THE ROLE OF THE EDUCATION LABOUR RELATIONS COUNCIL IN COLLECTIVE BARGAINING

by

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DECLARATION

I, NOLUSINDISO OCTAVIA FOCA, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

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SUMMARY

The 1996 Constitution provides workers with the right to form and join trade unions and to participate in the activities and programmes of those trade unions. The organizational and associated rights contained in sections 23(2)-(4) of the Constitution of Republic of South Africa, form the bedrock of a labour-relations system characterized by voluntarist collective bargaining. The constitutional protection that the above section gives to these organisational rights shields the trade unions and employer organisations from legislative and executive interference in their affairs and in turn, inhibits victimisation of and interference in trade unions by employers.

One of the expressly stated purposes of the Labour Relations Act of 1995 (hereinafter referred to as the "LRA") is to promote collective bargaining and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine wages, terms and conditions of employment, other matters of mutual interest and to formulate industrial policy. Notwithstanding the above purpose, the Act does not compel collective bargaining, with the result that the courts have no role in determining, for example, whether an employer should bargain collectively with a trade, what they should bargain about, at what level they should bargain or how parties to a negotiation should conduct themselves.

Despite this, by extending and bolstering the right to strike, the LRA has effectively empowered trade unions to have recourse to the strike as an integral aspect of the collective bargaining process. The LRA provides a framework that is conducive to collective bargaining and thus providing for the establishment of bargaining councils.

The purpose of this treatise is to examine the role played by the Education Labour Relations Council (hereinafter referred to as the "ELRC") as one of the sectoral bargaining councils in the Public Service, in collective bargaining. In order to place this discussion in context, it is valuable to know the history of industrial relations and collective bargaining in South Africa.

OVERVIEW OF THE STUDY

The study consists of two parts: the first part is an overview of the South African collective bargaining system with a specific focus on the historical development of the collective bargaining system and the changes brought about by the promulgation of the Labour Relations Act of 1995. In sharp contrast it is demonstrated how the collective bargaining

system has evolved from the pre-democratic era to a more progressive system during the post democratic period. The second part focuses more on the public-sector bargaining system with specific reference to the role of the Education Labour Relations Council as a bargaining council, in collective bargaining.

The purpose of Chapter 1 is to demonstrate how the South African legislature has attempted to attain the stated objectives of the Labour Relations Act, by means of collective bargaining with an emphasis on centralised collective bargaining. This insistence on a centralised system of collective bargaining is borne out by the bias in favour of majoritianism, the encouragement of super trade unions and a general antipathy to the proliferation of a number of smaller trade unions. Since collective bargaining forms the backbone of the South African labour law legislative framework, as will be demonstrated in the same chapter, it is necessary to explain the meaning, origins and objectives of collective bargaining. The different levels at which collective bargaining takes place are also discussed.

The promulgation of the LRA in 1995 radically altered the system of labour relations in the public service; for the first time, the public service was covered by the same provisions as the broader workforce. Unlike the private-sector bargaining councils which are formed through a voluntary process, the LRA establishes the Public Service Bargaining Council (PSCBC) as a mandatory bargaining council for the public service. This chapter is to provide an overview of collective bargaining within the public service with specific reference to the coordinating role of the PSCBC of the other bargaining councils in the public sector.

Chapter 3 is “Collective Bargaining at the Education Labour Relations Council”. The role of ELRC as a forum provided for by the LRA, in collective bargaining is explored with specific reference to its constitution; who is covered in its scope; the process provided for in its constitution for collective bargaining as well as its dispute-resolution process on matters of mutual interest where collective bargaining has resulted in a conflict.

Chapter 4 focuses on the findings of this study with reference to the achievements of the ELRC in collective bargaining since its inception to date as well as the challenges that have confronted the ELRC over the years of its existence. This chapter concludes by putting forward recommendations on how some of the observed challenges may be overcome by the ELRC.

CHAPTER 1
AN OVERVIEW OF SOUTH AFRICAN COLLECTIVE BARGAINING SYSTEM

1.1 INTRODUCTION

The purpose of this chapter is to provide an overview of the South African collective bargaining system by focusing on both the pre-1994 and post-1994 collective bargaining systems. This chapter will also highlight the objectives of the South African labour-law dispensation and the manner in which the legislature has attempted to achieve these objectives will also be explained. The South African legislative framework with reference to collective-labour law demonstrates that our legislature adopts a pluralist approach to labour relations and therefore strongly supports trade unions and collective bargaining especially at sectoral level. A brief overview of the regulation of collective-labour law in terms of the Labour Relations Act is necessary to explain the background and structures for subsequent chapters wherein the collective bargaining within the public service will be discussed in detail.

Collective bargaining lies at the heart of any industrial democracy. In South Africa collective bargaining is of particular importance because it is the mechanism through which "regulated flexibility" will be achieved. In other words, the ability of collective bargaining to set wages and conditions that balance employees' needs with those of employers is critical for the ability of the labour-relations system to balance the imperatives of equity and economic development.

In South Africa the central pillar of collective bargaining has historically been provided by the industrial- and bargaining-council system. Statutory councils, an innovation of the Labour Relations Act[1] (hereinafter "the LRA"), appear to have more limited appeal.[2] Outside the statutory system, however, bargaining takes place at enterprise and plant levels, as well as in non-statutory centralized bargaining forums.

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1 Act 66 of 1995.

2 Gold and coal mining, and automobile manufacturing are examples where non-statutory centralised collective bargaining structures were created.

1.2 HISTORICAL BACKGROUND OF COLLECTIVE BARGAINING

1.2.1 COLLECTIVE BARGAINING PRE-1994

Under the dual system of labour relations that existed during the apartheid period collective bargaining was almost exclusively the preserve of trade unions representing White, Coloured and Indian workers. The latter trade unions were recognised by a statutory framework that governed industrial relations and bargained in institutions provided for by that framework, namely industrial councils. Before the 1970s very little collective bargaining took place at firm or plant-level outside the industrial council system. Black workers could form or join trade unions but these operated without legislative protection and trade unions for black workers could not join industrial councils. Collective bargaining for Black workers was therefore almost non-existent and, not surprisingly, wages and conditions of employment were extremely poor.

The position changed after 1973. The strikes that erupted in and around Durban in that year and that gave birth to a new generation of trade unions, most of which were non-racial, but which in practice largely organised and represented Black workers. The new emergent trade unions pioneered the negotiation of recognition agreements to secure collective bargaining and other rights at individual plants and firms. They did not have it easy since employers did everything they could to prevent the trade unions organizing their workers, while the state sought through various means to undermine or crush them. Apartheid, furthermore, ensured that trade-union organisations and collective bargaining had a political import that went well beyond shopfloor issues.

The 1970s and 1980s were turbulent decades. The rapid growth of the new trade unions and their success in pursuing a plant-level bargaining strategy to push up wage levels, improve employment conditions and address arbitrary disciplinary action, resulted in the state appointing the Wiehahn Commission in 1977 to investigate and report on the industrial relations system. The Commission issued its main report in 1979. This was followed by a series of amendments to the Labour Relations Act.[3] The most important amendment was the definition of an “employee” to remove the exclusion of Black workers, thus allowing them to join registered trade unions and be directly represented on industrial councils and conciliation boards. After this amendment, within few years circumstances changed and industrial councils began to look much more attractive. For a start, many of the new trade

unions had become significantly bigger and they could join councils and in most cases dominate the employee side of the council.

In the mid-1980s, the new trade unions increasingly shifted the emphasis of their bargaining to more centralised levels, particularly to industrial councils. It was not a smooth process as there was opposition from the employers' industrial councils and resistance by the established trade unions. Given the voluntary nature of the industrial council system, employers had an option of opting out of the council, thereby threatening its existence.

The level at which bargaining took place has been a key industrial relations issue in South Africa since the emergence of the new trade unions since after 1973. It has been as much a feature of collective bargaining in this period as has been the substance of negotiations. The thrust by trade unions to raise wages, improve other conditions of employment and expand social benefits for their members was critical in addressing the distorted labour market created by apartheid. But as important was the intention to maximize the spread of such improvements by negotiating them at more centralised levels. Both goals created enormous tensions in the industrial relations system and also exposed the limitations of the statutory framework for collective bargaining. The political struggle and the active role of trade unions in the struggle informed and exacerbated these tensions.

1.2.2 THE COLLECTIVE BARGAINING SYSTEM POST - 1994

The transition to democracy relieved some of the tensions but did not improve the standard of living of the majority of the population, or change the demographics of the average South African workplace, or eliminate the heritage of politicized industrial relations. It also did not resolve the problems with regard to the level at which bargaining took place. But the election of the ANC[4] in the first democratic election in South Africa in 1994 opened the way for a review of labour legislation, of which a key aspect of such was the collective bargaining dispensation.

The task team that was appointed to design a new industrial relations statute identified "the lack of conceptual clarity as to the structure and functions of collective bargaining"[5] as the major problem with the 1956 LRA.[6] This criticism refers mainly to the "lack of commitment to

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3 As the Act was re-named, the amendments were made to the Industrial Conciliation Amendments Acts 94 of 1979 and 95 of 1980, and the Labour Relations Acts 57 of 1981, 51 of 1982 and 2 of 1983.

4 African National Congress.

5 Draft Negotiating Document, (1995) 121.

6 Act 28 of 1956.

an orderly system of industry-level bargaining"[7] that had resulted in the development of a "patchwork" system of industrial councils, and the failure of the statute to provide a legal framework for the separate system of workplace bargaining that emerged after 1973. The task team concluded that as a result of the above problems "there is no existing statutory framework which can accommodate and facilitate an orderly relationship between bargaining at the level of industry and at the level of the workplace".[8]

The remaining problems identified by the task team related specifically to industrial councils. These included the criteria for the representativeness of industrial councils, the bureaucratic structure of councils, procedures for granting exemptions from industrial council agreements, and the enforcement of council agreements by criminal prosecution. The task team considered three collective bargaining models when deliberating on how to solve these problems. The first model was one of statutory compulsion, wherein there would be a duty to bargain together with statutory determination of the levels at which bargaining takes place and the issues over which parties bargained. The second model advocated a considerable degree of compulsion but proposed that it would be the judiciary that would determine the appropriate levels of bargaining and bargaining agenda. The third model comprised a voluntarist system in which the parties would determine their own bargaining arrangements through the exercise of power. The latter model was the most preferred as it can be seen in the existing system.

Why the task team rejected the two models that entailed compulsion was that these would introduce rigidity into the labour market that needed to be able to respond to changing economic conditions.[9] The Draft Bill, therefore, retained many of the provisions of the LRA with regard to industrial councils, which the Bill proposed to re-name "bargaining councils". But, there were some important changes:

- Bargaining councils could be formed in the public sector or could straddle the public and private sectors.

- Small business interests would need to be represented on councils.

- The representativeness of councils would be reviewed annually.

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7 Draft Negotiating Document (1995) 121.

8 *Ibid.*

9 See Draft Negotiating Document (1995) 122.

- A requirement for the extension of a council agreement would be the existence of an independent body to hear exemptions on grounds of undue hardship.

In addition, it would be left to NEDLAC[10] to establish criteria for the demarcation of sectors. The intention was that this would allow NEDLAC to design a more coherent system of sector-level bargaining.

An important new function that bargaining councils would perform was dispute resolution within their registered scope. In order to do so the council would become accredited by the CCMA[11] or would have to engage the services of an accredited private agency to conciliate and arbitrate disputes.

Instead of a duty to bargain and other forms of compulsion, the task team provided support for collective bargaining. Key to this was a series of organisational rights, none of which was absolute and all of which would be accessible only if the trade unions met thresholds of representativeness. Further support for collective bargaining was a provision for agency shops, a new dispute-resolution system that would use conciliation and advisory arbitration to assist parties to reach agreements and, most importantly, a protected right to strike.

