

**THE FUTURE OF COLLECTIVE BARGAINING IN THE SOUTH AFRICAN  
PUBLIC SECTOR EMPLOYMENT RELATIONSHIP**

By

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## **DECLARATION**

I declare that the mini dissertation submitted to the University of Limpopo for the Master of Laws degree in Labour Law is original, has not been submitted for a degree at this or any other university by me, and all sources used have been appropriately acknowledged. I accept full responsibility for the content written, and all conclusions and findings presented herein.



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Date: 02 April 2024

Madiba Clive

## **Declaration by Supervisor**

## **Dedication**

Firstly, I would like to give thanks and praise to my Lord and Saviour Jesus Christ for being with me throughout the journey of writing this paper.

To my parents, Maropeng Madiba and Motsiri Masedi, thank you for believing and supporting me throughout the journey of writing this paper.

To my brother, Shaun Madiba, Thank you for your support and motivation.

This dissertation is dedicated to my special person, Tebatso Montsha, thank you for your support.

To my friend Lehlogonolo Kgosana, colleagues and Family.

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## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Introduction**

Democracy has ensured that public service workers have the full enjoyment of labour rights. This has been achieved through the enactment of the Constitution, it affords a range of rights to workers in the labour arena. One of the rights enjoyed by workers under the constitutional dispensation is the right to collective bargaining.<sup>1</sup> These workers also enjoy the right to also join trade unions, and these unions also enjoy this right.<sup>2</sup>

The government has made it a purpose to reform the labour policies in order to ratify the racial inequalities of the labour environment they had inherited.<sup>3</sup> A legislative framework was put in place in order to achieve this objective. The LRA Plays a role in the advancement of collective bargaining. The LRA ensures effective collective bargaining through the establishment of bargaining institutions, it promotes sectoral bargaining. It provides for public sector bargaining councils and ensures efficient collective bargaining.<sup>4</sup>

The bargaining process in the public services is facilitated by its specific bargaining forum. It is through this forum that the state and its employees are able bargain at a centralised level.<sup>5</sup> The state as the employer can engage with its employees and bargain on public service issues.

The PSCBC is a forum through which unions and the state can negotiate and enter into agreements that affect employees. There has been challenges over the years with the enforcement of collective agreements, of which led to industrial action. The 2007 the wage negotiations resulted in a deadlock, which later was resulted in a strike, this strike lasted for almost 30 days. Which had public service workers out on strike.

Strike action has been one of the main challenges of the collective bargaining process. Though in terms our law, strike is a constitutional right that employees

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<sup>1</sup>Constitution of the Republic of South Africa, 1996.

<sup>2</sup>Section 23 of the Constitution of the Republic of South Africa,1996.

<sup>3</sup>G. Ferreira, 'Collective Bargaining and The Public Service' (2008) Journal of public administration vol 43 no 2.1.

<sup>4</sup>G. Ferreira, 'Collective Bargaining and The Public Service' (2008) Journal of public administration vol 43 no 2.1.

<sup>5</sup>Arthur Russel Clarke 'Public service labour relation: Centralised collective bargaining and social dialogue in the public service of south Africa (1997-2007)' <<http://hdl.handle.net/11394/2354>> accessed 02 April 2023.



and their trade union are entitled to, it has been one of the main concerns in the public sector over the years. The cause of this challenge is the ineffectiveness in the implementation of collective agreements, which gives rise to strikes in the public sector, of which is a growing concern. The 2022/23 wage strike was as a result of the failure of implementation of the collective agreement. Our country has currently been faced with a new spread of strikes that emanated from an outstanding dispute regarding the implementation of the 2022/23 cost of living adjustment by the government. The public sector has been experiencing strikes for number of years, one of the longest strikes to take place was in 2007.<sup>6</sup> Collective bargaining as system needs to ensure the regulation of industrial relations. The economic state of South Africa and the impact of covid-19 had affected the manner in which trade unions bargain on issues of wages and conditions of employment.<sup>7</sup>

Industrial action is embedded in the public services, one cannot seem to be able to divorce the public service from the notion of industrial action. Essential workers enjoy a limited right to strike.<sup>8</sup> But can we say that there is a need for policy development to ensure an effective implementation of collective agreements, one should investigate the shortfalls of the systems of the bargaining process in this particular sector.

Failure to engage in an effective bargaining process, will lead to industrial action which will have detrimental consequences for the public sector. An effective bargaining process is needed to ensure that we curb the rise of industrial action in the public sector. Industrial action is one of the concerning issues in the public sector. One of the ways in which industrial action can better be addressed is through a social dialogue, which will need actors in the sector to enter the bargaining arena.

This paper will investigate the bargain process as far as it relates to the public sector, we'll take a look at the current problems and challenges facing the bargaining system in South Africa.

## **1.2 Problem Statement**

There are levels to public sector bargaining in South Africa and it takes different actors in the field to ensure the success of the bargaining process. There has been a rise in tension between the government and its workers over wages, the

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<sup>6</sup>Arthur Russel Clarke 'Public service labour relation: Centralised collective bargaining and social dialogue in the public service of south Africa (1997-2007)' <<http://hdl.handle.net/11394/2354> > accessed 02 April 2023.

<sup>7</sup> Bargaining Monitor – Wage outcomes in the past six months.

<sup>8</sup>G. Ferreira, 'Collective Bargaining and The Public Service' (2008) Journal of public administration vol 43 no 2.1.

collective bargaining process in the public sector is said to be under attack.<sup>9</sup> Employees in the public service together with their trade unions have embarked on strike over the wage increases for the year 2022/2023, this ensues as a result of the court's decision. The bargaining process has faced a number of challenges over the years in its development. The failure to implement collective agreements, has led to an increase in public sector strikes for many years. What can be done to ensure an effective enforcement of collective agreements? There should be an investigation into the current standing of collective bargaining and how it should be improved to minimize these challenges.

### **1.3 Aims and objectives.**

The aim to explore the bargaining system in the South African public sector. To look into the developments that have been made over the years, in reaching the objectives of the PSCBC. The study seeks to identify the issues and challenges of the bargaining process.

This study is intended to achieve the following objectives:

- what is collective bargaining as a right.
- To provide a recommendation that will ensure the effective of bargaining in the public sector.
- To study the pros and cons associated with collective bargaining as far as the public service is concerned.
- The study seeks to look at the functionality of strike action during the bargaining process.

### **1.4 Literature Review**

The private sector collective bargaining regulations were adopted to regulate the same process in the public sector and meet the needs of the State and its employees.<sup>10</sup> It is more concerned with providing better terms and conditions of works, which include higher wages and so forth. it is the key means of improving wages and conditions of work in order to regulate employment relations. It is said that the practices of collective bargaining need to adapt to remain responsive. Labour disputes are said to be on the rise in countries where the bargaining practice is not well advanced.

Bargaining occurs at different levels, which include the plant level, sector level or industry level.<sup>11</sup> Centralized and decentralized bargaining should be distinguished

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<sup>9</sup>Londiwe Buthelezi, 'Asinamali, we are all poorer': Public Service Summit Begins amid growing distrust' (28 March 2022)< 'Asinamali, we are all poorer': Public Service Summit begins amid growing distrust | Business (news24.com)> accessed 03 May 2023.

<sup>10</sup>G. Ferreira, 'Collective Bargaining and The Public Sector' (2008) Journal of public administration vol 43 no 2.1.

<sup>11</sup>McGregor M. Dekker A H. Budeli M. Germishuys W. Manamela M E. Manamela T E. Tshoose CI, Labour Law Rules (2nd edition., Siber Ink 2014).

from one another. Decentralized bargaining occurs between individual employers and a union, as opposed to centralized bargaining, which serves the interests of all employees within a given sector.

There should be a difference between centralised and decentralised bargaining. Centralised bargaining benefits all employees in a sector, whereas decentralised bargaining occurs between individual employers and one or more unions.<sup>12</sup> The bargaining structures are found where there is managerial authority. The state, acting as the employer, negotiates with unions in four sectors and before a council that is more centralised. They are known as sectoral bargaining councils. They play their role sectors have their own roles players which include employer organisations and trade unions representatives.<sup>13</sup>

Godfrey and Bamu in their study state that public sector bargaining is faced with a number of challenges, criticism have been made that the PSCBC is failing to create guidelines for the bargaining process, which include the monitoring of the implementation and enforcement of collective agreements.<sup>14</sup> There is a need for grow and expand the public sector bargaining. They Hold that system of centralised bargaining will continue depending on the strength and interest of trade unions and employers' organisations. They further assert that the bargaining in the public sector will see an increase as there is a decline in council restructure and coverage in the private sector. There are also concerns on the issue of human resource constraints within the PSCBC and other councils, as the PSCBC is losing a number of its negotiators to the private sector.<sup>15</sup> Some are of the view that an expansion of the bargaining process in the public services will serve as advantage.

