of a registered medical practitioner or medical institution designated by the employer, discharge the employee, whereupon the entitlement to sick leave shall cease.

A question it would be interesting to explore in relation to these provisions is whether the phrase “not occasioned by the default of the employee” refers both to illness and to accident or only to accident. Assuming it refers to both, then it would be interesting to inquire how, in practice, a provision like this is applied. What does it mean, in practice, to say a person is ill due to her own default? If, say, an employee works very hard and gets not nearly enough time to rest, and she gets, as a result, recurrent tension headaches, is this the type of thing we might be speaking of? Would we be including in this category of employees people who are, e.g., HIV-positive? What would the practical implications of these scenarios be?

If, on the other hand, we apply the phrase to accidents, how might we deal with a situation where the employee is guilty of contributory negligence? Would we embark on an exercise in which we try to compute her degree of negligence in order to determine how much sick leave we might afford her, or would we withhold sick leave from her completely? Might it not make our lives easier if we simply proceeded on the basis that she is ill or incapacitated by the accident she was involved in, and allow her the stipulated sick leave?

The **South African** statute deals with sick leave in *sections 22-23* thus:

- 22(2) During every sick leave cycle⁷, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.
- 22(3) Despite subsection (2), during the first six months of employment, an employee is entitled to one day’s paid sick leave for every 26 days worked.

⁶ *Minimum Wages and Conditions of Employment Order*, 119 of 1997.

⁷ In *subsection (1)* a leave cycle is defined as a period of 36 months counted either from the date of employment with the same employer, or from the day after completing a previous cycle.

- 22(4) During an employee's first sick leave cycle, an employer may reduce the employee's entitlement to sick leave in terms of subsection (2) by the number of days' sick leave taken in terms of subsection (3).
- 22(5) Subject to section 23, an employer must pay an employee for a day's sick leave –
- (a) The wages an employee would have received for work on that day; and
 - (b) On the employee's usual pay day.
- 22(6) An agreement may reduce the pay to which an employee is entitled in respect of any day's absence in terms of this section if –
- (a) The number of days of paid sick leave is increased at least commensurately with any reduction in the daily amount of sick leave pay; and
 - (b) The employee's entitlement to pay –
 - (i) For any day's sick leave is at least 75 per cent of the wage payable to the employee for the ordinary hours the employee would have worked on that day; and
 - (ii) For sick leave over the sick leave cycle is at least equivalent to the employee's entitlement in terms of subsection (2).
- 23(1) An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.
- 23(2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.
- 23(3) If it is not reasonably practicable for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the employee to obtain the certificate.

The **Namibian** statute provides in *section 40* that:

- (1) An employer shall grant an employee who is absent from work through incapacity:
 - (a) In the case of an employee who works not more than five days during a week, not less than 30 working days; or
 - (b) In the case of any other employee, not less than 36 working days sick leave in the aggregate on full remuneration during each period

of 36 consecutive months for which the employee is employed by him or her (hereinafter referred to as a sick leave cycle): Provided that during the first 12 consecutive months of employment an employee shall not be entitled to sick leave on full remuneration at a rate of more than, in the case of an employee who works not more than five days during a week, one working day in respect of each completed period of five weeks employment, and, in the case of every other employee, one working day in respect of each completed month of employment.

- (2) The amount to be paid in terms of subsection (1) to an employee in respect of a day's sick leave on full remuneration, shall not be less than the remuneration payable to him or her in respect of the time (excluding overtime) ordinarily worked by him or her on that day of the week.
- (3) An employer shall not be bound in terms of subsection (1) to pay to an employee an amount in respect of any absence from work for a period covering more than two consecutive days, unless the employee produces a medical certificate signed by a medical practitioner and stating the nature and duration of the employee's incapacity: Provided that if an employee has during any period of up to eight weeks received payment in terms of that subsection on two or more occasions without having produced such a certificate to his or her employer, his or her employer shall during the period of eight weeks immediately succeeding the last such occasion not be bound to pay the said amount to the employee in respect of any absence from work, unless he or she produces such a certificate.
- (4) The provisions of subsection (1) shall not apply in respect of:
 - (a) an employee at whose written request an employer makes contributions, at least equal to those made by the employee, to any fund or organisation designated by the employee, which fund or organisation guarantees to the employee in the event of his or her incapacity the payment to him or her of not less than the equivalent of his or her remuneration for 30 working days in each period of 36 months of employment, if he or she works not more than five days during a week, or 36 working days in each such period if he or she works six days during a week;
 - (b) any period of incapacity of an employee in respect of which the employer is by or under a provision of any law required to pay to the employee an amount of not less than the equivalent of his or her remuneration;
 - (c) any casual employee.