In line with the notion of self-regulation that informed the Draft Bill, provision was made for registered trade unions and employers to conclude legally binding agreements that would be enforceable by arbitration rather than through criminal or civil courts. In terms of this new scheme, trade unions, employers and employers' organisations would be responsible for the enforcement of their own agreements.

In addition, a new institution was proposed, the workplace forum, which would be separate from the collective bargaining system but would supplement that system in important ways. The mode of engagement in the workplace-forum model was envisaged as joint problem-solving, and its focus would be on non-wage matters such as restructuring, work re-organisation, and the introduction of new technology. Implicit in the proposals regarding bargaining councils and workplace forums was a scheme in which adversarial bargaining over distributive issues would be located at the industry level and co-operative engagement over issues affecting productivity and performance would take place at the workplace. Workplace forums proved not to be successful. Trade unions need to trigger the creation of

10 National Economic Development and Labour Council.

11 Commission for Conciliation, Mediation and Arbitration.

such forums as they prefer not to do so due to mistrust in the idea of co-operative engagement with elected worker representatives.

1.2.3 THE NEW ERA MARKED BY THE PROMULGATION OF THE LRA OF 1995

The Draft Bill discussed above was the basis for public comment and negotiation between the social partners in NEDLAC.[12] Some of the provisions proposed in the Draft Bill were amongst the most contentious issues in negotiations. This section briefly outlines the provisions in respect of collective bargaining that emerged at the end of the negotiations and were promulgated into the new LRA.[13]

The LRA is firmly committed to the promotion of collective bargaining, particularly at the sectoral level. However, the LRA of 1995 significantly narrowed the scope of the unfair labour practice, which had the effect of removing a judicially imposed duty to bargain. **The LRA[14] abolished the broadly formulated unfair labour practice which accorded the industrial court the ability to create a judicially enforceable duty to bargain.[15]** Thompson and Benjamin[16] are of the view that the LRA has an even stronger underlying philosophy of voluntarism when it comes to the collective bargaining which differs significantly with its predecessor. Under the unfair labour-practice provisions of the 1956 Act,[17] employers were saddled with a legal duty to bargain with trade unions. Most presiding officers held that only sufficiently representative trade unions held rights in this regard, but some went as far as to extend entitlements to trade unions with insignificant strength. In the current LRA[18] the collective dimension of the unfair labour practice jurisdiction has now been effectively abolished, and with it a duty to bargain. However, the institution of collective bargaining is unequivocally fostered, albeit a different approach. This is confirmed by the voluntaristic foundation for the collective bargaining regime introduced by the LRA.[19]

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12 National Economic Development and Labour Council established in terms of Act 35 of 1994. Pre-1994 the National Manpower Commission representing the interests of the State, employers and employees, conducted investigation and submitted recommendations to the Minister of Labour on all labour matters. With the advent of democracy it became evident that a new body was required to address existing problems and to develop possible solutions in a holistic manner. This body had to be fully representative of all stakeholders to make meaningful discussions and negotiations possible and as such the National Economic, Development and Labour Council Act number 35 of 1994 was promulgated, which established NEDLAC.

13 Act 66 of 1995.

14 66 of 1995.

15 Benjamin and Thompson *South African Labour Law* Vol 1 (1997) AA1-5.

16 *Ibid.*

17 Act 28 of 1956.

18 66 of 1995.

In terms of the LRA it would therefore be power that would determine the recognition of bargaining agents, the choice of bargaining levels, the scope of the bargaining agenda and bargaining conduct.[20] In place of a duty to bargain is a set of organisational rights that should create the conditions for effective trade-union organisations that will result in collective bargaining. Trade unions that are sufficiently representative (acting alone or jointly) are able to acquire some of these rights (access to the employer's premises, stop–order facilities, the right to hold meetings and ballots, and leave for trade-union office bearers), while majority trade unions (acting alone or jointly) can acquire certain additional rights, that is, the election of trade unions representatives and the right to information for bargaining and monitoring purposes. A further aspect of the promotion of collective bargaining is that collective bargaining agreements are made legally binding and enforceable through arbitration. And underpinning collective bargaining is a protected right to strike that is given to trade unions that follow the statutory procedure.[21]

As indicated previously in this study, the LRA is a cornerstone of the transformation process. Du Toit *et al* confirm this view as follows "the LRA encapsulated the new government's aim to reconstruct and democratize the economy and society in the labour relations arena".[22] The objectives of the LRA are rather ambitious and are stated as follows:[23]

> "The purpose of the Act is to advance economic development, social justice, labour peace and democratization of the workplace by fulfilling the primary objects of this Act, which are –
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27[24] of the Constitution;
>
> (b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employer's organisation can –
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
> (ii) formulate industrial policy;
>
> (d) to promote –
>
> (i) orderly collective bargaining;
> (ii) collective bargaining at sectoral level;
> (iii) employee participation in decision-making in the workplace; and

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19 *Ibid.*

20 Du Toit, Bosch, Woolfrey, Godfrey, Rossouw, Christie, Cooper, Giles and Bosch *Labour Relations Law* (2006) 250-252.

21 Du Toit *et al Labour Relations Law* (2006) 29.

22 Du Toit *et al Labour Relations Law* (2003*)* 244*.*

23 S 1 of LRA 66 of 1995.

24 Now s 23.

(iv) the effective resolution of labour disputes."

The emphasis of the LRA is clearly on collective labour law.[25] The intention of the legislature was to create an orderly collective bargaining system with emphasis on centralised bargaining forums representing all sectors.[26] It appears that the most important means of achieving the stated objectives of social justice, economic development and so forth was perceived to be through collective bargaining especially at sectoral or industry level.[27]

The LRA provides a framework that is conducive to collective bargaining.[28] It provides for:

- simple registration procedures for trade unions and employers organisations;[29]
- the application of the principle of freedom of association;[30]
- the granting of extensive organisational rights to sufficiently representative trade unions;[31]
- the creation of for a for collective bargaining;[32] and
- the right to strike supplemented by the protection of employees from dismissal for partaking in a strike.[33]

The intention and hope of the legislature was that this enabling framework would result in employers and trade unions setting conditions of work in the different sectors and resolving their own disputes; thus resulting in social justice and economic development.[34]

The next section outlines the various ways in which the employer and trade unions have set conditions to provide for a conducive environment to engage and interact with one another as provided for in the Act.

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25 Mishcke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in Terms of the LRA" 2004 13 6 *CLL* 51.

26 Du Toit *et al Labour Relations Law* (2003) 41, 244.

27 See s 1(d)(ii).

28 See Grogan *Workplace Law* (2003) 299; Du Toit *et al Labour Relations Law* (2003) 167; Basson, Christianson, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* Vol 2 (2005) 22-24.

29 S 96 of the LRA.

30 Ch II of the LRA.

31 Ch II part A of the LRA.

32 Ch II part C, D and E of the LRA.

33 Ch IV of the LRA.

34 See Grogan *Workplace Law* 304; Du Toit *et al Labour Relations Law* (2003) 227.

1.2.3.1 FREEDOM OF ASSOCIATION

An entire chapter of the LRA is dedicated to the freedom of association.[35] This is in line with the South Africa's obligations as a member of the International Labour Organisation[36] (ILO) and the Bill of Rights.[37] The concept of "freedom of association" was given content in terms of section 23(2)-(5) of the RSA Constitution. The rights provided for in terms of the Bill of rights are also of relevance to individuals, trade unions and employer organisations in cases where LRA is not applicable. In such situations an aggrieved party can rely on the rights provided for in terms of the Constitution.[38]

1.2.3.2 ORGANISATIONAL RIGHTS

Organisational rights can be acquired by a trade union in terms of a collective agreement. The statutory organisational rights act as a floor or minimum, which can be demanded under certain circumstances (which will be discussed hereunder), and there is nothing precluding the existence of a collective agreement granting a trade unions(s) more extensive organisational rights.[39] Where an employer refuses to grant such organisational rights they can be obliged to, provided the trade union is registered[40] and it possesses the required threshold of representivity at the employer's workplace[41] for the organisational right(s) it seeks to enforce. Different thresholds of representivity are required for the different organisational rights. However, trade unions that are parties to a bargaining council or a statutory council automatically have rights of access,[42] and rights to stop-order facilities,[43] irrespective of the extent of their representivity.[44] Parties to a bargaining council[45] or a

35 See Ch II of the LRA.

36 ILO *Convention 87 Freedom of Association and Protection of the Rights to Organise* (1948).

37 S 23 of the Constitution of South Africa 1996.

38 *South African National Defence Union v Minister of Defence* (2003) 24 *ILJ* 2101 (T).

39 Du Toit *et al Labour Relations Law* (2003) 202.

40 For an explanation of the process of registration see Van Jaarsveld, Fourie and Olivier "Labour Law" in Joubert *The Law of South Africa* (2001) 388-393; Du Toit *et al Labour Relations Law* (2003) 183-185.

41 For a discussion on the meaning of "workplace" see Du Toit *et al Labour Relations Law* (2003) 203-204; *Oil Chemical General and Allied Workers Union and Volkswagen of SA (Pty) Ltd* (2002) 23 *ILJ* 220 (CCMA).

42 S 12 of the LRA.

43 S 13 of the LRA.

44 S 19 of the LRA.

45 Bargaining councils are forums for collective bargaining at sectoral level.

majority representative[46] trade union may by a collective agreement with the employer establish the thresholds of representativeness for the acquisition of organisational rights.[47]

As discussed above, once it is established or accepted that a trade union is "sufficiently representative" or that it represents the majority of the employees at a particular workplace that a trade union is entitled to certain organisational rights. Where it is accepted that such trade union is not "sufficiently representative", the question as to whether that trade unions will be in a position to embark on a protected strike action in order to demand certain organisational rights has arisen. The Labour Court,[48] the Labour Appeal Court[49] and the Constitutional Court[50] have all had an opportunity to pronounce on this vexed issue.

The LRA provides for both closed shops[51] and agency shops.[52] Only trade unions that represent a majority of the workers at a workplace may enter into such collective agreements with the employers.[53] The provisions regarding granting of organisational rights, closed shops and agency shops demonstrate the legislature's preference for majoritarianism, as an attempt to prevent a proliferation of smaller trade unions, and a definite bias in favour of the creation and maintenance of power of the super trade unions.

As will be seen hereunder the theme of majoritarianism is repeated with reference to the creation of *fora* for collective bargaining such as bargaining councils and workplace forums.

1.3 FORUMS FOR COLLECTIVE BARGAINING

Aside from the provision of organisational rights and the protection of freedom of association the LRA provides for *fora* for collective bargaining as well as the enforcement of collective agreements. The Act unashamedly encourages collective bargaining particularly at sectoral

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46 Whilst the current LRA provides for the majority representative union, the proposed amendment to s 21 aimed at the expansion of the application of organisational rights, probably to enhance the ability of trade unions with enough membership to bargain with employees, thereby doing away with the principle of majoritarian.

47 S 18 of the LRA.

48 *Bader Bop (Pty) Ltd & another v National Bargaining Council & Others* (2001) 22 *ILJ* 2431 (LC).

49 *Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of SA and Others* (2002) 23 *ILJ* 104 (LAC).

50 *National Union of Metal & Allied Workers of SA v Bader Bop (Pty) Ltd and Another* (2003) 24 *ILJ* 305 (CC).