One of the major concerns in the public sector is the industrial action that is giving rise to violence during public sector strikes.<sup>16</sup> Though strike action is essential to the process of collective bargaining, but the rise in violence has an impact of the bargaining process. There is a need to improve the skills of negotiators and the efficacy of the process of collective bargaining.<sup>17</sup> One of the issues in relation to strikes is the designation and regulation of essential services. Strikes have led to the disruption of essential services, and not much has been done to develop policies that will ensure that there is a conclusion of minimum service agreements to avoid the disruption.<sup>18</sup>

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<sup>12</sup>AJ van der walt et al labour law in context (2012) 187.

<sup>13</sup>Arthur Russel Clarke 'Public service labour relation: Centralised collective bargaining and social dialogue in the public service of south Africa (1997-2007)' <<http://hdl.handle.net/11394/2354>> accessed 02 April 2023.

<sup>14</sup> Bamu, Pamhidzai & Godfrey, Shane, 'The State of Centralised Bargaining and Possible Future Trends' Acta Juridica (2012) 326-347. Acta Juridica. 2012. 219 - 243.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*

<sup>18</sup>*Ibid.*

Botha asserts that the functionality of strikes to collective bargaining should be determined by emphasising the purpose of both strike and collective bargaining and the attainment thereof.<sup>19</sup> Strike is an integral to the bargaining process. It is further asserted that a protected strike that gives ensures the LRA fulfils its objectives, and the constitution is functional to collective bargaining.<sup>20</sup> To be considered as functional, strike action must promote an orderly collective bargaining.

In light of the above, there is a need to put in place measures that will improve the process and will ensure effective bargaining negotiations. Strikes are essential to the effectiveness of the bargaining process, but the rise in the number of strikes over the years has been detrimental to the public service itself. The rise of unprotected, violent strikes south Africa gives rise to issues such as the lawfulness of using strike as a measure of last resort have been put under the spotlight.

### **1.5 Research Methodology**

The qualitative method of research will be used in this paper. This methodology will focus on desktop research which will consult journal articles, legislation, case law, online articles and international instruments of law, and Constitution of South Africa. Furthermore, this study will also conduct a comparative analysis from different jurisdictions.

### **1.6 Scope and Limitation of the Study**

In this study discussion will revolve around collective bargaining in general, and how bargaining forums are created as set out in LRA. The study will also assess the issues and challenges associated with the bargaining process in the public sector. The study will also conduct a comparative analysis from other jurisdictions.

The study will comprise of five (5) chapters.

### **1.7 Definition of Key Concepts**

#### **1.7.1 Collective Bargaining**

All negotiations that often take place between and employer and the employees organisations in order to facilitate issues of work conditions, to regulate

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<sup>19</sup> Botha, Monray & Germishuys, Wilhelmina, 'The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market, and the powers of the Labour Court (2)' (2017) *THRHR*.

<sup>20</sup>Botha, Monray & Germishuys, Wilhelmina, 'The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market, and the powers of the Labour Court (2)' (2017) *THRHR*.

relationship between employers and their employees; and to regulate the relationship that exist between employers and employees' organizations. In its nature it is voluntary with the view of ensuring better working conditions.

### **1.7.2 Public Service**

It involves activities that are aimed at promoting the interest of the public, through public employees. Some national departments are excluded from this definition.<sup>21</sup>In order to advance the purposes of collective bargaining there are national public departments that are excluded in the definition of what the public services entails.

### **1.7.4 Strike**

As outlined in the LRA, strikes involve the refusal of work or an obstruction of work by employees of the same employer or a different employer. The LRA outlines that such a refusal of work should be partial or complete and that it should be concerted.

### **1.8 Chapter Layout**

The study will consist of five chapters, outlined as follows:

**Chapter 1** will introduce the study or the topic. **Chapter 2** will outline the legislative framework of collective bargaining. **Chapter 3** will analyse the collective bargaining process.

**Chapter 4** of the study will embark on a comparative study from other jurisdictions on how the system of collective bargaining operates in their public service. **Chapter 5** provides the conclusion and recommendations of the study.

### **1.9 Summary**

Collective bargaining is constitutionally entrenched in our law as an institution of conflict. The objective of the bargaining process is agreement. The creation of the PSCBC as a bargaining forum was to facilitate for an effective bargaining process. It negotiates and bargain collectively, to prevent and resolve disputes and enforce collective agreements. One of the concerns in the public service is that there is a lack of human resources. Strike action is essential to the bargaining process, but over the years it has led to the disruption in the public service. One of the causes of the Strike is the failure to implement collective agreements.

In light of the above the study will focus on issue and challenges of collective bargaining in the public services

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<sup>21</sup>Arthur Russel Clarke 'Public service labour relation: Centralised collective bargaining and social dialogue in the public service of south Africa (1997-2007)' <<http://hdl.handle.net/11394/2354> > accessed 02 April 2023.

## CHAPTER 2

### LEGISLATIVE FRAMEWORK AND BACKGROUND

#### 2.1 Introduction

This chapter will be looking into the legislative and constitutional framework. The international framework and regulations will also be considered. The primary legislative frameworks governing collective bargaining include the Constitution and the LRA.<sup>22</sup> The constitution provides for a right whilst the LRA for duty to bargain collectively.

South Africa is one country that was faced with racial inequality that was imbedded in its legislature which segregated certain groups of individuals in the society, especially in the labour market.

One of the bodies of legislation that incorporate labour rights is the Constitution, which was enacted after the 1996 Interim Constitution cleared the way for a constitutional era. The Constitution protects labour rights and grants freedom of association, fair labour practices, and the ability to engage in collective bargaining. The Constitution guarantees collective bargaining rights.

The Labour Relations Act, which assures the success of collective bargaining, also forms part of the legislative framework. The goal is to advance economic growth, social justice, labour peace, and workplace democratisation.<sup>23</sup> It gives effect to the constitutional right as it ensures the creation of a bargaining councils. The International Labour Organisation establishes an international framework. South Africa, as an ILO member, has ratified various conventions and recommendations, and thus is bound by them.

This chapter highlights the legislative framework and provides an overview the legislative protection.

#### 2.2 The interpretation and analysis of the constitutional framework on collective bargaining

Workers are entitled to constitutional rights that ensure fair labour practices. This includes the right to establish trade unions, engage in union activities, and participate in strikes.<sup>24</sup> In *National Education Health and Allied Workers Union v University of Cape Town*,<sup>25</sup> fair labour practice was examined as follows: The right to fair employment practices is enshrined in our constitution, setting it apart

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<sup>22</sup> Angela Patricia Molusi, 'The Constitutional Duty to Engage in Collective Bargaining' (2010) 31 *Obiter* p 156-166.

<sup>23</sup> The Labour Relations Act 66, 1995('LRA').

<sup>24</sup> Angela Patricia Molusi, 'Constitution of the Republic of South Africa, 1996 ('the Constitution').

<sup>25</sup> 2003 (3) SA 1 (CC).

as unique. This Constitution ensures the right to collective bargaining, a freedom that should be utilized. Section 23(5) states, "Every trade union, employers' organization, and employer have the right to engage in collective bargaining."