The **Botswana** statute states in *section 100*:

- (1) Any employee shall, after medical examination at the expense of the employer by a medical officer nominated by the employer, or after medical examination at the expense of the employee by a medical officer nominated by the employee, be entitled to such sick leave as the medical officer concerned

- recommends, and shall be entitled to be paid his basic pay for at least 14 days of such sick leave in any one year of continuous employment.
- (2) Any employee who absents himself from his place of employment on the grounds of sickness shall –
 - (a) Inform his employer of his absence as soon as it is reasonably practicable to do so; and
 - (b) Where he is absent from his place of employment for 24 hours or more, provide his employer, upon his return ... with a certificate signed by a medical officer or with other evidence to the employer's satisfaction accounting for the entire period of absence.
 - (3) The employer shall pay to the employee his current basic pay for every day of paid sick leave granted under this section.

In setting out the rule with reference to Zambia, the difficulty was raised about that country's formulation, which requires that it must first be ascertained whether the employee is not to blame for her illness or the accident which triggers the sick leave provisions of the law. It will be noted that there is no such requirement in the legislation of the three other countries forming part of the study.

It is further noteworthy that South Africa and Namibia regulate their sick leave by creating three-year leave cycles. Zambia and Botswana, on the other hand, do not make reference to sick leave cycles. It would seem that an employee in Botswana is entitled to 14 days non-accumulative sick leave every year, so long, only, as she has worked for that employer continuously. (There's a case to be made for a dispensation with the type of sick leave cycles as South Africa and Namibia have. If an employee were to fall ill for longer than 14 days, for instance, such a sick leave cycle would stand her in much better stead.)

The Zambian case is a little difficult to comprehend from the instrument studied. Assuming that the employee who seeks sick leave qualifies for it, it does not seem to matter how long she has been employed by her current employer. Further, over what kind of period would she be entitled to the six month sick leave? The Zambian situation would clearly require a lot more study than was possible. It is difficult to imagine, for instance, that an employee in Zambia might, so long as she does not transgress the six-month limit, keep on taking paid sick leave in the manner provided for.

In all four countries considered, the employee is required to produce some evidence of the incapacitation leading to her absence from work, if she must have the hope to be paid for the period when she was absent. The number of days of absence that triggers the need for the production of the evidence is not uniform. In South Africa and in Namibia the employee must have been absent for more than 2 consecutive days (unless other factors specified in the legislation are present). In Botswana the timeframe is 24 hours. In Zambia it would appear even one day's absence requires production of the evidence. This evidence is by way of a certificate by a medical practitioner. In South Africa, additionally, any person registered with a professional council in terms of an Act of Parliament can issue the required certificate. In Botswana the

evidence does not have to be by way of a certificate: any other form of evidence with which the employer is satisfied will do.

A reading of *section 23(1)* of the South African statute suggests that there's no automatic obligation on the employee to produce the certificate even if the number of days of absence throws up the need for it. It is only if the employer asks for it that the obligation seems to arise. Therefore an employer who has not requested an employee to produce the certificate would seemingly not be within her rights to withhold such an employee's pay in respect of the days she was absent from work on account of illness or an accident.