51 S 26(1) of the LRA.

52 S 25(1) of the LRA.

53 S 25(2) and s 26(2) of the LRA; *National Manufactured Fibres Employers Association v Bikwani* (1999) 20 *ILJ* 2637 (LC).

or industrial level.[54] It provides for the creation of bargaining councils and statutory councils.[55]

1.3.1 BARGAINING COUNCILS

The key institution of the LRA is the bargaining council. Its primary functions are collective bargaining, the conclusion of collective agreements and the resolution of disputes.[56] Bargaining councils are voluntarily created, on application by one or more registered trade unions and one or more registered employers' organisations and/or the state if it is an employer in the sector and for which the bargaining council is established.[57]

The 2002 amendments to the LRA provided bargaining councils with extensive powers for the promotion, monitoring and enforcement of bargaining councils' agreements. According to commentators "this provision addressed difficulties experienced by many bargaining councils seeking to enforce the terms of their collective agreements. One of the significant policy considerations underlying the LRA 1995 was to decriminalise labour law. The Act gave effect to this policy by abolishing the jurisdiction of the criminal courts in respect of failures to comply with a collective agreement entered into by a bargaining council and introduced a system of arbitration to enforce these agreements. In many instances this created practical difficulties for councils that lacked the infrastructure to establish panels of arbitrators, and in some instances bargaining councils appointed their own officials as arbitrators, thus becoming judges in their own cause".[58]

1.3.2 STATUTORY COUNCILS

The provisions relating to statutory councils were as a result of a compromise between government and the big trade unions to allay trade unions' fears that bargaining councils would not do enough to promote cetralised collective bargaining.[59] Only 30 % representivity

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54 S 1(d)(ii) of the LRA.

55 Statutory councils are established in terms of Part E of Chapter III of the LRA. According to Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 355 "Statutory councils were established at a late stage in the negotiations of the LRA, to address, at least in part, demands by the trade unions federations for compulsory centralised bargaining in all sectors of the economy. The idea behind statutory councils is that they might be established in sectors where trade unions representativity is relatively low and where there is no bargaining council established and that given a relatively modest set of powers and functions".

56 S 28 of the LRA.

57 S 27 of the LRA.

58 See Van Niekerk and Le Roux "A Comment on the Labour Relations Amendment Bill 2001 and the Basic Conditions of Employment Bill 2001" 2001 *ILJ* 2164, 2165-2166.

59 Grogan *Workplace Law* 302-303.

on the part of trade unions and employers' organisations is sufficient for the establishment of a statutory council. Its functions are more limited but similar to those of a bargaining council. They also include dispute resolution and entering into collective agreements.[60]

Unlike bargaining-council membership, which is voluntary, membership of statutory councils by trade unions or employer organisations can be enforced by Ministerial order.[61] Another inroad into voluntarism and flexibility is the fact that a statutory council that has less than 30% representivity can still impose its agreements on other parties in the sector by submitting agreements to the Minister, who may promulgate the agreements as if they were determinations under the BCEA.[62]

As seen above, the legislature was intent on enforcing sectoral regulation of conditions of employment by conferring *quasi-legislative* powers on the Minister by the extension of bargaining-council and statutory-council agreements to non-parties in the sector.

1.3.3 WORKPLACE FORUMS

The idea behind the concept of workplace forums is that worker participation will result in a workplace democracy,[63] which in turn would engender high rates of productivity and labour peace, enabling South African companies to compete globally.[64] The Act provides for the establishment of workplace forums[65] for the promotion of worker participation at the workplace in order to achieve the legislature's stated objective of workplace democracy.[66] The intention of the legislature was that there should be a dual system of collective bargaining; more antagonistic forms of negotiation concerning distributive issues as wages and benefits should not occur at plant level but rather at industrial or sectoral level (i.e. at bargaining councils).[67] Co-operative joint problem-solving and decision-making with worker participation concerning matters of mutual interest between employer and employees, such as strategic business decisions, the introduction of new technology, health and safety, affirmative action measures and the like should be reserved for collective bargaining at the workplace itself.[68]

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60 S 43(2) of the LRA.
61 S 41 of the LRA.
62 S 44 of the LRA.
63 See Basson *et al Essential Labour Law* Vol 2 (2005) 25.
64 Olivier "Workplace Forums: Critical Questions from a Labour Law Perspective" 1996 *ILJ* 8121 813.
65 S 213 of the LRA.
66 See Basson *et al Essential Labour Law* Vol 2 (2005) 182-183.
67 Grogan *Workplace Law* 293.
68 Summers "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 803.

1.3.4 COLLECTIVE BARGAINING THROUGH INDUSTRIAL ACTION

Without the right to strike, trade unions have very limited bargaining power in the collective bargaining process.[69] In the well-known judgment of *NUMSA v Bader Bop (Pty) Ltd*[70] the Constitutional Court held as follows:

> "The right to strike is essential to collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle".

Van Jaarsveld, Fourie and Olivier explain:

> "The right to strike must not be seen in isolation but viewed and understood against the background and in the context of employees' right to associate and organise themselves and then to exercise the right to bargain collectively."[71]

The authors then quote Basson to support their argument:

> "Once employees are organised in trade unions, they are able to conduct negotiations with the employer on a more or less equal footing. But effective collective bargaining can still take place only if the demands made by the trade unions are accompanied by the capacity to embark upon collective action in the form of collective withdrawal of labour as a counterweight to the power of the employer to hire and fire employees or to close its plant."[72]

The Constitution provides that every worker has the right to strike.[73] The right to strike is also provided for in the LRA.[74] Although the Constitution[75] does not make provision for the employer's right to lock out, the LRA does; the definition of a lockout, however, is more limited than the definition of a strike[76] and is consequently of more limited application.[77]

The legislature's stance with reference to industrial action is that it has a legitimate role to play in the system of collective bargaining provided it is preceded by attempts at reaching settlement through negotiation and conciliation and no other remedies are available.[78]

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69 Bendix *Industrial Relations in the New South Africa (*1998) 522.

70 *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC).

71 *NUMSA v Bader Bop (Pty) Ltd supra* par 908.

72 Basson "The Dismissal of Strikers in South Africa (Part 1)" 1992 *SAMLJ* 292.

73 S 23(2) RSA Constitution 1996.

74 S 64(1).

75 RSA Constitution Proclamation 103 of 1996.

76 S 213 of the LRA.

77 See s 64(1) of LRA.

78 Grogan *Workplace Law* 326; see also Basson *Essential Labour Law* Vol 2 (2002) 103.

1.4 MEANING OF THE CONCEPT

Grogan explains the concept of collective bargaining as follows:

> "Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation. The dynamic of collective bargaining is demand and concession; its objective is agreement. Unlike mere consultation, therefore, collective bargaining assumes willingness on each side not only to listen and to consider the representations of the other but also to abandon fixed positions where possible in order to find common ground."[79] [80]

In the ILO Global Report,[81] collective bargaining has been described as "a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial". Brown and Oxenbridge[82] refer to collective bargaining as "constantly mutating institution". By this it means that collective bargaining, as a social institution, is necessarily responsive to economic demands and circumstances, and that the nature and extent of legal intervention to regulate collective bargaining will always reflect particular interests.[83]

1.5 OBJECTIVES OF COLLECTIVE BARGAINING

The objectives of collective bargaining may be described as the following:[84]

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79 Grogan *Workplace Law* 304 see also Grogan *Collective Labour Law* (2010) 99.

80 Basson *et al Essential Labour Law* Vol 2 (2002) 56 state: "The collective bargaining process can broadly be defined as a process whereby employers (or employer's organisations) bargain with employee representatives (trade unions) about terms and conditions of employment and other matters of mutual interest." The Wiehahn Comission Part V par 2.6.2 defined collective bargaining as follows: "Collective bargaining is a process of decision-making between employers and trade unions with the purpose of aiming at an agreed set of rules governing the substantive and procedural terms of the relationship between them and all aspects of and issues arising out of the employment situation." See also Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 533, where various definitions of collective bargaining are quoted. In the end these authors conclude: "From these definitions the following may be extrapolated: collective bargaining is a voluntary process by means of which employees in an organised relationship negotiate with their employers or employers in an organised relationship, with regard to employment conditions or disputes arising therefrom with the object of reaching an agreement on these matters."

81 ILO "Organising for social justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work" (2004). See also Kahn-Freund, Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 69, where the purposes of collective bargaining are summarised: "by bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc, should not be frustrated through interruptions of work. By bargaining collectively with the management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity of the individual, and also that jobs should be reasonably secure".

82 Brown and Oxenbridge "Trade Unions and Collective Bargaining" in Barnard, Deakin and Morris *The Future of Labour Law* Liber Amicorum Sir Bob Hepple QC (2004) 63.

83 Van Niekerk *et al Law@work* 6.

84 Finnemore and Van Rensburg *Contemporary Labour Relations* (2002) 276.

(i) The setting of working conditions and other matters of mutual interest between employer and employees in a structured, institutionalised environment;

(ii) conformity and predictability through the creation of common substantive conditions and procedural rules;

(iii) the promotion of workplace democracy and employee participation in managerial decision-making;

(iv) the resolution of disputes in a controlled and institutionalised manner.

The main function of collective bargaining is the reaching of a collective agreements that regulate terms and conditions of employment.[85] Grogan[86] asserts that collective bargaining is aimed at reaching agreements that bind the employers to treat the group of employees in a standardised manner. What renders the bargaining "collective" is the presence of a trade unions(s) that represents the interest of employees as a collective. The other party to collective bargaining is usually an employer. However, it could be a number of employers or an employer's organisation. Representatives of the state may form a third party to the collective-bargaining process so that a form of corporatism or tripartite collective bargaining can be instituted.[87] Sometimes the state could be the employer party.[88]

Basson *et al*[89] contend that "when a trade union enters into collective bargaining process with the employer or an employer's organisation it will normally have one of the three objectives in mind. The first, and perhaps the most important, is the regulation of terms and conditions of employment. The second is the regulation of the relationship between the trade unions and an employer in whose workplace it has members. The third, and linked to the first two objectives, is that it may wish to attempt to resolve a dispute that has arisen between it and an employer".

Both broad and narrow conceptions of collective bargaining exist.[90] In the broad sense collective bargaining is perceived as different types of bipartite and sometimes tripartite discussions concerning employment and industrial relations that have an impact on a group

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85 Bamber and Sheldon "Collective Bargaining" in Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (2002) 1.

86 Grogan *Collective Labour Law* (2010) 99.

87 Bendix *Industrial Relation in the New South Africa* 241.

88 This is the case in the public service.

89 Basson *et al Essential Labour Law* (2005) 253.

90 Bamber and Sheldon "Collective Bargaining" in Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* 642.

of employees.[91] The narrow sense of the word is limited to bipartite discussions.[92] The terms "collective bargaining" on the one hand and "consultation" on the other have been accorded different meanings. With consultation the prerogative remains the employer's. However, the employer is obliged to share relevant information with the trade unions or employee representative and in good faith consider its proposals. Collective bargaining on the other hand implies an attempt by both parties to reach consensus usually by means of compromise.[93] Consultation therefore is a less competitive and more integrative process whereby the parties will exchange views but not necessarily reach a formal agreement.[94]

1.6 RIGHT TO COLLECTIVE BARGAINING

This applies to the right of employees to negotiate the terms and conditions of employment with their employer, through a trade union.[95] Although the ultimate objective is that agreement should be reached, the right to collective bargaining does not entail a *ius contrahendi,*[96] but merely entails a *ius negotiandi.*[97].[98] In South Africa the right to collective bargaining is recognised in terms of the Constitution[99] and also in terms of the LRA.[100]

In some instances this right is confused with the "duty to bargain", as it has been highlighted in the previous sections the Act,[101] and was designed to provide a framework for collective bargaining that met the constitutional requirements. Any duty to bargain over interest issues will be derived from the contract and not the legislation. Moreover, a duty to bargain is distinguishable from bargaining in good faith. The latter means the manner in which negotiations are conducted. The "duty to bargain" notion applies to both employers and employees; it has always meant to meet the constitutional- and international-law requirements. In *SANDU v Minister of Defence*,[102] the court held that for the purposes of section 23(5)[103] "collective bargaining" meant negotiation in good faith between employer and

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91 *Ibid.*

92 *Ibid*.