In drafting of the Constitution there was a need to encourage collective bargaining in the labour environment. A duty to engage in collective bargaining is not stipulated in the constitution; rather, it only grants the right to do so.<sup>26</sup> The constitution is more focused on the voluntaristic approach to collective bargaining. The voluntarist system as fostered by the constitution plays a role in promoting good relations.<sup>27</sup>

Public service employees are protected in that the constitution ensures that their rights are protected as it promotes the enactment of legislations that will ensure that these employees are protected. 'The terms and conditions of employment in the public service are regulated by national legislation'.<sup>28</sup>

To safeguard their freedom of association, employees are guaranteed the ability to organize and join a trade union, take part in its affairs, and go on strike under Section 23. The PSCBC is where employees may bargain collectively with the state. These provisions enable employees to join the trade unions of their choice.<sup>29</sup> in *Numsa & Others v Bader Bop (Pty) Ltd & Another*, it was found that freedom of association allows unions to find new members and represent them during disputes, as well as to strike to enforce bargaining demands.<sup>30</sup>

### **2.2.1 Right to collective bargaining**

The constitution invalidates every law that is inconsistent with its provisions.<sup>31</sup> The constitution includes a Bill of Rights that outlines all South Africans' fundamental freedoms, such as the right to dignity and equality. The state is bound to uphold all the rights laid out in the Bill of Rights.<sup>32</sup> The law, provides for equality and equal benefit of the law,<sup>33</sup> and that there should be equal enjoyment of all freedoms and rights.<sup>34</sup>

The public administration established by the Constitution is committed to upholding the laws and policies of the current government, and it is organised

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<sup>26</sup> 'The Constitutional Duty to Engage in Collective Bargaining' (2010) 31 *Obiter* p 156-166.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* Section 197(2).

<sup>29</sup> Arthur Russel Clarke 'Public Service labour relation: Centralised Collective Bargaining and Social Dialogue in the Public Service South Africa (1997-2007)' <<http://hdl.handle.net/11394/21354>> accessed 02 April 2023.

<sup>30</sup> (2003) 24 ILJ 305 (CC) para 34.

<sup>31</sup> Section 1(d) of the Constitution.

<sup>32</sup> Section 7(2) of the Constitution.

<sup>33</sup> Section 9(1).

<sup>34</sup> *Ibid* Section 9(2).

and operates in accordance with national legislation.<sup>35</sup> National legislation regulates terms and conditions in the public service.<sup>36</sup> Section 23(5) provides that 'every trade union, employers organisation and employer have a right to engage in collective bargaining' and there must be national legislation in place to regulate collective bargaining. Ferreira submits that collective bargaining is an institutionalisation of conflict.

### **2.2.2 Fair labour practice in terms of the Constitution**

Fair labour practices are guaranteed every member of society.<sup>37</sup> This right extends to both trade unions, employers' organisations, and employers to engage in collective bargaining. In *Numsa v Bader bop (pty) Ltd*,<sup>38</sup> in addressing the aspect of fair labour practice pointed to section 23, It is established that this right includes the freedom of workers to organize and be a part to unions, participate in strikes, and the freedom of employers, employers' organizations, and trade unions to conduct collective bargaining. These freedoms collectively underscore that equitable industrial relations hinge on the practice of collective bargaining between employers and employees.

In *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & others*,<sup>39</sup> The ruling emphasized that the right to collective bargaining should be interpreted within the context of the broader right to fair labour practices provided by section 23(1).

### **2.2.3 Freedom of association**

This right enjoys constitutional and legislative protection.

As stated in Section 18, "Everyone has the right to freedom of association."<sup>40</sup> Workers have the freedom to organize and join unions, take part in union activities, and go on strike.

The two international instruments which are in line with these principles are the International Labour Organisation's Freedom of Association, as well as its protection of the Convention on organized labour.

One of the fundamental human rights guaranteed by the 1948 UDHR is the freedom of expression. The right to collective bargaining and the freedom of

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<sup>35</sup> *Ibid* Section 197(1).

<sup>36</sup> *ibid* Section 197(2).

<sup>37</sup> *ibid*.

<sup>38</sup> (2003) 24 ILJ 305 (CC) para 13.

<sup>39</sup> (2003) 24 ILJ 2335 (LC).

<sup>40</sup> the Constitution.



association are interrelated. This right enables workers to organise and become members of a union, as well as take part in the activities of such a union.

### **2.3 International legal framework**

The BoR (Bill of Rights) must be interpreted in accordance to international standards, Customary international law constitutes the law of the republic, provided it does not violate the Constitution or any legislation.<sup>41</sup> Any interpretation that aligns with international law should be considered, in interpreting the Bill of Rights.<sup>42</sup>

The ILO is the regulatory body at the international level, it defines Collective bargaining as follows:

"A process of voluntary negotiation between one or more employer (or their organisation) and one or more workers' organisations (that is, trade unions)."<sup>43</sup>

There are a number of ILO instruments that have been out in place to regulate the right to bargaining, which are:

- (a) Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- (b) Labour Relations (Public Service) Convention, 1978 (No. 151)
- (c) Collective Bargaining Convention, 1981 (No. 154)

In the next section these conventions are discussed in detail.

#### **2.3.1 Right to Organise and Collective Bargaining Convention, 1949 (No. 98)**

This convention outlines rules for freedom the freedom of unionisation and collective bargaining, it ensures that workers are protected against discrimination for their membership in union activities. The convention is focused on addressing the problems of discrimination and collective bargaining in the employment arena.<sup>44</sup> It requires that necessary machinery be implemented to ensure the right to organise.<sup>45</sup>

#### **2.3.2 Labour Relations (Public Service) Convention, 1978 (No. 151)**

it extends to all public sector employees, providing protection against anti-union discrimination, including measures that could limit public employees to join or become members of employer's organizations.<sup>46</sup> South Africa has made efforts to ratify this convention into its national laws.

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<sup>41</sup> Section 233 Constitution.

<sup>42</sup> Section 39(1)(b) Constitution.

<sup>43</sup> International Labour Organization (ILO).

<sup>44</sup> Article 1 of the Right to organise and collective bargaining, 1949.

<sup>45</sup> Article 3 the right to organise and collective bargaining, 1949.

<sup>46</sup> Article 1 of the Labour Relations (public service) Convention, No 151 of 1978.

### **2.3.3 Collective Bargaining Convention, 1981 (No. 154)**

it encourages bargaining between employers, employers' organisations and workers and their representatives in order to regulate employment conditions and terms, as well as interactions between employers and workers.

### **2.4 The labour relations Act**

The Labour Relations Act (LRA) promotes collective bargaining as a framework to enhance social justice, labour peace, and economic development. Concerning section 1,<sup>47</sup> The goal is to establish a collective bargaining framework to work conditions, promoting sector-level bargaining and worker participation.

This Act gives effect to the right of collective bargaining in that it provides for the establishment of bargaining forums. It has adopted a wide industry collective bargaining. Before labour Relations Act came into effect in 1995, the old legislation provided a more adversarial collective bargaining. Bargaining is not compelled, but rather it requires willingness by each party to the process. The LRA, creates an infrastructure that promotes a voluntary collective bargain at a sectoral level. There is no duty to bargain, bargaining is merely voluntary as it does not create an enforceable duty to bargain.<sup>48</sup>

The LRA promotes a voluntary system of collective bargaining, this idea was supported by the case of *National Police Service Union & others v National Negotiation Forum & others*,<sup>49</sup> the court held that the LRA adopts an 'Unashamedly voluntarist approach'. The establishment of an institutional framework facilitates the freedom to bargain, which, according to Cheadle, enables the exercise of economic power, including lockouts, the use of replacement labour, and picketing.<sup>50</sup>

Section 35 of the Labor Relations Act (LRA) addresses public service bargaining councils in particular and creates statutory and bargaining councils as well. Successful collective bargaining in the public sector is guaranteed by the PSCBC, which the LRA founded.<sup>51</sup>

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<sup>47</sup> *Ibid.*

<sup>48</sup> Angela Patricia Molusi, 'The Constitutional Duty to Engage in Collective Bargaining' (2010) 31 *Obiter* p 156-166.

<sup>49</sup> (1999) ZALC 179.

<sup>50</sup> Halton Cheadle, 'Collective Bargaining and the LRA' (2005) 9(2) *Law, Democracy & Development*.

<sup>51</sup> Barbara Adair and Sue albertyn, 'New Management' (1998) 22(3)

## **2.5 Collective bargaining**

*Ferreira* is of the view that collective bargaining as an institution of conflict, that involves the acceptance and formulation of rules and procedures that regulate the process.<sup>52</sup>

Collective bargaining under the LRA is promoted at a sector or industry level and it is more centralised. collective bargaining is encouraged by the LRA through the granting of organisational rights, the establishment of bargaining institutions and through closed shop and agency shop agreements.

The end objective of collective bargaining is to conclude collective agreements, which are outlined in chapter 3 of the LRA. Section 23 of the Act regulates the legal binding effect of the agreements. It further provides an outline of agency and closed shop agreements.