4.5 Other Types of Leave

4.5.1 The **Zambian Order**⁸ makes provision in *paragraph 6(2)* for a female employee to be granted "leave of absence without loss of pay to enable her to nurse her sick child who has been hospitalised" if the illness of the child "requires special attention". The employer is however entitled to require such female employee to produce "a certificate from a medical institution recommending that the leave be granted". *Paragraph 6(3)* says that such leave is not deductible from the employee's accrued leave days. (The *Order* does not say how much time an employee may take as leave under this provision.)

The **South African** statute makes provision for family responsibility leave in *section 27* if the employee has worked for the same employer for longer than four months and such employee works for at least four days per week for that employer. Such an employee is entitled in each leave cycle to three days paid leave:

- When the employee's child is born;
- When the employee's child is sick;
- When the employee's spouse, life partner, parent (biological or adoptive), grandparent, child (biological or adoptive), grandchild or sibling, has died.

It is suggested that the first bullet bears on male employees, since female employees would already be provided for in *section 25* (maternity leave).

4.5.2 The **Namibian** statute provides in *section 41*:

- (1) A female employee who has completed at least 12 months continuous service in the employment of an employer shall, with a view to her confinement, be entitled to at least four weeks' maternity leave before the expected date of her confinement, certified in writing by a medical practitioner to be such expected date, and ending at least eight weeks after the date of such confinement, so certified to be such date of confinement.

⁸ 119 of 1997.

- (2)(a) A female employee referred to in subsection (1) shall not be deprived of any rights which vested in her by virtue of her employment on the date immediately before the date on which her maternity leave commences, and such rights, including any rights in relation to seniority, promotion and any benefits to which she is entitled by virtue of her membership of a medical scheme or fund or a pension scheme or other retirement scheme, shall continue as if her period of employment were not interrupted during the period of any maternity leave granted to her in terms of that subsection;
- (2)(b) The provisions of paragraph (a) shall not be construed as conferring any right upon the female employee concerned to receive any remuneration during the period of her maternity leave, but such female employee may be entitled to receive during such period such compensation as may be provided for in any law governing security of employment.
- (3) An employer shall not terminate any contract of employment of a female employee referred to in subsection (1) during any period of her maternity leave or at the expiry of such leave:
- (a) On account of the reorganisation of the business carried on by such employer or for economic or technological reasons; or
 - (b) On account of such female employee being incapable of continuing to perform the work she performed on the date immediately before her maternity leave commenced;
- unless such employer has taken all reasonable steps to offer her another appropriate work or such female employee has unreasonably refused to accept any such offer.

In these provisions the Namibian statute simultaneously establishes maternity leave rights for female employees, and ensures that employers do not circumvent those rights by reorganising the workplace for reasons which appear, at face value, to be legitimate but are essentially meant to thwart the rights so established. It also effectively constricts the space in which an employer may prefer to appoint male employees because she does not wish her business to be interrupted by women falling pregnant.

4.5.3 The **South African** statute makes provision for maternity leave in the following terms in *section 25*:

- (1) An employee is entitled to at least four consecutive months' maternity leave.

- (2) An employee may commence maternity leave –
 - (a) At any time from four weeks before the expected date of birth, unless otherwise agreed; or
 - (b) On a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.
- (3) No employee may work for six weeks after the birth of her child, unless a medical practitioner or a midwife certifies that she is fit to do so.
- (4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.
- (5) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to –
 - (a) Commence maternity leave; and
 - (b) Return to work after maternity leave.
- (6) Notification in terms of subsection (5) must be given –
 - (a) At least four weeks before the employee intends to commence the maternity leave; or
 - (b) If it is not reasonably practicable to do so, as soon as it is reasonably practicable.
- (7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act....

4.6 Public Holidays

The **Botswana** statute provides in *section 99*:

- (1) Each of the public holidays specified in the Second Schedule shall be a paid holiday ...: Provided that, within the mining industry alone, paid public holidays shall be those public holidays customarily recognized by the industry as paid public holidays.
- (2) Where a paid public holiday falls on a rest day the day next following the rest day which is itself not a rest day shall be deemed ... to be a paid public holiday.
- (3) Any employee who works on a paid public holiday or on a day observed as a public holiday by virtue of subsection (2) shall –
 - (a) Be paid at least double the wages he would have been paid had the day been an ordinary working day; or
 - (b) Be granted a paid off in lieu of that day within 10 days immediately thereafter.
- (4) Subject to subsection (3), the employer shall pay to the employee his basic pay in respect of every paid public holiday.