93 See Grogan *Workplace Law* 293 and 304.

94 Bamber and Sheldon "Collective Bargaining" in Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* 642.

95 Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* par 537.

96 A right to contract.

97 A right to negotiate.

98 Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* par 537.

99 S 23(5) of RSA Constitution states that every trade union, employer's organisation and employer have the right to engage in collective bargaining.

100 Act 66 of 1995.

101 *Supra*.

102 (2007) 28 *ILJ* 1909 (CC).

103 RSA Constitution Proclamation 103 1996.

employee on all matters of mutual interest pertaining to the term of conditions of employment. The court held that as SANDU had a right to engage in collective bargaining in terms of section 23(5)[104] the conferral of such a right had to impose a correlative duty on some person since the right "binds" the state according to section 8(1)[105] of the Constitution. The court further held that for SANDU to exercise such a right they had to have someone to negotiate with and that could be only the Minister.

1.7 LEVELS AND REQUIREMENTS FOR COLLECTIVE BARGAINING

In South Africa collective bargaining takes place at national level at NEDLAC,[106] sectoral or centralised level and plant level. Since collective bargaining takes place at different levels the question as to which level an employer should bargain has arisen. It should be noted that prior the promulgation of the current Act,[107] the Industrial Court generally took a view that plant-level bargaining was to be encouraged. This is evident in the principles adopted by the Industrial Court in all matters where the level of bargaining was the subject of a dispute. Under the previous LRA[108] in *Besaans Du Plessis (Pty) Ltd v NUSAW*[109] the employer was active in the metal industry and was represented on the national industrial council for that particular industry. The trade union, which represented the majority of the employees of the employer, was not a member of the industrial council. The employer refused to bargain collectively with the trade unions. On appeal the Labour Appeal Court held that in the absence of manifest unfairness, the choice of bargaining forum should be left to be determined by the respective power of the parties. In *Metal and Allied Workers Union v Hart*[110] the court took a view that whether an employer party to centralised bargaining was obliged also to bargain at plant level depended on the circumstances: an employer's refusal to bargain over funeral benefits and wages in excess of the prescribed rates was held not to constitute an unfair labour practice. The fact that the employer already paid wages in excess of council rates was itself sufficient to warrant an order compelling the employer to bargain actual wages at plant level.[111] It must be remembered that the present system of collective bargaining does not include a justiciable legal duty to bargain or to bargain in good faith, while the previous system where the unfair labour practice concept was used to develop such obligations.

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104 *Ibid.*

105 *Ibid.*

106 National Economic Development And Labour Council.

107 66 of 1995.

108 Act 28 of 1956.

109 (1990) 11 *ILJ* 690 (LAC).

110 (1985) 6 *ILJ* 478 (IC).

111 *SA Woodworkers Union v Rutherford Joinery (Pty)* (1990) 11 *ILJ* 695 (IC).

Whilst the dispensation under the current LRA[112] is such that centralised bargaining is encouraged and is the preferred level,[113] it is so under one condition that the interests of small enterprises should not be ignored in the process. This principle of attaching a condition of the preference on centralised bargaining is in *NUMSA/Defy Appliances Limited*[114] wherein it was held that where a matter is not covered by a council's main agreement, employees are entitled to bargain about it at plant level.

The existence of various levels where collective bargaining takes place requires that the process is managed in a coordinated way so as to ensure that the manner in which parties operate is properly regulated; this therefore entails setting up requirements for all parties to the process.

1.7.1 REQUIREMENTS OF REPRESENTATIVENESS

Where there is more than one trade union that wishes to bargain collectively with an employer, the question arises as to which trade unions the employer should bargain with. This has been the main source of conflict in the labour-relations sector, the Marikana (Lonmin) 2012 being an example of such.[115] The following approaches to this dilemma have been identified:[116]

(i) Majoritarian approach: The employer bargains only with a trade union that represents a majority (more than 50%) of the employees.

(ii) Pluralist approach: the employer bargains with all trade unions that represent a substantial percentage (usually 30% or more) of the employees.[117]

(iii) All comers approach: The employer bargains with all trade unions irrespective of their representivity.

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112 66 of 1995.

113 S 1(d)(ii) of the LRA.

114 *NUMSA/Defy Appliances Limited* [2005] 3 BALR 298 (MEIBC).

115 In the *Marikana/Lonmin* case , the source of a dispute was the fact that AMCU as the union that was not sufficiently represented challenged the Employer – Lonmin demanding that they be given the same recognition enjoyed by NUM which was a majority union .

116 See Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 797.

117 In *Mutual and Federal Insurance Co Ltd v Banking Insurance Finance and Assurance Workers Trade Unions* (1996) 20 *ILJ* 1078 (LC) it was held that the trade unions had to be "sufficiently representative" of the employees in the appropriate bargaining unit before the duty to bargain arose.

1.7.2 CONDUCT OF PARTIES DURING COLLECTIVE BARGAINING

The legislation displays preference for collective bargaining as the main means for settling disputes and dealing with conflict. In order for collective bargaining to be effective the parties must bargain in good faith. It is impossible to draw up a *numerus clausus* of what constitutes good-faith or bad-faith bargaining.

Good-faith bargaining has been described as negotiating "with an honest intention of reaching an agreement, if this is possible".[118] Having recourse to court decisions, Van Jaarsveld[119] has drawn up a comprehensive list of both employer and employee conduct which the courts have considered to constitute negotiating in bad faith.[120] Such conduct includes *inter alia*:

(i) making unrealistic, absurd, unfair or unlawful demands, insulting and offensive behaviour;

(ii) refusing to supply information which is relevant to the negotiations;

(iii) implementing unfair delaying tactics.

1.7.3 ASPECTS OF COLLECTIVE AGREEMENTS

i. Requirements for a valid collective agreement

The LRA[121] defines a collective agreement as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand –

(i) One or more employers;

(ii) one or more registered employers' organisation; or

(iii) one or more employers and one or more registered employers' organisations."[122]

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118 *East Rand Gold & Uranium Co Ltd v National Union of Mineworkers* (1989) 10 *ILJ* 683 (LAC) 697F.

119 Van Jaarsveld and Van Eck *Principles of Labour Law* par 802-804.

120 *Ibid.*

121 Act 66 of 1995.

122 S 213 of Act 66 of 1995.

It follows from this definition that in order for a collective agreement to be valid it must be in writing, the trade unions concerned must be registered and the agreement must concern itself with the conditions of employment or any other matter of mutual interest between the parties.[123] A matter of mutual interest includes "any matter that fairly and reasonably could be registered as affecting the common interests of the parties concerned, or otherwise be directly or indirectly related thereto".[124] It is also generally accepted that all the usual common-law requirements for a valid contract must be present.[125] This assertion is confirmed by Grogan[126] who contends that "the requirements for validity of a collective agreement are the same as for those of ordinary contracts".

ii Legal consequences of collective agreements

The parties to the collective agreements, their members, members of the registered trade unions and employers' organisations that are parties to the agreement are all bound to the collective agreements. Furthermore the agreement is also binding on employees who are not members of the registered trade unions if: the trade unions represent the majority of the employees employed by the employer at the workplace and these employees are identified and specifically bound to the agreement in terms of the agreement.[127] All trade-union members are bound to the collective agreements irrespective of when they became members.[128]

A collective agreement takes precedence over an individual contract of employment, and any provisions in the individual contract of employment which are contrary to the collective agreements will be amended.[129] Where the individual contract of employment purports to amend an applicable collective agreement such provision is invalid.[130] No provision in an individual contract of employment may permit an employee to be paid less remuneration than agreed to in terms of an applicable collective agreement.[131]

123 Basson *et al Essential Labour Law* Vol 2 (2002) 59.
124 Van Jaarsveld and Van Eck *Principles of Labour Law* par 808.
125 Van Jaarsveld and Van Eck *Principles of Labour Law* par 809.
126 Grogan *Collective Labour Law* (2010) 125.
127 S 23(1)(d); see also Basson *et al Essential Labour Law (*2002) 60-63.
128 S 23(2) of the LRA.
129 S 23(3); see also Basson *et al Essential Labour Law* (2002) 67-68 in this regard.
130 S 199(2) of the LRA.
131 S 199(1)(a) of the LRA.

No provision in an individual contract of employment may permit an employee to be treated less favourably or receive a benefit that is less favourable than that provided in terms of the applicable collective agreement.[132] An employee may not waive any rights in terms of the applicable collective agreement in terms of an individual contract of employment.[133] A collective agreement remains in force for the whole period of the agreement,[134] and if it is concluded for an indefinite period its termination may be effected by either party giving the other party reasonable notice, unless the agreement contains a provision prohibiting this.[135]

1.8 CONCLUSION

The historical background of collective bargaining provided above displays the evolution of collective labour law in South Africa resulting in an improved system compared to that which prevailed prior the country's democratic government. The brief overview of the sections of the LRA that deal with collective labour law serves to demonstrate the legislature's faith in the ability of collective bargaining to achieve the LRA's ambitious objectives. The legislature provided a framework which encourages collective bargaining by "super" trade unions, especially at sectoral level with the intention of achieving the following:

(i) Minimum conditions of work and wages could be collectively bargained and set by employers and trade unions within each sector. This would result in uniformity within industries; and

(ii) the parties themselves would settle their own disputes resulting in a type of self-governance within industries.[136]

In conclusion, it is therefore submitted that the emphasis of the Labour Relations Act of 1995 is on co-operation and constructive engagement between labour and management.

The next chapter provides a brief overview of how these principles of co-operation and constructive engagement between labour and management have been given effect within the public sector bargaining context.

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132 S 199(1)(b) of the LRA.
133 S 199(1)(c) of the LRA.
134 S 23(2) of the LRA.
135 S 23(4); Basson *et al Essential Labour Law* (2002) 64-65.
136 Baskin "South Africa's Quest for Jobs Growth and Equity in a Global Context" (1998) *ILJ* 986.

CHAPTER 2
COLLECTIVE BARGAINING WITHIN PUBLIC SERVICE

2.1 INTRODUCTION

As demonstrated in chapter 1, the demise of the apartheid state in 1994 and the coming in of a new democratic era resulted in fundamental legislative changes. Additional to the new human rights-centered Constitution;[137] the democratic South African Government also ratified a number of ILO Conventions and recommendations, surprisingly as is, with the exception of specific ILO Conventions 151 and 154 relating to public service. Despite the non-ratification of these conventions, South Africa gave effect to these conventions through the statute and practice as displayed in the principles of the LRA. The purpose of this chapter is to provide an overview of collective bargaining within the public service with specific reference to the coordinating role of the PSCBC of the other bargaining councils in the public sector.

2.2 THE PUBLIC SERVICE COORDINATING BARGAINING COUNCIL

With the advent of democratization in the 1990s, the public service was brought within the ambit of the Act[138] allowing for the first time the full development of trade unions and collective bargaining. The LRA provides for the establishment of a bargaining council for the public service as a whole, to be known as the Public Service Co-ordinating Bargaining Council (hereinafter referred to as "the PSCBC"), and for any sector within the public service that may be designated as such in terms of section 37 of the Act.[139]

The establishment of the PSCBC was aimed at addressing the fragmented system of collective bargaining created by the three separate statutes in the public service, namely the Education Labour Relations Act,[140] Public Service Labour Relations Act,[141] and South African Police Regulations.[142]

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137 RSA Constitution.
138 Act 66 of 1995.
139 *Ibid.*
140 Act 146 of 1993.
141 Act 102 of 1993.
142 Act 68 of 1995.