## **2.6 The establishment of bargaining councils**

These councils have a duty to conclude collective agreements. The LRA makes provision for the creation of a council that is responsible for engaging in the bargaining process, in accordance with section 35, this council covers the whole sector and other sectors in terms of section 37.

All the functions of a bargaining council may be carried out by the public service bargaining council with regard to issues that: (a) are governed by regulations, that apply to the public service; (b) pertain to terms and conditions of employment; or (c) are assigned to the state as employer with regard to the public service that are not assigned to the State as employers in any sector.

## **2.7 Establishment of the PSCBC**

The PSCBC is created in accordance with the LRA, section 35 read with section 36 and 37. This bargaining council is established for the whole of the public service. The PSCBC has been created to discharge certain functions in terms of section 36.

The PSCBC as established in accordance with the LRA covers the whole the sector, in exclusion of certain individuals, it excludes the National Defence force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence.

There are sectors that make up the public service bargaining council referred to as the Sectoral bargaining councils. These are outlined in accordance with section 37 of the LRA. All these sectoral bargaining councils play a role in

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<sup>52</sup> G. Ferreira, 'collective Bargaining and Public Sector'. (2008) Journal of public administration vol 43 no 2.1.

resolving of disputes in issue. The PSCBC serves a regulatory body for all these sectoral bargaining councils, and it has jurisdiction to deal with issues in dispute.

## **2.8 Prospect and challenges associated with collective bargaining in South Africa**

Its primary objective is to reach collective agreements between the parties involved in the bargaining process. It is a form of organised labour that is largely concerned with the conditions of employment.<sup>53</sup> The extension of agreements to non-members remains one of the growing concerns.

Workers who are not members or parties to the agreement, they are however bound by that agreement, on three grounds, firstly, there must be an identification of these employees, secondly, the agreement must clearly make such an indication, and thirdly, the trade unions entering into the agreement must have majority membership of such employees.

The extension of bargaining agreements is governed by Section 32. Collective agreements may be extended through two methods. First, if the voting parties represent the majority of workers in the sector, the minister is obligated to extend the agreement without discretion. Secondly, the minister has the option to extend the agreement should the voting parties fail to sufficiently represent the majority of the workers' interests.<sup>54</sup>

One of the Challenges against section 32(2) was raised in the case of *Free Market Foundation v The Minister of Labour & others*.<sup>55</sup> The applicants in this case sought to have section 32(2) declared unconstitutional because it hindered the market growth of small businesses and infringed the right to administrative justice. The argument behind the challenge was that section 32(2) allows the minister to automatically extend collective agreements where the parties maintain a majority without the appropriate judicial oversight from the courts.<sup>56</sup>

The minister's discretion under section 32(5)(b) compromises the employers' rights of recourse, given that non-parties to the agreement are not consulted on the decision to grant an extension. This places a significant socioeconomic burden on small and medium-sized businesses because they cannot afford the significant increases they are expected to pay.<sup>57</sup>

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<sup>53</sup> Code of good practice: collective bargaining.

<sup>54</sup> Jeanne Mari Retief 'Paper v Practice- Examining the Scope and Limit of Section 206 of the Labour Relations Act in Providing a Remedy for a Non-Party to an Agreement Extended Collective Agreement' *Obiter* 2012 <<http://hdl.handle.net/2263/21302>> accessed 21 October 2023.

<sup>55</sup> (2016) 37 ILJ 1638 (GP).

<sup>56</sup> *Ibid* 35 Para 9.

<sup>57</sup> Jeanne Mari Retief 'Paper v Practice- Examining the Scope and Limit of Section 206 of the Labour Relations Act in Providing a Remedy for a Non-Party to an Agreement

*Retief* asserts that there are many flaws in the process of extending collective agreements that need to be fixed and that doing so burdens small and medium-sized businesses since they can't keep up with huge salary increases.<sup>58</sup>

The growth of non-traditional employment presents a problem for collective bargaining in South Africa. Johaan notes that the scope of negotiated agreements diminishes with the prevalence of atypical employment, as it becomes more difficult for trade unions to recruit and retain such workers, leading to a decline in union membership.<sup>59</sup> She further asserts that employers favour atypical employment because it allows them to have great flexibility which allows them to remain competitive internationally. One of the challenges of collective bargaining is that it must endure that flexibility in employment is achieved by ensuring that the security of employees is not undermined in the process.

## **2.9 Summary**

This chapter has successfully shown that collective bargaining is protected by a number of legal instruments, which include the Constitution, the LRA and ILO. Our constitution clearly enshrines this right as part of our fundamental rights. It should be noted that the Constitution grants employers, employer organizations, and unions the right to engage in collective bargaining.<sup>60</sup>

Considering the constitution as a whole, collective bargaining is one of the rights that should be protected, promoted, and respected. The constitution as a source of law guarantees the right to fair labour practices, which effect to the right to bargain. Furthermore, this chapter has shown that there are international instruments that provides for collective bargaining. South Africa as a member of the ILO has taken initiatives to ratify the conventions and recommendations.

The next chapter examines the bargaining process in the public service.

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Extended Collective Agreement' Obiter 2012 < <http://hdl.handle.net/2263/21302> > accessed 21 October 2023.

<sup>58</sup> *Ibid.*

<sup>59</sup> Johann Maree, 'Trends in the South African Collective Bargaining System in Comparative Perspective' South African Journal of Labour Relations: Vol 35 No 1 2011.

<sup>60</sup> Section 23(5) of the Constitution.

## **CHAPTER 3**

### **The Process of Collective Bargaining in the Public Sector**

#### **3.1 introduction**

In the previous chapter discussed the legislative and constitutional framework. It is a voluntary process of negotiating between the employer or employer's organisation and the workers organisation with a view to regulating employment terms and conditions through a collective agreement between the two parties. The LRA is responsible for the bargaining processes, which outlines the creation of bargaining structures, creation of collective agreements and how they should be enforced.

The South African public service has transitioned from a system which only favoured White workers and to one in which all workers have full labour rights. There is no limit to the number of union and employers' representatives, there is ex-officio representation.<sup>61</sup>

This chapter outlines how the bargaining structures are established and what are their functions in terms of the LRA. The chapter further examines the creation of bargaining agreements, the enforcement of such agreements and as to how they are binding upon the parties. This chapter outlines the process of collective bargaining in the public sector, on how public sector bargaining councils are established, their powers, objectives, and functions.

#### **3.2. The bargaining structures.**

It is through the establishment of bargaining and statutory councils that the LRA aims to promote sectoral bargaining. In order to create these councils, one or more unions and one or more employers' groups must agree to keep these councils active.

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<sup>61</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

Generally, these bargaining councils are formed by unions, and they are usually accompanied by a registered employers' organisation. It is necessary to adopt a constitution that is in accordance with the provisions of section 30; as well as to register the bargaining council in line with section 29.

These bargaining councils have been conferred powers and functions in terms of section 28(1), among other powers and functions they have the power to conclude and enforce these agreements, they resolve labour disputes, they provide industrial support services within the sector.

The creation of bargaining councils as per the LRA, such councils may in accordance to their constitution appoint a sector for the purposes of establishing a bargaining council and may change such an appointment or dissolve the bargaining council so established.<sup>62</sup>

### **3.3 Bargaining agreements**

Collective agreements are outlined in detail in the LRA. These agreements are as a result of the bargaining process. One of the known agreements arising from the collective bargaining process includes the agency shop agreements and closed shop agreements. They written agreements that are entered into between a registered union and an employer, or their organisations and it is largely concerned with the terms and conditions of employment.<sup>63</sup>

The legislation requires that these agreements should include dispute resolution procedures that are concerned with the interpretation or application of the agreement.<sup>64</sup> When a dispute concerning the agreement suffices, these procedures will allow the parties to the agreement to find a common ground in the resolution of the dispute. In terms of section 24(2), where there is a dispute in relation to the interpretation of or application of collective agreements, such dispute should be conciliated or subject to arbitration by a council as outlined in

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<sup>62</sup> Section 37 *Ibid.*

<sup>63</sup> Section 213 of the Labour Relations Act 66.