The **Namibian** statute deals with the matter in *section 32* as follows:

- (4) When an employee does not work on a public holiday which falls on a day which otherwise is an ordinary working day for him or her, his or her employer shall pay to him or her, on the next succeeding payday, in respect of that public holiday an amount which shall be not less than the remuneration payable to him or her in respect of the time (excluding overtime) which is ordinarily worked by him or her on that day of the week.
- (6) For the purposes of subsections (3) and (4) a shift worked by an employee which falls on a Sunday or public holiday as well as on another day shall be deemed to have been worked on that Sunday or public holiday, but if the major part of the shift falls on that other day such shift shall be deemed to have been worked on that other day.

Subsection (3) provides that work on a public holiday must be paid at double the rate it would be paid if it were performed on an ordinary working day.

The **South African Basic Conditions of Employment Act** provides in *section 18* that:

- (1) An employer may not require an employee to work on a public holiday except in accordance with an agreement.
- (2) If a public holiday falls on a day on which an employee would ordinarily work, an employer must pay –
 - (a) An employee who does not work on the public holiday, at least the wage that the employee would ordinarily have received for work on that day;
 - (b) An employee who does work on the public holiday –
 - (i) At least double the amount referred to in paragraph (a); or
 - (ii) If it is greater, the amount referred to in paragraph (a) plus the amount earned by the employee for the time worked on that day.
- (3) If an employee works on a public holiday on which the employee would not ordinarily work, the employer must pay that employee an amount equal to –
 - (a) The employee's ordinary wage; plus
 - (b) The amount earned by the employee for the work performed that day, whether calculated by reference to time worked or any other method.
- (4) An employer must pay an employee for a public holiday on the employee's usual pay day.
- (5) If a shift worked by an employee falls on a public holiday and another day, the whole shift is deemed to have been worked on the public holiday, but if the greater portion of the shift was worked on the other day, the whole shift is deemed to have been worked on the other day.

An explanatory note might help:

- Work on a public holiday cannot be foisted on an employee where there's no agreement that she will work on a public holiday;

- If the employee has worked on that day, two calculations must be made. The employer must check what the employee's pay for a day, multiplied by two, would be, and then check what the number of hours the employee has actually worked on that day, multiplied by her hourly rate plus a day's wage would yield. The employer must then pay the employee for that day according to the calculation that that is more beneficial to the employee.⁹
- *Section 18(3)* deals with a situation where the employee works on a public holiday falling on a day that is not ordinarily a working day. It commands that such an employee must be paid a day's wage plus whatever amount she has earned by working on that day. Supposing our explanation with reference to an employee who worked on a public holiday falling on a day on which she would have worked to be correct, then *subsection (3)* is clearly problematic. Why should an employee who works for two hours on such a day come out any less favourably than one who put in the same number of hours on a day that she would otherwise have worked?

In **Zambia** the *Order*¹⁰ provides in the *interpretation clause* that "paid public holiday" means:

New Year's Day, Good Friday, Easter Sunday, Labour Day, Heroes Day, Unity Day, Independence Day, Christmas Day and any holiday declared by the Minister to be a paid public holiday under subsection (4) of section fifteen of the Employment Act.

And then it states in *paragraph 4(2)* that:

An employee who works on a paid public holiday or on a Sunday where a Sunday does not form part of the normal working week shall be paid at double the employee's hourly rate of pay.

The impression emerges from the legislative instruments considered that, whilst there's a difference in the detail of the legislation, there's similarity between Zambia, Namibia and Botswana insofar as employers are required to pay the employee double their day's wage if they work on a public holiday.