The PSCBC covers the whole of public service[143] and one of its main objectives is to provide mechanisms for the prevention and resolution of disputes in the public service. Apart from regulating and setting employment conditions for the public service, the PSCBC's key function is to create a platform for developing sound labour relations. Thus it executes this in collaboration with sectoral councils (discussed hereunder) for the purposes of ensuring uniformity in the public service.

The PSCBC's pivotal role and main function is to ensure the application of section 36(2)(b) of the LRA, in matters which apply to terms and conditions of service that apply to two or more sectors.

The PSCBC may perform all the functions of a bargaining council in respect of the following:

- matters which are regulated by uniform rules, norms and standards that apply across the public service; or

- matters which apply to terms and conditions of employment applicable to two or more sectors; or

- matters assigned to the state as employer in respect of the public service which matters are not assigned to the state as employer in any particular sector.[144]

The PSCBC may designate a sector of the public service for the establishment of a separate bargaining council. Such a bargaining council has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the state, as employer, has the requisite authority to conclude collective agreements and to resolve labour disputes.[145]

The overarching framework for conditions of employment and regulations pertaining to employment for the public service are negotiated at PSCBC level and as such its collective agreements are in the form of frameworks wherein details and implementation thereof are dealt with at sectoral bargaining councils established in terms of section 37 of the Act.[146]

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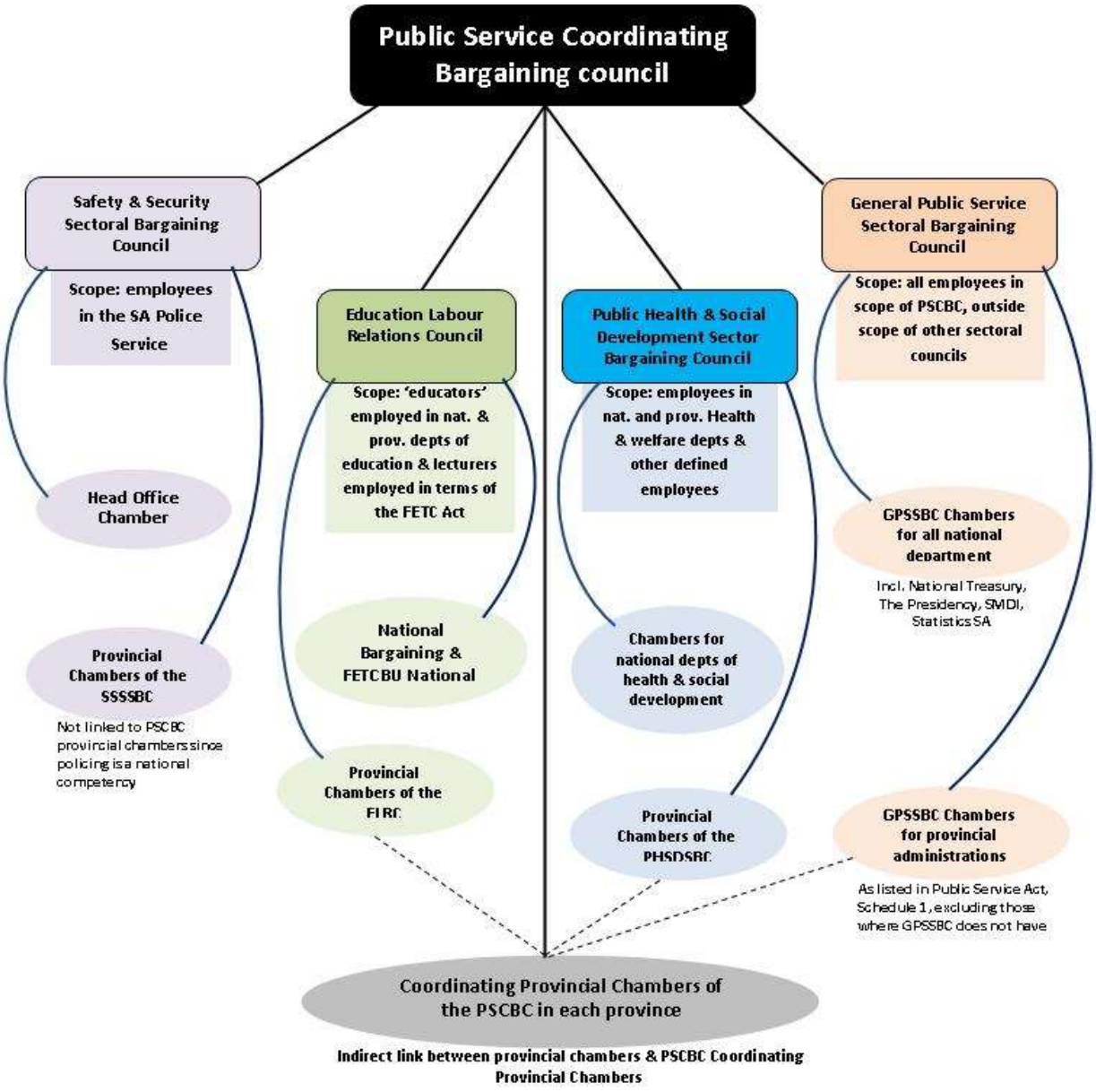
143 As defined as meaning the public service referred to in s 1(1) of the Public Service Act of 1994, and includes any organisational component contemplated in s 7(4) of that Act and specified in the first column of Schedule 2 to that Act, but excluding the members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service.

144 S 36(2) of the LRA.

145 S 37 of the LRA.

146 Act 66 of 1995.

The diagram below illustrates the current collective bargaining structures in the public service.[147]



The PSCBC therefore plays a co-ordinating role amongst the various bargaining councils in sectors of the public service. The PSCBC constitution also states that one of its and the sectoral councils' objectives is to cooperate and coordinate with, and contribute to, one another. PSCBC's responsibilities regarding sectors include overall policy formulation on dispute resolution together with the sectors to ensure uniformity; commissioning and maintenance of the case-management system; and overall co-ordination of Public Service Sectoral Bargaining Councils.

147 Adapted from PSCBC's 2012/13 Annual Report.

The sectors, however, are fully responsible for their own costs, including the management and resourcing of collective bargaining, human resources, dispute resolution, administration, and establishment and resourcing of their chambers.

PSCBC decisions of the council in so far as they affect the sectoral councils and bind such councils. Sectoral councils cannot make decisions that bind the PSCBC. However, a sectoral council may make recommendations to the PSCBC and, if such a recommendation is made, the PSCBC must discuss and consider it. The PSCBC is free to make any decision regarding such recommendation, provided it falls within the scope of its constitution.

A collective agreement concluded in the PSCBC automatically binds the sectoral councils, unless a sector concludes its own agreement addressing the same issue, in which case the sector agreement will take precedence over the PSCBC's collective agreement.

2.3 THE SCOPE OF PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

The scope of Public Health and Social Development Sectoral Bargaining Council (hereinafter referred as "the PHSDBC") is the whole of the health and social development sector, it covers all employees of both the Departments of Health and Social Development at both National and Provincial levels. It also covers all other health- and social development professionals employed in all other national and provincial Departments as reflected in section 1 of the PHSDBC constitution,[148] except those in education which will be discussed in chapter 3 under the scope of the Education Labour Relations Council.

2.4 THE SCOPE OF SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL

The scope of Safety and Security Sectoral Bargaining Council (hereinafter referred to as "the SSSBC") covers all employees employed in terms of South African Police Service Act[149] and their support staff employed in terms of the PSA.[150]

148 Can be accessed from the PHSDBC's website – http://www.phsdsbc.org.za.

149 Act 68 of 1995.

150 Proclamation 103 of 1994.

2.5 THE SCOPE OF GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

All employees that do not fall under the sectors mentioned above including the ELRC are covered in the General Public Service Sectoral Bargaining Council's (hereinafter referred to as "the GPSBC") scope. It must, however, be noted though that uniformed soldiers as well as employees of the National Intelligence Agencies and South African Secret Services are excluded.

2.6 CONCLUSION

In conclusion it is submitted that collective bargaining in the South African public service continues to remain highly centralised with sectoral and provincial bargaining structures, having limited jurisdiction to negotiate substantial pay or conditions of service issues. The sector bargaining-council's constitution provides for consultation at the level of provinces and as a result of the centralised bargaining, these structures have limited powers to reach collective agreements even if they do conclude agreements, which must be submitted to the relevant sector councils at national level for ratification. Patel[151] asserts that collective bargaining arrangements are subordinate to the Constitution and legislation concerned with the organisation of the state and the distribution of powers and responsibilities within Government.

The RSA Constitution provides for a single public service, and in giving effect to this the Public Service Act was amended in 1997 to allow Executing Authorities greater powers over work organisation and other aspects of human resources management such as recruitment and dismissal. It is submitted that these amendments did not affect the level at which bargaining takes place within the public sector as it is still at a central level. This matter remains a bone of contention between sector councils and the PSCBC, with the parties in education and police sectors arguing that substantive negotiations should take place in the sectoral councils, whilst trade unions in other sectors, while the Department of Public Service and Administration as the employer argued that the PSCBC should be accorded more powers.

Upon close examination of the scopes of the sector councils, it is clear that some of the councils are not "sectoral" in nature but rather occupationally based. Examples of such are

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151 Patel "Collective Bargaining in the Public Service" in Adler *Public Service Labour Relations in a Democratic South Africa* (2000) 40.

the SSSBC and ELRC. There have been discussions in the relevant sectors with a view to make them truly sectoral in nature, e.g. inclusion of the Department of Justice and Correctional Services in the SSSBC scope and non-educators under the scope of the ELRC. This invariably will reduce the scope of the GPSSBC and as such might have implications on its existence, however, there has not been any finality on this matter as no decision has been taken. This matter is further illustrated in the discussion that follows in the next chapter where the Education Labour Relations Council as a sectoral bargaining council is considered in detail.

CHAPTER 3
COLLECTIVE BARGAINING AT THE EDUCATION LABOUR RELATIONS COUNCIL

3.1 INTRODUCTION

Prior to 1994, there existed two specific pieces of legislation which regulated the employment relationship between the state as employer and its employees. These were the Public Service Labour Relations Act[152] (hereinafter referred to as "PSLRA") and the Education Labour Relations Act[153] (hereinafter referred to "ELRA"). Owing to the inequities that existed in the pre-democracy era as a result of the apartheid legacy, these respective acts were skewed in favour of the employer. As a result negotiations between the employer and the trade unions were often highly confrontational and dispute mechanisms were laborious and time consuming.

The enactment of the LRA[154] in 1995 amalgamated all acts of Parliament relating to labour relations both in the public and private sector. There was thus only one Act of Parliament regulating employment relationship. The LRA,[155] which was the product of intensive engagements between the state, the trade unions and the private sector business community significantly levelled the playing fields in terms of the power balance between employer and employee parties. In essence, the LRA[156] created and egalitarian approach in terms of the employment relationship.

The two prominent areas of progressive development in labour relations enshrined in the LRA[157] were the provisions for the establishment of sector-specific Bargaining Councils and the streamlining of dispute resolution by making it more easily accessible to individual employees.

As indicated in the previous chapter the LRA established the Public Service Co-ordinating Bargaining Council (PSCBC) as the "umbrella" bargaining council for the entire public service

152 Act 102 of 1993.
153 Act 146 of 1993.
154 *Supra.*
155 *Ibid.*
156 *Ibid.*
157 *Ibid.*

and created sector specific bargaining councils under its wing of which, amongst others, is the ELRC.