<sup>64</sup> Section 24(1) of the Labour Relations Act 66.

the agreement.<sup>65</sup> These agreements are conciliated and arbitrated under the exclusive jurisdiction of the CCMA.<sup>66</sup>

When the procedure provided in the agreements is not operative, the parties must write to the commission. It is a requirement that the agreement should include a procedure that caters for conciliation as a means of resolving the dispute. If there is no provision for a procedure in the collective agreement, or if the prescribed procedure is not functional, or if any party involved in the agreement has deliberately impeded the resolution of the dispute as outlined in the agreement.<sup>67</sup>

### **3.4 Organisational rights**

The provision of the LRA embodies these rights. Section 12 to section 16 of the LRA outlines the kind of organisational right that unions are entitled to. Trade unions are entitled to access the workplace, which enables them to conduct their activities within the employer's premises without obstruction from the employer. Thus, allowing them to recruit members to join them. They are also granted the right to make deduction of membership fees. Union members have to pay their membership fees, these unions have this right in terms of the legislature to make deduction on their members wages. The legislature also grants a right to paid leave for office bearers. The right to elect work representatives. They also have the right to disclosure of information. These unions are entitled to have access to certain information from the employer. For a union to acquire these rights it must be a representative Union.<sup>68</sup> A representative trade union refers to a registered trade union, or a coalition of registered trade unions, that collectively represent the majority of employees working for an employer at a given workplace.<sup>69</sup> In *POPCRU v LEDWABA NO and Others*,<sup>70</sup> the court held that 'organisational rights are not an end in itself but a means to an end. It is part of the process of collective bargaining...at the start of a collective bargaining process, it is the

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<sup>65</sup> *Ibid.*

<sup>66</sup> Section 24(2) *ibid.*

<sup>67</sup> LRA.

<sup>68</sup> The Labour Relations Act.

<sup>69</sup> Section 14(1) *Ibid.*

<sup>70</sup> 2013 11 BLLR 1137(LC).



organisational rights that enable the trade union to have a proper platform from which to engage in collective bargaining.'

In order to resolve matters governed by uniform standards and regulations that apply to the public service, including conditions of service spanning across two or more public service sectors, the LRA establishes public service bargaining council to handle such matters.<sup>71</sup>

One of the common problems associated with organisational rights is in terms of section 18(1) of the LRA, which has a disadvantage on minority unions, in terms of this provision there is an agreement between trade unions and employers to create threshold that will be impossible for minority unions to attain. Minority unions are unable to obtain organisational rights due to this threshold.

According to Tshoose and Kruger, section 18 only permits an employer and majority unions to negotiate a bargaining agreement that governs the workers' organizational rights within a bargaining unit.<sup>72</sup> It is said that the section is permissive. This section does not encourage employers and majority unions to refuse minority unions and their members rights.<sup>73</sup>

The growing threshold has an impact on the minority unions, which leads to the loss of recognition. Minority unions lose their members in that particular see a need to belong to a trade union when such a trade union has no organisational rights.<sup>74</sup>

### **3.5 Collective bargaining in the PSCBC**

In carrying out its labour relations functions, the PSCBC has a key role to play in consulting with social partners. These consultations may be formal or informal. The State and trade unions are the main role players of the bargaining in the public sector council. The council is mandatory to the public sector.

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<sup>71</sup> Schedule 1 of the Labour Relations Act 66 of 1995.

<sup>72</sup> Tshoose CI and Kruger J, 'The impact of the labour relations act on minority trade unions: A South African perspective' (2013) Vol.16 (4) Potchefstroom Electronic Journal.

<sup>73</sup> *Ibid.*

<sup>74</sup> Tshoose CI 'Determining the threshold for organizational rights: The legal quagmire facing minority union resolved - *South African Post Office v Commissioner Nowosenetz No & Others*' (2013) 2 BLLR 216 (LC)' (2013) Vol.34 (3) Obiter Journal 600.

Everyone is guaranteed freedom of association in terms of the Constitution of South Africa.<sup>75</sup> *Budeli*,<sup>76</sup> claims that although workers for the SANDF, NIA, and SASS are free to form trade unions, they are however not allowed to participate in the bargaining forum where other public employees are represented in order to engage in the bargaining process, as stated in the Public Service Act and the LRA.

The exclusion of these workers from benefiting from the results of collective bargaining is an infringement of their Constitutional right to equality, as outlined in terms of section 9(1) which affords every individual. Employees under these three public sector departments are entitled to fair labour practices, and the right to fair labour practice is inclusive of the right to collective bargaining as set out in the Constitution.

### **3.5.1 The objectives of the PSCBC**

The promulgation of the 1995 LRA has led to the establishment of a bargaining council in the Public Service. The LRA provides that the public service bargaining council, will be called the Public Service Coordination Council.<sup>77</sup>

It is an institution that has been created to negotiate and to enter into the bargain process with the objective of reaching agreements on matters of mutual interest.<sup>78</sup>

The PSCBC has an objective within its provided scope to perform the following objectives:

- (a) To Improve labour peace in the sector
- (b) To ensure better relationship between employers and employees.

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<sup>75</sup> Section 18 of the Constitution.

<sup>76</sup> Budeli, M. 2009, 'Workers' right to freedom of association and trade unionism in South Africa: an historical perspective', Southern African Society of Legal Historians, *Fundamina: A Journal of Legal History*, vol. 15, no. 2, pp. 57-74.

<sup>77</sup> Section 35 LRA.

<sup>78</sup> Schedule 1 of the Constitution of the PSCBC.

- (c) To enter take part in the negotiations of matters of mutual interest that may arise between the employer and employees in order to reach an agreement on such matters.
- (d) To provide ways of resolving disputes that may arise.
- (e) They must perform a supervisory function and ensure the enforcement of collective agreements.
- (f) To perform its duties in terms of the Act and its constitution.<sup>79</sup>

The case of *National Education and Allied Workers Union v Minister of Public Service, Administration, and Others*,<sup>80</sup> this case outlines some of the challenges that beset the system of collective bargaining in the public service in South Africa,

In this case, the Unions sought leave to appeal the Labour Appeal Court's decision. The enforcement of clause 3.3 was declared invalid and unlawful. The agreement included various clauses that regulated wage increases in three financial years. one of the issues regarding these clauses was that there was no budgetary means to enforce them. What had to be determined before the court was whether failure to comply with the regulations rendered the clauses as per the collective agreement invalid and unenforceable. The court found that the minister in his exercise of power to enter into collective agreements, must first have a legal authority to do so. In its findings, the court held that jurisdictional facts were absent, and non-compliance with the regulations resulted in the agreements being deemed invalid and unlawful.

The Constitutional Court had to determine the validity and enforceability of the clauses as outlined in the collective agreement between the state and the unions.<sup>81</sup> This matter before the Constitutional Court raises an issue with regards to the enforceability and validity of collective agreements, it raises a question on whether there are certain factors at play that should be fulfilled before such agreements are enforced.

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<sup>79</sup> Schedule 1 of the Constitution of the PSCBC.

<sup>80</sup> (2022) 43 ILJ 1032 (CC).

<sup>81</sup> *Ibid.*

The labour Appeal court found that there was a requirement in terms of the regulations, for the conclusion of agreements by the state. The requirement involved the cost of a collective agreement, in addressing the aspect of invalidity, the Minister of Finance in his submission before the court held that the organs of state must act within the law. The standard of lawfulness must be met, to ensure compliance with the rule of law.<sup>82</sup>

### **3.5.2 Powers of the PSCBC**

The PSCBC has a range of powers and duties that have been conferred upon it by its constitution, Section 36(5) of the Labour Relations Act governs public service agreements, ensuring uniform rules across sectors, applicable terms and conditions, and state-assigned employers in public service, ensuring efficient and effective negotiation.<sup>83</sup>

The PSCBC has various powers and duties, including negotiating minimum standards, supervising, and enforcing collective agreements, preventing and resolving labour disputes, resolving disputes between council parties, and resolving disputes between non-council parties within the council's registered scope, as per section 51(3) of the Act and council dispute resolution procedures.<sup>84</sup>

### **3.5.2 Structure of the PSCBC**

In line with provision 35 of the Labour Relations Act 66 of 1995, as well as sections 36 and 37, the PSCBC was founded as an independent.<sup>85</sup> The government and trade unions constitute 50 % of the Parties to the PSCBC. The involvement of these parties ensures that the PSCBC remains impartial, independent, and unbiased at all times.<sup>86</sup> The Public Service Co-ordinating

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<sup>82</sup> *Ibid* Para 55.

<sup>83</sup> Section 36(2).

<sup>84</sup> *Ibid*.

<sup>85</sup> PSCBC information Brochure.

<sup>86</sup> PSCBC information Brochure.