The South African position has been explained in setting it out. A matter, in SA, which might well be interesting to explore in this regard, is the following. An employee who chooses not to work on public holidays gets paid, in respect of those public holidays, as if she has worked. An employee who chooses to work on a public holiday gets paid what she would be paid if she had elected not to work, plus another day's wage.

⁹ Say an employee worked for 2 hours on such a public holiday; that she fetches R50 per hour; on an 8-hour day. Double her day's wage would be R800. If such an employee is paid on the basis of 1 day + hours **actually** worked, she would earn R400 + R100 = R500. In such a case she must be paid R800 because it is the higher of the two amounts. Say, on the other hand, such an employee has worked for 9 hours. The minimum she would be entitled to is (R50 x 9) + R400 = R850.

¹⁰ *Minimum Wages and Conditions of Employment (General Order)* 119 of 1997.

Let's assume, for the purposes of the argument we wish to develop, that our hypothetical employee's normal working day is 8 hours, and that she has put in 8 hours worth of work on the public holiday in question.¹¹ We say that she gets paid double her wage. But in fact that is not correct. She receives what other employees who elected not to work will also receive, plus the earnings in respect of the public holiday on which she has shown up. If the notion of double pay for work on a paid public holiday means merely that an employee gets her wage (which she would get in any event), plus the earnings of an additional day (calculated ordinarily) in respect of the work she has done on the public holiday, there's nothing "double" about this.

If our argument is correct, we have to ask what the incentive is for such an employee to give up her leisure (if she or her union has not negotiated a better deal). In her circumstances, the additional day's wage, which an employee who has elected not to show up will not get, might well be significant. But isn't there something wayward in inducing her to show up under the ruse of double pay when, in fact, all she gets, which those who elected not to show up will not get, is pay for the day she has sacrificed by showing up? We have to ask how the rituals the law has constructed around public holidays help workers if they are worth only another ordinary day's wage.

Apart from Botswana, which makes exception of the mining industry in dealing with paid public holidays, there is no exception that is made on the basis of a specific industry in the other jurisdictions. Exceptions are rather made on the basis of the nature of the job, i.e., whether it is continuous or not.

5. Conclusion

There's a number of other statutory provisions having a bearing on the rights of employees in the four jurisdictions considered—around issues like termination of employment. We have proceeded on the basis that the study is meant to inquire into the minimum conditions which prevail whilst a person remains employed. We can point out, however, that security of employment is a rather important consideration. Therefore there are set factors that must be present before an employer can lawfully terminate an employee's employment, and adjudication fora are established in order to look into disputes involving termination of employment.

The study suggests that the issues considered to constitute minimum conditions of employment are more or less similar. Therefore it has been possible to find legislation on more or less the same topics in all four jurisdictions considered. At times the legislation is very similar and at others perhaps slightly different.

¹¹ The benefits are quite clear if our hypothetical employee works for less than 8 hours on the public holiday in question: she gets paid for a full working day, allowing for the reservation we have raised about *section 18 (3) (b)* of the *Basic Conditions of Employment Act* (SA).

The question that must concern us is whether it is possible to generalize from the four jurisdictions to the SADC region. Our first take is that the case studies were not selected with statistical representativity as an object. Had that been the case, it would have been prudent to divide the region up into categories according to location and political history (which would probably include language: English, Portuguese and French). Since this was not done, we would be slow to assume that the case studies can be generalized without further ado to the entire region.

On the other hand, however, there are significant politico-historical differences amongst the four case studies. Zambia, Botswana and South Africa were at some point under British influence; Namibia, on the other hand, was under German influence. South Africa, Namibia and Zambia have a colonial history: Botswana was a protectorate. Notwithstanding the differences, significant similarities were found in their minimum conditions of employment.

Further, one must suppose that the fact that countries belong to SADC indicates their resolve to harmonise their approach on various issues that affect development. Labour is incontrovertibly one such issue. It would therefore be safe to suppose that SADC countries might try to adopt as similar legislation as possible on labour. Therefore it is possible to entertain cautious hope that what we learn from the four case studies might be possible to generalize, with the necessary modifications, to other countries in the region.