3.2 THE HISTORICAL BACKGROUND ON THE ESTABLISHMENT OF THE ELRC

The Education Labour Relations Council (ELRC) was established as a statutory council in 1994 at its founding meeting in Pretoria. This was indeed a significant milestone for the regulation of sound labour relations within the education sector in South Africa. The event was a culmination of various attempts to provide a forum for negotiations and consultation between the Departments of Education (hereinafter referred to as "the DOE") and the teacher-trade unions. The first committee consisted of representatives of the DOE and representatives of National Professional Teachers Organisation of South Africa (hereinafter referred to as "NAPTOSA"). The proposals of this committee led to the passing of the Education Labour Relations Act,[158] which realised the need for the ELRC.

The South African Democratic Teachers Trade Union (herein after referred to as "SADTU") attended the meetings of this committee in an observer capacity. With the transition of Government in 1994, SADTU join the ELRC in September of that year. Before SADTU joined circumstances were not ideal for the functioning of the Council, as it only consisted of the representatives of the employer and one trade-union party, namely NAPTOSA.

After the change of government in 1994, the other teacher trade-union formations joined the Council, and the ELRC had to deal with the challenge of the allocation of vote weights. At that stage there were no thresholds of representativeness and the ELRC consisted of a conglomeration of both large and relatively small trade unions.

With the promulgation of the LRA, the ELRC was deemed to be established as a bargaining council by the PSCBC in terms of section 37,[159] despite the fact that it existed prior the establishment of the PSCBC.

3.3 THE SCOPE OF THE ELRC

The registered scope of the ELRC covers the State in its capacity as employer and those employees in respect of which the Employment of Educators Act,[160] as well as employers in

158 146 of 1993.

159 S 37 of the LRA.

the Further Education and Training Colleges' sector and those employees to which the Further Education and Training Colleges Act[161] applies. Educators employed by the school governing bodies are not covered.

3.4 COMPOSITION OF COUNCIL

The ELRC operates in terms of its Constitution[162] at a national level and in nine Provincial Chambers. It enjoys the participation of all the educator trade unions, namely: SADTU,[163] the Combined Trade Union - Autonomous Teacher Trade Unions (hereinafter referred to as "the CTU-ATU"), comprising of NAPTOSA,[164] Suid- Afrikaanse Onderwysersunie (hereinafter referred to as "SAOU"), National Teachers Trade Union (hereinafter referred to as "NATU"), Professional Educators Trade Union (hereinafter referred to as "PEU"), Public Service Association (hereinafter referred to as "PSA), and Health and Other Service Personnel Trade Union of South Africa (hereinafter referred as "HOSPERSA"), and the employer, representing the State as an employer, and is a collective made up of the Provincial Departments of Education co-ordinated by the National Department of Basic Education.

3.5 PARTIES TO COUNCIL

The parties to Council is the State in its capacity as employer and registered trade unions that have members who fall within the registered scope of the ELRC and are admitted to the Council in terms of the provisions of the ELRC's constitution. Clause 9.1.2[165] provides that any employer organisation registered in terms of the Act[166] may apply in writing to the Council to be admitted as a party.

Admission to ELRC is regulated in terms of clause 9.3.1[167] wherein a provision is made for any trade unions or 2 or more trade unions acting together (referred to as Combined Trade Union "CTU") may apply to the General Secretary for admission to Council provided that they meet the threshold requirement of 50 000 members within the registered scope of the ELRC.

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160 Act 76 of 1998.

161 Act 16 of 2006.

162 ELRC collective agreement Number 1 of 2006 as amended and certified by the Registrar of Labour Relations 2009.

163 *Supra.*

164 *Supra.*

165 ELRC collective agreement 1 of 2006 – ELRC Constitution.

166 66 of 1995.

167 ELRC collective Agreement 1 of 2006 (*supra*).

3.6 VOTE WEIGHTS FOR PARTIES TO THE ELRC

The vote weights of parties to Council are regulated in terms of clause 18[168] of the constitution wherein a provision is made that the employer shall have 50% of the vote weight in the Council and its committees and that the admitted trade unions shall have the other 50% according to each trade union's membership. Clause 18[169] further provides that trade unions cannot exceed 50% representation. This arrangement is also applicable to ELRC's provincial chambers. The vote-weight allocation is regulated through a collective agreement on an annual basis based on figures calculated as at 31st December of each year. Clause 18.5 provides for referral of a dispute on the vote weights by trade unions within five days upon receipt of determination. The Constitution further provides that in the event that there is a dispute declared on this matter, the vote weights of the previous year shall apply until such time the dispute has been resolved. Provision is also made for the amendment of the vote weights to give effect to any changes that might occur due to changes occurring in the membership of any admitted party to ELRC during the course of the year or in the event where a new trade union or combined trade unions party is admitted to ELRC.

3.7 BARGAINING AT THE EDUCATION LABOUR RELATIONS COUNCIL

As indicated in the previous sections of this chapter, bargaining at the ELRC takes place at two levels, one being at a national level and provincial level. As it is the case with all other bargaining councils within the public service, the provincial chambers have minimal issues to bargain over as most issues are dealt with at national level. The sections below give further details of how collective bargaining takes place at the ELRC.

3.7.1 NEGOTIATIONS AND CONSULTATION ON MATTERS OF MUTUAL INTEREST WITHIN THE ELRC

The LRA[170] does not require negotiations on any particular subject, except in the case of the workplace forums where certain issues for consultation and joint decision-making are expressed. Any matter of mutual interest concerning the employment relationship may form the subject matter of negotiation between the parties. In bargaining councils, this process is regulated through their constitutions as in the case at the ELRC.

168 *Supra.*

169 *Ibid.*

170 66 of 1995.

Clause 1.1 in Annexure A of the ELRC's constitution provides that, "any party may submit proposals for consultation or for the conclusion of a collective agreement in the ELRC and request, in writing, a special consultation or negotiating meeting of the Council to deal with such a matter". Annexure A further provides that within five (5) days of submission of such proposals or requests, the General Secretary must serve copies of such to parties to Council. Thereafter, within fourteen (14) days of receiving the proposals or written request for such a meeting, the General Secretary must, after consulting in writing with other parties and receiving an assurance of a quorum, call a Special Consultation or Negotiation meeting of the ELRC. Clause 1.5 provides that any party to Council, prior to the holding of the meeting contemplated in clause 1.4, may request in writing that an item/ matter be placed on the agenda of such a meeting, after which the meeting will decide whether these issues are to be included on the agenda or whether to refer them to the relevant forum.

Clause 1.7 states that at the meeting referred to in clause 1.4, the Council must attempt to agree on a negotiation or consultation process which may include the following:

a) the submission of counter proposals;

b) the establishment of a negotiation committee of task team;

c) the appointment of a panellist, if necessary, to facilitate the negotiations or consultations and chair the meetings; and

d) the timetable for negotiations or consultations.

Clause 1.8 stipulates that "in the event of parties not agreeing on a negotiating or consultation procedure, the parties must within seven days commence negotiation or consultations in the Council". The constitution also provides for the process of referring or dealing with any dispute that may arise out of this process. To that extent, clause 1.9 states that "if parties do not conclude a collective agreements dealing with all the proposals referred to the ELRC after the expiry of thirty (30) days after the matter was first included on the agenda of the negotiating meeting, which period may be extended by agreement between the parties, any party may declare a dispute. Where the parties to a dispute have agreed to extend the negotiation period, any party may declare a dispute at any time during such extended period only if, in its view, negotiations have failed and the party holding such view has informed all the other parties, in writing, of its view".

This clause has been put to a test recently by trade union parties to council, wherein currently there has been a registered dispute[171] between the two parties; on a matter that was placed on the Council's agenda in the year 2009 and to date there has not been any collective agreement concluded as such which has resulted in SADTU and CTU ATU labour trade unions referring a dispute for Council to determine. In this matter the trade-union parties referred the dispute to the ELRC regarding the parity in the notches that exist between the educators as the public service employees and those other employees of the public service.

Collective bargaining at ELRC takes places at two levels, national and in provincial chambers. The provisions outlined above are also applicable at a provincial level with reference to the process of negotiations or consultations.

3.7.2 COLLECTIVE AGREEMENTS WITHIN THE CONTEXT OF THE ELRC

Bargaining councils act to maintain labour peace in the sector for which they are registered.[172] This function is fulfilled by the negotiation, supervision and enforcement of collective agreements. Amongst some of the primary powers and functions of bargaining council are those to conclude and enforce collective agreements.[173] Collective agreements are defined as written agreements concerning terms and conditions of employment or other matters of mutual interest concluded amongst on the one hand, a registered trade union and on the other hand, one or more employers, registered employers' organisations or one or more employers' organisation.[174] It follows from this definition that in order for a collective agreement to be valid it must be in writing, the trade unions concerned must be registered and the agreement must concern itself with conditions of employment or any other matter of mutual interest between parties.[175] Although the collective agreements must be in writing, there is perhaps surprisingly no requirement that it should be signed in order to be valid unless is stipulated so in the agreement.[176]

In formulating and drafting collective agreements, the ELRC complies with the requirements as specified in the LRA,[177] in that clause 3.1 of Part A[178] states that "a collective agreement

171 ELRC case number PSES 26-13/14 NAT.

172 See s 28(1)(c) of the LRA.

173 See s 28 of the LRA.

174 S 213 of the LRA; see also Le Roux "The Role and Enforcement of Collective Agreements" 2006 *CLL* 15 (6) at 51-58.

175 See Basson *et al Essential Labour Law* Vol 2 (2002) 59.

176 *Diamond v Daimler Chrysler SA (Pty) Ltd* (2006) 27 *ILJ* 2595 (LC).

177 66 of 1995.

must comply with the provisions of the LRA".[179] This is further reinforced by clause 3.7 of the constitution, wherein the following is listed as part of the requirements and procedures applicable to collective agreements of Council: "3.7.1 It must be reduced to writing and it will take effect only on the date on which sufficient parties to the ELRC have concluded the collective agreement to comply with the requirements for the adoption of a collective agreement in clause 3.1".

Apart from addressing the requirements with regards to the validity of the collective agreements, the ELRC's constitution also stipulates that "a draft collective agreement shall be put to vote, and it shall be considered approved only when a vote of the employer on the one side and a majority vote of the trade unions on the other side are cast in favour of its adoption". Whilst this clause upholds the principle of democracy it also has its own disadvantages wherein if all the CTU ATU trade unions support the signing of the collective agreement together with the employer party, without SADTU's support no agreement can be concluded.

As referred to in the previous sections of this paper, bargaining at the ELRC takes place at the provincial level as well as through the provincial chambers. Clause 22 of the General Provisions lists the functions of the provincial chambers as follows:

> "(a) to deal with such matters referred or delegated to that Provincial Chamber by the Council;
>
> (b) to conclude collective agreements on matters pertaining only to that Province; provided that no collective agreements concluded in a provincial chamber may conflict with a collective agreement concluded in the Council;
>
> (c) to act as a forum for consultation between the employer and the trade unions in that province;
>
> (d) to deal with matters emanating from agreed dispute resolution procedure of the Council which fall within its competency; and
>
> (e) to refer matters which fall outside its scope, which matters should be dealt with by the Council or PSCBC, to the General Secretary."[180]

With reference to collective agreements concluded at the provincial chamber, the constitution further places a requirement that for such agreements to have force and effect they are to be

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178 ELRC Constitution collective agreement 1 of 2006.

179 66 of 1995.

180 ELRC Constitution collective agreement 1 of 2006.

ratified at a national level by Council, to this extent Annexure A clause 6.2.4(d)[181] reads as follows:

> "All collective agreements of a Provincial Chamber must: include a provision that the collective agreement has no force or effect until it has been ratified by the Council, and may not be implemented until such time that it has; provided that omission of such clause does not invalidate the agreement, while the requirements of prior ratification and prohibition of implementation before such ratification remains".