Bargaining Council is made up of four sectors for Educators, Police, Health, and General Public Service.<sup>87</sup>

### **3.6 Dispute resolution process**

The PSCBC has the authority to prevent and resolve labour disputes, as well as disputes between council parties, in accordance with the Act and dispute resolution procedures.<sup>88</sup> Section 51 defines a dispute as a matter of mutual interest between trade unions, employees, or both, and employers' organizations, employers, or both.

Disputes that normally arise are the ones that have to do with collective agreements. They are more about the interpretations and application of collective agreements. The Public Service Coordinating Bargaining Council has the power to preside disputes that concern collective agreements. Public service disputes involve employees, involving interpretation of PSCBC collective agreements, mutual interest, unilateral changes to employment terms and conditions, and refusal to bargain, which can be referred to PSCBC and sectoral councils.<sup>89</sup>

Disputes of right are more concerned with the interpretation of rights, and the application of such right thereof. It is through the legislature and collective agreements that these rights come into existence. In the Public services, such matters are resolved through the processes of arbitration and conciliation.

### **3.7 parties to the bargaining process**

#### **3.7.1 The State**

The state as an employer is subject to the constitution, and it serves as a party to the council in the sector which it is an employer. The state is represented by the Chief negotiator from the Department of Public Service and Administration.

#### **3.7.2 Trade unions**

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<sup>87</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

<sup>88</sup> Schedule 1 of the PSCBC constitution.

<sup>89</sup> PSCBC information Brochure.

The ILO Core convention on freedom of association provides for a right to be a member of a trade union.<sup>90</sup> Employees join trade unions for different reasons, and they expect certain services from the trade union. In providing their services they give employees sufficient reasons to become and remain members.<sup>91</sup> Trade unions are the key players of the collective bargaining process, They are pivotal to the bargaining process as a whole. They ensure the protection and enhancement of workplace security, health, and safety, as well as wages.<sup>92</sup>

### **3.7.2.1 Trade union membership**

Trade union membership in South Africa is said to declining at an increasing rate and it stands at 23%.

The public service workers are represented by 12 union organisations. One of major unions is COSATU with four unions affiliated with it, namely the South African Democratic Teachers Union, the Police and Prison Civil Rights Union, the National Education, Health and Allied workers Union, and the Democratic Nursing Organisation of South Africa.

A single union party can apply for council admission if it meets the required membership threshold and is admitted to sectoral bargaining.<sup>93</sup> Two or more trade unions can apply for council admission if their combined union meets the 50,000-member threshold and each constituent party is admitted to a sectoral council. Public service bargaining council members include SADTU, NEHAWU, and POPCRU.

Trade unions that are admitted to the PSCBC, become members of the council. There are two factors that determine membership in the PSCBC, the criteria for admission and also the trade union membership, without which a trade union

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<sup>90</sup> Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

<sup>91</sup> Leslie Kgapola and Paul Smit 'Trade Unions' Services & Member Satisfaction in Public Sector' Indian Journal of industrial Relations, Vol 53, No 2, pp 332-345.

<sup>92</sup> Manga Makofe, 'The Changing World of Work and Further Marginalisation of Workers in South Africa: An Evaluation of the Relevance of Trade Unions and Collective Bargaining' Comparative and international law journal of southern Africa.

<sup>93</sup> PSCBC constitution 2003 clause 7.1.

may not obtain membership to the council. There has been a variation trade union membership since the establishment of the PSCBC.

The Trade union national membership in the public services as end December 2021 is as follows:

<b>TRADE UNION</b>	<b>TOTAL</b>	<b>VOTE WEIGHT</b>	<b>REPS</b>
<b>DENOSA With SAMATU; PAWUSA; SAEPU</b>	82 254	6.72%	4
<b>HOSPERSA with NATU</b>	94 434	7.71%	4
<b>NAPTOSA with SAQU</b>	73 133	5.97%	4
<b>NEHAWU</b>	196 201	16.02%	5
<b>POPCRU</b>	145 190	11,86%	5
<b>PSA with UNIPSAWU and NPSWU</b>	231 880	18,93%	5
<b>SADTU</b>	260 780	21,29%	5
<b>SAPU with PEU and NUPSAW</b>	140 781	11,50%	5
<b>Grand total</b>	1 224 653	100%	36

Source: <https://pscbc.co.za>

### **3.8 The GPSSBC**

The General Public Service Sector Bargaining Council adheres to PSCBC Resolution 10 of 1999. Alongside formulating an effective communication strategy, the GPSSBC is instrumental in establishing and upholding robust

administrative practices, expediting dispute resolution, and creating an environment conducive to trade unions.<sup>94</sup>

Public Service Employees who are not covered by any other Public Service sector council is covered by the GPSSBC. However, the scope of this council does not extend to the National Defence Force, the National intelligence Agency, the South African Secret Service, and the South African National Academy of Intelligence.

Under its constitution, the council has the power to negotiate and enforce collective bargaining agreements. It holds the authority to prevent conflicts, create a dispute resolution fund, develop training programs, offer policy recommendations affecting the industry, determine non-contentious issues through collective bargaining in case of strikes or work stoppages, and foster an environment that bolsters the PSCNC's operational services to the council, as long as it improves efficiency and it enables the sharing of resources.<sup>95</sup>

The GPSSBC Constitution states that the council aims to foster a constructive relationship between employers and employees and to further labour peace. It ensures the availability of an effective mechanism for conflict resolution and participates in negotiations concerning issues of mutual interest.<sup>96</sup>

### **3.9 The intricate challenges and issues faced by the PSCBC in dispute resolution.**

Rights and interest disputes are two of the labour relations issues facing the public sector. These disputes have to do with the interpretation and application of collective agreements, Conflicts relating to collective agreements reached within the PSCBC are under the jurisdiction of the PSCBC.<sup>97</sup> Employees may prior to conciliating retract the dispute. The PSCBC acting as the central collective bargaining council, negotiate on salaries or wages for the public service.<sup>98</sup> Clarke

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<sup>94</sup>GPSSBC Annual Report 2021/22.

<sup>95</sup> Annual report 2021/22.

<sup>96</sup> Annual report 2021/22.

<sup>97</sup> Arthur Russel Clarke 'Public service labour relation: Centralised collective bargaining and social dialogue in the public service of south Africa (1997-2007)' < <http://hdl.handle.net/11394/2354> > accessed 02 April 2023.

<sup>98</sup> *Ibid.*



Madmin's research indicates that the PSCBC has settled thousands of rights-based disputes; from June 2006 to June 2007, over half of the claims submitted pertained to promotions and appointments.<sup>99</sup>

### **3.10 Summary**

This chapter has successfully shown how the bargaining process is regulated. The PSCBC is established by legislation as a bargaining council. Collective bargaining is promoted at a sectoral level. The legislation outlines how these bargaining structures are created, and also their functions. They are able to enter into agreements and to enforce such. The PSCBC is established by legislation, as bargaining council in the public sector. The PSCBC can resolve disputes that arise in the sector, they may be disputes of right or disputes of mutual interest. Trade unions and the state are the main parties to the council. when performing their functions, these unions ensure the efficiency of negotiations between them and the state as the employer.

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<sup>99</sup> *Ibid.*

## **CHAPTER 4**

### **A COMPARATIVE STUDY: CANADA, UNITED STATES OF AMERICA, UNITED KINGDOM, AND UGANDA**

#### **4.1 Introduction**

In different countries, there are laws that regulate the collective bargaining process, these laws provide a framework on how bargaining forums should be established and also the powers and objectives of these forums. In some jurisdictions there are three levels of collective bargaining: company, sectoral and national. There exist different approaches to collective bargaining from each country. A comparative study will be undertaken to demonstrate the different systems of collective bargaining that have developed in each country.

There has been developments that have taken place worlds public service sector at large. Making a comparison of different systems and processes can be useful in gaining a better understanding of how other countries have developed their labour relations. A comparative study can help in learning from other countries regarding their bargaining systems and procedures.

A study conducted by the ILO will be useful in conducting and analysing the position of collective bargaining from another jurisdiction.

#### **4.2 Rationale for a comparative analysis with the selected foreign jurisdictions.**

In most regions around world, labour relations are in flux, and the changes have resulted in new patterns of labour relations activity. As a result of technological innovation, the public sector is facing new issues.

Traditional bargaining problems remain same in both Canada and the United States, but they are more focused on intricate issues that involve among others job security, and other conditions of employment.

In the U.S the coordination of collective bargaining and budgeting processes have been on the rise. In contrast to numerous other developed nations,

collective bargaining in these two countries is gradually shifting from decentralisation to centralization. Both countries have experienced changes that account for the majority of this tendency. The scope of collective bargaining has been on a decline.

In most European countries public service bargaining is still centralised, the decentralisation of the bargaining process at large is said to be transferring more power to the role players at the enterprise level. In the UK, there is a decentralization of collective bargaining, however in the public service it is decentralized to a minor extent.

Over the last few decades, the changes in the scope of collective bargaining and union density in most regions of Africa have not changed. The changes in labour legislation in these African countries have allowed workers to exercise labour rights. Collective bargaining is practiced at all levels throughout most African countries. Collective bargaining for Uganda's public sector is centralised at the national level.<sup>100</sup>

An increase in technological advancement has had an impact on public service labour relations. The issue of globalization is one that governments around the world are finding ways to deal with it. The System of labour relations will experience a profound change due to technological advancement.<sup>101</sup>

### **4.3 A comparative analysis**

#### **4.3.1 Canada**

##### **4.3.1.1 Background of the public service collective bargaining**

There are three levels government that make up the public sector, they are : federal, provincial, and municipal, each with public service employees, public enterprises, and public. Legislation plays a critical role in Canada's public

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<sup>100</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

<sup>101</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

services. One of the legislations is the Police Act and the Crown Employees Collective Bargaining Act. These laws are applied unilaterally by government.<sup>102</sup>

#### **4.3.1.2 The legal framework**

Collective bargaining legislation provides for clear procedures that allow trade unions to acquire collective bargaining rights. These legislations make use of sanctions during the length of the agreement that have economic implications.<sup>103</sup> Some of the legal instruments include the Canadian Labour Code and other provincial labour laws. The legislature creates a right to freely form associations and bargain collectively.

There is a unilateral application of these laws by governments with regards to labour relations in the public service.<sup>104</sup>

#### **4.3.1.3 Collective bargaining Parties**

##### a) Workers' organisations

There are a number of unions that are part of the public service, The Canadian Union of Public Employees, which represent a majority of municipal and health care employees; The National Union of Public and General Employees.

##### b) Employers' associations

Employers in the public service among others include those in federal and territorial governments. When collective bargaining rights are granted to public servants by government there are three groups that are created, which include the unions; and the administrative tribunals.<sup>105</sup> These administrative tribunals are there to maintain the relationship between the union and the government.

#### **4.3.1.4 Levels of collective bargaining**

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<sup>102</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

<sup>103</sup> *Ibid.*

<sup>104</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

<sup>105</sup> *Ibid* 3.

Collective bargaining is made of two levels, which takes place between unions and employers. Bargaining is now more centralised. Most public service institutions have consolidated their collective bargaining. Almost all provinces facilitate collective bargaining for school boards and health care institutions, while some unions bargain directly with the province. .<sup>106</sup>

#### **4.3.1.5 Challenges to collective bargaining**

Wage settlements are one of the primary concerns being discussed in Canadian public service collective bargaining. The government's implementation of these different policies to limit collective bargaining by public employees had an effect on wage levels, which in turn harmed public sector employees' real earnings because wage adjustments fell behind.<sup>107</sup> The aspect of job security also remains one of the critical issues in public service, job security is thus threatened.

The issues of maternity and paternity leave have been successfully negotiated by public service unions. Additional topics covered in collective bargaining for public sector employees include work hours, yearly leave, sick leave, and study leave. Although there is no collective agreement that extends to non-union members, this does not mean that they are excluded from the benefits of negotiated agreements.<sup>108</sup>

One of the issues in the public sector is determining which government agency has can act in the place of the employer; however, there are several alternatives, including the treasury board, as well as commissions. Negotiations also present a challenge. According to Farrel, there must be a clear communication between employers and unions that such an agency has a right to act on behalf of the employer to enter into agreements.<sup>109</sup>

#### **4.3.1.6 Lessons that South Africa can learn.**

The Canadian legal framework as established through federal and provincial labour laws, has contributed to labour relations stability. Employers and public

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<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

sector unions have shown the willingness to adapt economical or government budges changes that may ensue. This has led to a more cooperate approach to collective bargaining, allowing parties to engage in effective negotiations finding solutions. The Canadian public sector bargaining promotes accountability and transparency. This kind of transparency helps maintain public support for the bargaining process and outcomes.

### **4.3.2 United States of America**

#### **4.3.2.1 Background**

In the United States ('US') there are three levels of government which are the federal, state, and local. The labour relations in the US are governed by many statues and legislations. The role players in the labour relations include the legislature, unions, employers, to citizens. There are public enterprises, public institutions and agencies that make up the three levels of government.<sup>110</sup>

#### **4.3.2.2 The Legislature**

The constitution and other labour related laws that have been put in place, regulate the employment relations in the United states. In the Federal public sector for example The Civil Service Reform Act of 1978 has been in place. State and municipal employees are subject to state labour regulations, while federal employees' rights are covered by federal labour laws.<sup>111</sup>

#### **4.3.2.3 Parties**

##### **(a) Workers' Organizations**

The workers' organization in the U.S. are active political campaigners. Politics is often included in the activities of the union. Majority unions that represent public sector employees are members of the Congress of Industrial organizations. The

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<sup>110</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

<sup>111</sup> *Ibid.*

Service Employees International Union represent county and city employees, with a membership of over a million<sup>112</sup>

#### (b) Employers' Associations

There are agencies and departments that are responsible for entering into negotiations that have to do with employment conditions. The subject matters of these negotiations involve wages and salaries. congress. The main representatives in many places when it comes to addressing work conditions are the county boards, city councils, and school boards. To represent their various agencies in labour talks, certain governmental units and agencies employ experienced negotiators or have specialised labour relations divisions.<sup>113</sup>

#### **4.3.2.4 Levels of collective bargaining**

The bargaining process enjoys the protection of the legislature throughout the public sector. It takes place at the national level, the sectoral level, the Local level, and enterprise level. There exist various government agencies at the federal level which negotiate with workers' representatives directly. Union members and agencies are bound by these agreements.<sup>114</sup>

#### **4.3.2.5 Challenges of collective bargaining**

Some of the pressing issue related to collective are the ones that have to do with wages, hours of work and other employment conditions. In other states and local agencies, the issues of pay are established directly by the employer, who has control over whether or not to consult with the employees.

Employers also have the power to decide on wage issues without a need to consult with their employees.

#### **4.3.2.6 Lessons that South Africa can learn from the US collective bargaining.**

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

- (a) Their collective agreements are more detailed, and they provide a more satisfactory employment conditions, grievances, and dispute settlements.
- (b) It should allow a more coordinated budgeting process of the government administration.
- (c) South Africa should also adopt the three methods of determining conditions of employment which are: A two-way negotiation method that involves employers and employees' unions, unilateral decision by the employer and arbitration.

### **4.3.3 United Kingdom**

#### **4.3.3.1 Legal framework**

One of the distinguishing factors of the bargaining process in the United Kingdom is that the legislative framework does not differentiate employees across its sectors. Collective bargaining is the foundation of labour relations in the United Kingdom, encompassing both public and private sectors. There is no substantive statutory law regulating the bargaining process, unlike in South Africa, nor is there a written Constitution. Instead, the participants take part collective bargaining voluntarily. Legislation that clearly defines the process of identifying and creating bargaining units is the Employment Relations Act of 1999. its labour relations is devoid of government intervention; the only entities authorised to negotiate and finalise collective agreements are trade unions. It is not necessary for work councils or other employee representatives to write collective agreements. Union and government officials are the actors in collective bargaining in the public sector. Collective agreements are not legally enforceable but are backed by parties involved. Wage negotiations and agreements for the public sector are centralised.<sup>115</sup>

#### **4.3.3.3 Parties to collective bargaining**

- (a) Workers organizations

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<sup>115</sup> G. Ferreira, 'Collective Bargaining and The Public Sector' (2008) Journal of public administration vol 43 no 2.1.



Most of the workers in this sector belong to a union. Although unions are experiencing a decline in union density, as it is around the world. Unions in the public sector were able to retain and enhance their membership numbers.

#### (b) Employers' organizations

There are the two employees' associations in the public service, these two associations have the power to resolve wage disputes that may arise. There are two committees that are responsible for negotiations during the bargaining process. The bargaining agreements differ between the civil service the public service differs.