Whether this clause is in line with the LRA's[182] requirement for a collective agreement to be valid, for it to have force and effect remains to be tested in the court of law, as someone may argue that the Council extended its powers by placing such as a requirement, however one would have to await such a test by the court of law.

In giving effect to clause 22(b), in clause 6.2.6[183] a provision is made that "the General Secretary must peruse any collective agreements received from a Provincial Secretary and make a recommendation at the first negotiating meeting of the Council following such receipt (provided that it is received in time for the notice provision to be complied with) as to whether the Provincial Chamber's collective agreement:

a) falls within the Provincial Chamber's jurisdiction; and
b) is in conflict with the law or any collective agreements of the Council."

The Constitution further provides that prior to making such a recommendation, the General Secretary may request a legal opinion on the proofreading of a Provincial collective agreement to ensure compliance. Upon receipt of a recommendation from the General Secretary on the ratification of a Provincial collective agreement, ELRC can either ratify or suggest such conditional amendments to be effected or refer the matter for a legal opinion provided that such is obtained expeditiously.[184] This process is regulated through strict time frames[185] though previously the ELRC has failed to adhere to such resulting in provinces implementing the collective agreements without their being ratified which is non-compliance with the Council's constitution and could create a huge dilemma if there could be a dispute arising out of implementation of such a collective agreement.

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181 *Supra.*
182 *Supra.*
183 *Supra.*
184 Clause 6.2.8 (a), (b) & (c) of the ELRC Constitution.
185 See clause 6.2.10 & 6.2.11 of the ELRC Constitution.

3.7.3 THE BINDING EFFECT OF COLLECTIVE AGREEMENTS WITHIN THE ELRC

Section 31[186] regulates the binding nature of collective agreements concluded in bargaining councils. This section is not dissimilar to section 23,[187] but takes account of the structure of a bargaining council, and the identity of the bargaining parties. Section 31[188] provides that a collective agreement concluded in a bargaining council binds only parties to the bargaining council who are parties to the collective agreement, subject to the provisions of section 32[189] and the constitution of the council. In this case, according to the ELRC's constitution this aspect is regulated through a provision that reads as follows "Unless the collective agreement provides to the contrary: such agreement applies to the employee of the employers that are not members of the signatory trade unions, subject to the requirements of the Act… and this clause shall be deemed to form part of such collective agreement".[190]

To ensure compliance with the collective agreements, the ELRC has built into its constitution a clause that empowers the General Secretary to enforce compliance and as such a detailed explanation of how the process is provided for will be done in the next sections of this chapter.

3.8 ELRC'S DISPUTE RESOLUTION ON MATTERS OF MUTUAL INTEREST

As alluded to in the previous chapters, the PSCBC may designate a sector of the Public Service for the establishment of a separate bargaining council. That bargaining council has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State, as an employer, has the requisite authority to conclude collective agreements and to resolve labour disputes.[191] The LRA distinguishes between two types of dispute; those disputes concerning "matters of mutual interest" and disputes which relate to matters other than "matters of mutual interest". A bargaining council's capacity to perform its dispute-settling functions in respect of a dispute depends on the following factors:

186 *Supra.*
187 *Ibid*.
188 *Ibid.*
189 *Ibid.*
190 Clause 3.8.1 of the ELRC Constitution.
191 S 37 of the LRA.

(a) whether the dispute is one between parties who are subject to the council's jurisdiction as far as it concerns the area and sector for which the council has been registered;[192]

(b) whether it is a dispute between parties to the council;

(c) the nature of the dispute.

The ELRC is accredited by the CCMA in terms of section 127[193] of the LRA to deal with disputes in the public education sector as per its scope with the exclusion of school governing-body educators. A discussion on this aspect will only be limited to the disputes of mutual interest. Clause 10[194] stipulates the process of referral as well as the time frames for such matters. A further provision is made in the constitution[195] that such referrals must be subjected to conciliation wherein the dispute should be settled within 30 days from the date commencement of such a process, failing which a the matter should be referred to voluntary arbitration. This is one aspect that distinguishes the dispute-resolution processes of the ELRC from that of the CCMA and the other bargaining councils where arbitration has to be applied where there is no settlement at conciliation, whereas at the ELRC the matter is automatically set down for arbitration without such a referral.

Clause 10.4.1 states that "if no settlement is reached and if no collective agreement covering the issues listed here exists, the panellist must try to facilitate agreement on:

a) rules about the conduct of a strike or lockout, if applicable; and
b) picketing rules, if applicable."

Clause 10.5[196] provides for a process wherein the dispute is about refusal to bargain or consult. This clause places an obligation on a panellist to issue an advisory award within 14 days from the date of receiving a request from a party to the dispute; equally it prohibits any party to a dispute to serve notice in terms section 64(1) of the Act[197] prior to obtaining such an advisory award within the period provided for in clause 10.5.1.[198] In this case, where the

192 *Fredericks v MECS Africa Project Support* (2005) 26 *ILJ* 2484 (BCA).
193 Act 66 of 1995.
194 Clause 10.1 of the ELRC Constitution.
195 Clause 10.2 of the ELRC Constitution.
196 ELRC Constitution.
197 66 of 1995.
198 ELRC Constitution.

matter is not settled at conciliation, the Council will not process the dispute any further. It is safe to say that any party to a dispute may exercise their rights in terms of the LRA.[199]

Clause 11 outlines the procedure for mutual-interest disputes in respect of non-parties to the Council. Clause 11.1.2 provides that if the dispute is about whether or not a matter is a matter contemplated in section 134 of the LRA[200] the dispute must be referred to arbitration in terms of clause 25. Clause 11 further provides for the process regarding negotiations wherein any non-party to Council may make a proposal in writing on a mutual-interest issue to the employer after which, if there is no collective agreement within 30 days of the date on which the proposal was made, a party may declare a dispute by referring a dispute to the Council in terms of these procedures.

3.9 DISPUTES ABOUT COLLECTIVE AGREEMENTS (INTERPRETATION AND APPLICATION)

Section 24(1) of the LRA[201] requires every collective agreement to provide a procedure to resolve disputes about the application or interpretation of that agreement. The procedure must provide for conciliation, and if the dispute remains unresolved, for arbitration.[202] Grogan[203] draws a distinction between a dispute of interpretation and that of application by asserting that a dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning of a particular provision, and a dispute over the application of a collective agreement exists arises when the parties disagree over whether the agreement applies to, or in, a particular set of facts and circumstances. On this aspect, Brassey[204] asserts that "an application dispute covers disputes which include the manner in which such collective agreements should be applied". The interpretation attached to this view is that this includes a party's non-compliance with the agreement and the opposing party's wish to have that agreement enforced. Because a dispute about the application and interpretation of a collective agreement must finally be resolved through arbitration, such a dispute may not be the subject of a strike or lockout. The ELRC in its constitution and all its collective

199 66 of 1995.

200 *Ibid*.

201 *Ibid*.

202 Where an agreement is extended, the enforcement of the agreement will be through the procedures prescribed in such agreement for its enforcement for both parties and non-parties to whom the agreement has been extended – see *Kem-Lin Fashions CC v Brunton* (2001) 22 *ILJ* 109 (LAC). In the absence of such, the CCMA will enter the dispute in terms of section 24.

203 Grogan *Collective Labour Law* (2010) 132.

204 Brassey *Employment and Labour Law: Commentary on the Labour Relations Act* A3-33.

agreements provides for the referral of disputes about interpretation and application, therefore is compliant with the requirements of section 24(1) of the LRA.[205]

In dealing with this matter, the Constitutional Court has held that

> "compliance with a collective agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment, the enforcement of collective agreement is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law."[206]

3.10 ENFORCEMENT OF COLLECTIVE AGREEMENTS

Section 33A of the LRA provides that, despite any other provision of the Act, a bargaining council may monitor and enforce compliance of its collective agreements by authorizing a designated agent to issue a compliance order. Section 33A further provides for the appointment of an arbitrator by a bargaining council to deal with an unresolved dispute on the compliance with its collective agreement. To give effect to this section, bargaining councils through their respective constitutions may establish a procedure for the compliance with the bargaining council collective agreements.

The ELRC is very progressive in this regard as it is currently the only bargaining council in the public service that has exercised this power as conferred to itself by the provisions of section 33A. Clause 23 of the constitution provides for the enforcement of collective agreements and of the Basic Conditions of Employment Act[207] (hereinafter referred to as "BCEA") provisions. Clause 23(4) empowers the General Secretary to issue an order requiring any person, bound by a collective agreement, to comply within a specified period. Clause 23 further empowers the General Secretary to refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by a panellist appointed by the Council or the CCMA, as the case may be.

For the purposes of clause 23, collective agreements include basic conditions of employment provided for in the BCEA.[208] Section 32(3) of the BCEA[209] provides that an employer must

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205 66 of 1995.

206 *CUSA v Tao Ying Metal Industry & Others* (2008) 29 *ILJ* 2461(CC) par 56.

207 75 of 1979.

208 *Ibid.*

pay remuneration not later than 7 days after the completion of the period for which the remuneration is payable. Hence the full remuneration without deductions must be paid and failure to do so would amount to non-compliance. This section must be read in conjunction with section 34 of the BCEA[210] which provides that an employer may not make any deductions from an employee's remuneration unless the deductions are required or permitted in terms of law. Regulation 13 of the terms and conditions of employment of educators authorises the employer to make deductions from the salaries of educators if salaries were paid erroneously. If the employer has made deductions in respect of educators who embarked on a strike action or who for any other reason did not report for duty and tendered their services, but who were paid for the days that they did not work or did not tender their services, then deductions would be permitted by law and there would be no basis to enforce compliance with any provision of the BCEA.[211] However, if the deductions were made in respect of educators who were by law entitled to remuneration, then deductions would be unlawful and in contravention of sections 34 and 32 of the BCEA, which would permit the ELRC to enforce compliance thereof in terms of clause 23 of its constitution, thereby directing the employer to pay back the unlawful deductions. A recent award issued by Council on a dispute of this nature where parties were in agreement that the dispute be dealt with as enforcement/compliance dispute,[212] is that which was referred by SADTU on behalf of its members.[213]

3.11 WITHDRAWAL OF COLLECTIVE AGREEMENTS

Section 23(4) of the LRA provides that

> "Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice to the other parties."

It is submitted that despite the fact that the Act provides for this, it is not the ideal if the purpose of collective bargaining is to be achieved in its fullest. However, having made such

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209 *Ibid*.

210 *Ibid*.

211 *Ibid*.

212 In *SAOU and NAPTOSA v HOD, Gauteng Department of Education (1)* (2011) 32 *ILJ* 1413 (LC), where both trade unions were successful in obtaining an interdict setting aside deductions that were made from the salaries of their members in respect of the 2010 strike. The relief was granted primarily based on the inaccuracy of the records used by the respondent to determine who had been on strike and not. The ELRC, however, does not have jurisdiction to grant interdicts or review and set aside decisions based on irregularities or unlawful conduct. The jurisdiction of the ELRC is confined to those powers granted to it in terms of its constitution, therefore could not grant similar relief to SADTU to that granted by the court in the *SAOU and NAPTOSA v HOD Gauteng Department of Education* case. This case could therefore not assist SADTU in their argument.

a submission it is also not wise for the bargaining councils to set a procedure for such in their constitution. This is one area that the ELRC is currently found wanting, and this has been a significant challenge confronting the Council as for the first time in its history since inception there was a withdrawal of a collective agreement by the employer wherein the matter was left to the Labour Court to decide. To date the judgment on this matter is still reserved.