#### **4.3.3.4 Levels of collective bargaining**

National level negotiations are directed at wage and employment conditions. Bargaining takes place at the enterprise level. The bargaining process is decentralized. As a result of opposing national level bargaining, in most enterprises there is no bargaining. The significance of national bargaining however is still prevalent in the sector, especially between the primary workers in this sector.

Compared to the other levels of negotiating, enterprise-level bargaining is more prevalent. Negotiating on the issues of minimum wage no longer takes place, despite the existence of tripartite consultation on the minimum wage.<sup>116</sup>

#### **4.3.3.5 Lessons that South Africa can learn from the UK's collective bargaining.**

The United Kingdom employs clearly defined frameworks for collective bargaining that delineate the roles, processes, and outcomes involved. For example, the "Public Services Social Partnership Forum" is utilized to structure dialogues between the government and trade unions. This systematic approach provides a

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<sup>116</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

model for South Africa to develop comprehensive guidelines and protocols for negotiations, ensuring alignment and coherence among all stakeholders.

The UK invests in training for negotiators and union reps to improve bargaining. South Africa could benefit similarly by implementing such training to enhance negotiation skills and understanding among all parties

#### **4.3.4 Uganda**

##### **4.3.4.1 Background to the public service**

The Ugandan government had overtaken a Public Service Reform Programme which had an effect on all the areas of the public service. The Ugandan public sector is comprised of different government role players that include administrators and public institutions.

Uganda's public sector is composed of the national government, a range of government administrators, public corporations, and public institutions. The sector includes four main commissions: the Public Service Commission, the Judicial Service Commission, the Health Service Commission, and the Teaching Service Commission.<sup>117</sup>

##### **4.3.4.2 Legal Framework**

The Public service labour relations is regulated by the Constitution and its labour legislations. These labour laws protect freedom of association to employees in the, which leads to new emerging unions in the sector. The Public service Act is one of the laws put in place.

The Ugandan Constitution, "Every worker has a right to collective bargaining and representation." Workers have an enjoyment of the right to fair labour practice. They are in a position to negotiate the issues of employment conditions.

##### **4.3.4.3 Parties to collective bargaining**

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<sup>117</sup> Casale and Tenkorang Public Service Labour Relations: A Comparative Overview ILO Paper 17 (August 2008).

(a) Workers' organisations

The public sector workforce is represented by the Uganda Civil Service Union, the Uganda Medical Workers' Union, the Uganda Public Employees' Union, the Uganda Civil Servants' Association, and the Uganda Teachers Association.

(b) Employers' association

The Ministry of Public Service is the main government agency in charge of managing labour relations in the public sector. It controls and makes decisions on issues related to working conditions.

#### **4.3.4.4 Levels of collective bargaining**

The public service minister responsible the composition of the staff council that is involved in negotiation processes. Collective bargaining and consultation are the primary negotiating instruments. These negotiations involve only two parties, the public sector workers, and the Ministry of Public Service.

There is centralised bargaining. Bargaining agreements between a commission and a union extend to all employees under the commission's authority. The determination of minimum wage is done through bargaining as there are no laws that provide for such determination. The bargaining structure is more formal, which includes government and union officials.

#### **4.4 Summary**

This chapter has successfully shown the process of collective bargaining in other jurisdictions. In this chapter an outline has been made between four countries. It has outlined how other countries have structured their public service in relation to collective bargaining. The comparison has been made between Canada, the United States the United Kingdom and Uganda. In the Canadian public services, it has been shown that collective bargaining is one that is centralised. In places like the US bargaining takes place at four levels. Bargaining forms the foundation of labour relations in the United Kingdom, encompassing both public and private sectors. There is no substantive statutory law regulating the bargaining process, unlike in South Africa, nor is there a written Constitution. Instead, the

participants engage in collective bargaining voluntarily. In Uganda, Bargaining and consultation are primary instruments of negotiation.

## **Chapter 5**

### **Conclusions and Recommendations**

#### **5.1 Introduction**

This dissertation has compared various jurisdictions to investigate collective bargaining in the employment relationship within the South African public service.

The aim of this study was to discuss collective bargaining in the public sector within the context of South Africa. To look into the developments that have been made over the years, in reaching the objectives of the PSCBC. The study sought address the bargaining challenges that are often experienced in the sector.

One of objective of the study was to establish what is collective bargaining. Definition as provided in the 1995 LRA were explored in order to understand collective bargaining. Definitions as provided by the International Labour Organization were used in providing a clear understanding of what collective bargaining entails.

The second objective was to provide recommendations that will assist where there is a shortfall in the bargaining process, to ensure the effectiveness of the bargaining process.

The third objective sought to study the pros and cons associated with collective bargaining as far as the public service is concerned. This was done by looking into the challenges that are faced by the public service.

The study seeks to look at the functionality of strike action during the bargaining process.

#### **5.2 Conclusion**

##### **5.2.1 Introduction**

The first chapter serves as an introduction to the topic, setting the stage by summarizing the research. It details the study's background, articulates the problem statement, defines the study's objectives, describes the methodology to be used, reviews the literature, and acknowledges the study's limitations.

##### **5.2.2 LEGISLATIVE FRAMEWORK AND BACKGROUND TO COLLECTIVE BARGAINING**

The second chapter looked into the legislative framework in relation to collective bargaining. It has looked into the definition as provided by the International Labour Organization (ILO), a special focus was made into the South African

labour law, with specific focus on the Constitution, the 1995 LRA, The chapter also looked into other human rights as provided for by the Constitution and how they give effect to the bargaining right.

### **5.2.3 COLLECTIVE BARGAINING**

Chapter 3 looks into collective bargaining as a right as underpinned by the Constitution. The chapter sought to outline how collective bargaining structures are established. There are four sectors that are created by the PSCBC. The chapter discusses collective agreements, the challenges relating to these agreements. This also includes the creation of a public sector bargaining council, its powers, and objectives. The challenges and issues faced by the PSCBC in dispute resolution.

### **5.2.4 A comparative study.**

Chapter 4 looked into a comparative study between Canada, United States of America, United Kingdom, and Uganda. The Chapter has explored into the public services of these four countries, it focused on the composition of the public services of each country, its focus was on public sector bargaining. The idea behind this chapter was to investigate how these countries have managed to ensure effective bargaining, especially in the public services. In the Canadian public services, it has been shown that collective bargaining is one that is centralised. In the US collective bargaining there are four levels which are the national level, the sectoral level, the Local level, and enterprise level. Collective bargaining is the foundation of labour relations in the United Kingdom, encompassing both public and private sectors. It is not governed by statutory law, unlike in South Africa, nor is there a written Constitution. Instead, the participants engage in collective bargaining voluntarily. In Uganda, Consultation and bargaining are the primary tools of negotiations in the public service.

### **5.3 Recommendations**

The study had embarked on unpacking what is meant by collective bargaining, it was focused on discussing the future of the South African bargaining process within the public service employment relationship. The study sought to analyse the pros and cons associated with such process.

The public service summit on collective bargaining has outlined some of the key things that should be done in creating a framework to strengthen and defend centralised collective bargaining. In order to improve the bargaining process, PSCBC should examine the bargaining structures of the public service in cooperation with the international labour organisation in order to follow international practices. This study has shown the role played by international law when it comes to collective bargaining, especially the role of the ILO.

There is a need as outlined in the summit to establish a task team that will audit all collective agreements to identify the areas of non-implementation and there should be a clear process for the implementation of outstanding area linked to a

time frame for completion of the proposed implementation strategies. To ensure an efficient enforcement of collective agreements, the PSCBC must conclude an implementation of its enforcement procedures and should ensure that sector councils include in their constitutions a provision for effective and efficient enforcement of collective agreements.

There is a need by the PSCBC to review its constitution to reinforce the principles of centralised collective bargaining. Sectors must also be willing to amend their constitutions to ensure it aligns with the concept of centralised collective bargaining in line with the reviewed PSCBC Constitution. To ensure a strong centralised bargaining there must be an alignment between the PSCBC Constitution and that of the other sectors.

To ensure an effective collective bargaining in the public services, there should be an enhancement of the public services through the use of the 4<sup>th</sup> industrial Revolution and digitalisation in the public service, The Public service summit has outlined that the government must strengthen systems and process as well as an internal infrastructure.

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