Whilst the Act provides for a withdrawal, the emphasis is also on the phrase "by giving reasonable notice to the other parties",[214] this is one of the issues that was challenged by the trade unions at the ELRC, wherein the Minister, in withdrawing ELRC collective agreement Number 1 of 2011, indicated in her notice served to the ELRC that the withdrawal was with "immediate effect". This matter has been addressed by the courts in various cases; in *TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum*[215] the Labour Court held that an employer will only be entitled to cancel a collective agreement concluded for an indefinite period on reasonable notice to the employee party.

Subsequent to the trade unions' objection to the notice of withdrawal by the Minister that was with immediate effect, the Minister issued another notice of withdrawal giving fourteen days as the notice period. It is submitted that in terms of the principles adopted by the courts, the fourteen-day notice could not be regarded as reasonable, as this was affirmed in *Edgars Consolidated Stores Ltd v FEDCRAW,*[216] wherein the LAC found that a three-month notice was reasonable. In *South African Federation of Civil Engineering Contractors & Others v National Union of Metal Workers & Others*[217] the notice period of termination / withdrawal was also there to afford the parties a period to attempt to negotiate in order to sustain their collective agreements. Therefore such could not have been achieved within fourteen days.

The withdrawal of a collective agreement is described as a "notice to terminate a collective agreement" in terms of section 23(4) of the LRA.[218] From this description, it therefore follows that section 23(4) cannot apply in an instance where no reasonable notice as envisaged by the Act and decided case law has been provided.

It is submitted that reference to giving reasonable notice where a collective agreement is withdrawn would probably refer to a procedural agreement as in the case law referred to

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213 ELRC PSES 393-10/11.

214 S 23(4) of the LRA.

215 *TAWUSA & Alliance Comprising of STEMCWU v Anglo Platinum* [2009] 5 BLLR 506 (LC).

216 *Edgars Consolidated Stores Ltd v FEDCRAW* (2004) 25 *ILJ* 1051 (LAC).

217 *South African Federation of Civil Engineering Contractors & Others v NUM and another* [2009*]* 11 BLLR 1104 (LC).

above, and not when a substantive collective agreement such as paying the markers of examination scripts a certain fee as per the ELRC's case.

3.12 CONCLUSION

With the collective-bargaining framework provided for within the ELRC in its constitution, it is submitted that the ELRC is one of the bargaining councils that is doing extremely well in so far as giving effect to the LRA's objectives in this regard.

As indicated in the previous chapter dealing with collective bargaining in the public sector, it is again submitted that some of the Bargaining Councils within the public sector are not "sectoral" in nature but rather occupationally based. The ELRC is one of those. There have been discussions within the ELRC to make it a truly sectoral Bargaining Council by extending its scope to include non-educators; however, there has not been any finality on this matter as no decision was taken. It is, however, submitted that such a decision will have grave consequences for the General Public Service Sectoral Bargaining Council.

This matter is further illustrated in the findings of the study that are presented in the next chapter wherein recommendations are also put forward for the consideration by the ELRC for it to be a true sectoral bargaining council.

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[218] 66 of 1995.

CHAPTER 4
CONCLUSIONS AND RECOMMENDATIONS

4.1 INTRODUCTION

The LRA[219] strives to achieve labour peace and democratisation of the workplace. Labour peace in itself can be achieved through democratisation of the workplace, which in turn can be achieved through orderly collective bargaining, which can include (or result in) the conclusion of collective agreements. This view is confirmed by Grogan[220] when he asserts that the object of collective bargaining between management and organised labour is to reach agreements in terms of which their relationship is formalized, remuneration, conditions of service and other matters of mutual interest are regulated for given periods. To this extent the ELRC through the years of its existence, has somehow managed to achieve these broad objectives of the LRA[221] by concluding a number of collective agreements.

4.2 COLLECTIVE BARGAINING ACHIEVEMENTS FROM THE YEAR 1995 UNTIL 2013

Collective bargaining at the ELRC has led to significant collective agreements being concluded over the past 19 years. These agreements are, but not limited,[222] to the following:

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219 66 of 1995.

220 Grogan *Collective Labour Law* (2010) 10.

221 66 of 1995.

222 Some of the collective agreements concluded at the ELRC are as follows: Resolution 6 of 1998: Procedure for rationalisation and redeployment of educators in the provisioning of educator posts; Resolution 7 of 1998: Workload of Educators (School-based); Resolution 8 of 1998: Duties and Responsibilities of Educators (School and Office Based); Resolution 2 of 1999: Funds for Transformation; Resolution 4 of 1999: A Study on Career Pathing and a Salary System for Educators; Resolution 5 of 1999: Appointment of full-time shop stewards in Education; Resolution 3 of 2000: Collective Agreement No 3 of 2000 was adopted in respect of a performance management and development scheme for office-based educators; Collective Agreement 1 of 2003: This was adopted in April 2003 for "Evaluation procedures, processes and performance standards for institution based educators"; Collective Agreement 1 of 2005:Vote weights for Trade unions that are party to Council; Collective Agreement 2 of 2005: This resolution dealt with the pay progression for educators from July 1996 to June 2002; Collective Agreement 3 of 2005: This resolution dealt with the full-time appointment of shop stewards for the educator trade unions; Collective Agreement 4 of 2005: Integrated quality-management system for public FETC based educators; Collective Agreement 3 of 2006: School Grading Norms; Collective Agreement 5 of 2006: Improved career pathing for qualified Post Level 1 educators and accelerated progression for all educators on applicable salary levels; Collective Agreement 1 of 2007: Vote weights to the Trade unions that are parties to Council; Collective Agreement 2 of 2007: Shop Stewards in Education; Collective Agreement 3 of 2007: Levy Agreement; Collective Agreement 4 of 2007: Implementation of the Further Education and Training Colleges Act 16 of 2006; Collective Agreement 5 of 2007: Further Agreement on the Transfer of Employees from the Department of Education to individual FET Colleges; Collective Agreement 1 of 2008: Framework for the establishment of an Occupation Specific Dispensation (OSD) for educators in public education; Collective Agreement 2 of 2008: Special Task Team on OSD; Collective Agreement 3 of 2008: Vote weights for the trade unions that are parties to the Council; Collective Agreement 4 of 2008:Amendment of the ELRC constitution as certified by the Registrar of Labour on the 25th of April 2007 and as ratified by Collective Agreement 6 of 2007; Collective Agreement 5 of 2008: Further Education and

- Resolution 3 of 1995**:** This resolution provided for the abolition of discrimination in respect of the home-ownership scheme. This meant that female educators could participate equally with male educators in the housing benefits.

- Resolution 5 of 1995: This resolution dealt with the rationalisation of education though the redeployment of educators. This was in order to establish equity in the distribution of educator posts between schools of the previously segregated departments. The practical implementation of the resolution took several years to complete. It necessitated the establishment of special provincial task teams to monitor and facilitate the process that was accompanied by immense tension within the ranking of educators.

- Resolution 6 of 1995: This resolution constituted a landmark for the Council by providing for the establishment of provincial chambers. This step led to the decentralising of bargaining and negotiations to provinces on matters of a provincial nature.

- Resolution 3 of 1996: The resolution was an agreement on a three – year condition of service adjustment package for educators. The package included:

    - Right-sizing of the public service;
    - voluntary severance package; and
    - redeployment of educators declared in excess. A large number of educators applied for and were granted severance packages, a situation that left vacancies open for the excess educators.

- Resolution 7 of 1997: This resolution established new Dispute Resolution Procedures for the Council. These procedures were adopted as an annexure to the Constitution of the Council. (These procedures have undergone major amendments necessitated by new labour practices and changes to the Labour Relations Act.

Training Colleges Sector Bargaining Unit; Collective Agreement 1 of 2009: Further Amendment of the ELRC Constitution as certified by the Registrar of Labour on the 25th of April 2007 and as ratified by Collective Agreement 6 of 2007; Collective Agreement 1 of 2011: Improvement on Remuneration of Markers in National Examinations; Collective Agreement 1 of 2012: Occupation Specific Dispensation (OSD) for Education Therapists, Counsellors and Psychologists employed in public education; and Collective Agreement 1 of 2013: Vote weights for the trade unions that are Parties to Council.

- Resolution 1 of 1998: Agency Shop Agreement: This agreement ensured that all non-trade unions' employees within the scope of the council who benefit from the process of collective bargaining at ELRC contribute towards the costs of this collective bargaining.

- Resolution 2 of 1998: Levy Agreement: The Council may raise levies from the employer and employee in order to finance Council expenditure, including: research, development, training, and other activities that enhance the collective-bargaining process.

- Resolution 3 of 1998: The South African Council for Educators (SACE): SACE was established in 1994. By means of this resolution it was re-established in terms of its constitution under the ELRC, reporting to the ELRC annually.

- Resolution 4 of 1998: Adoption of Developmental Appraisal for Educators: The Council adopted the Developmental Appraisal instrument for educators, based upon a model that requires educators to engage in: reflective practice, self-appraisal, collaboration, and interaction with appraisal panels. This agreement was a prelude to the agreement on Whole School Development;

- Resolution 5 of 1998: Transfer of Serving Educators in terms of operational requirements: The resolution provides measures to accommodate the obligations of the employer under the Labour Relations Act, in respect of:

    - offering vacancies that arise at educational institutions first to serving educators who have been displaced;
    - all vacancies having to be advertised and filled where possible by displaced serving educators;
    - clear regulations for advertising and filling of educator posts; and
    - dispute resolution relating to this agreement to be resolved under the ELRC.

- Collective agreement 8 of 2003: This resolution marked another milestone with the "Integrated Quality Management System" (IQMS). This agreement successfully integrated the various assessment systems, including Whole School Development. Extensive training has taken place in the provinces and regular monitoring takes place through the National Training Team. The IQMS has been heralded as a

significant achievement for the improvement of quality education in the public education sector.

The collective agreements concluded over the years have contributed significantly to improved conditions of service for educators in the public-education sector.

4.3 CHALLENGES IN COLLECTIVE BARGAINING THAT CONFRONT THE ELRC

It needs to be highlighted that the ELRC's achievements have not been without challenges that can be listed as follows but not limited to such.

4.3.1 THE DIFFERENT PIECES OF LEGISLATION REGULATING CONDITIONS OF SERVICE WITHIN THE SECTOR

The first noticeable challenge that confronts the ELRC as a bargaining council is a question of whether indeed it is a sectoral bargaining council as envisaged in section 37 of the LRA.[223] Despite the fact that its scope is only limited to employees employed in terms of the EEA,[224] within the sector there are employees who are categorised as "office-based" educators, however such a category is employed in terms of two different pieces of legislation, one being the "EEA" and the other being the "PSA".[225]

In essence this arrangement means that the conditions of service for the same category of employees are regulated in terms of different legislations and as such there will always be some aspects of their jobs that are affected. A case, for example, is that of what was expected of the sectoral councils, in particular the ELRC, when the PSCBC concluded Resolution 1 of 2007 which established the "Occupation Specific Dispensation"[226] for the sectors. This meant that there would be a specific dispensation for education employees, however, in terms of the ELRC's scope not everyone who was in the system and classified an educator would be covered by ELRC collective agreement that deals with this matter, which therefore means that despite the fact that it pertains to the same category of employees with the same job title and job description, the conditions of service will always differ due to the different legislation regulating such.

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223 *Supra.*

224 *Supra.*

225 *Supra.*

226 PSCBC Resolution 1 of 2007: Establishment of OSD for the sectors.

The overlaps in statutes not only affect matters of mutual interest for bargaining purposes, but equally the disciplinary processes used for these employees will differ. An example for such is that of the different prescripts of managing cases of misconduct in regard to PSA[227] office-based educators' timeline for abscondment is 30 days whilst for EEA[228] office-based educators it is 14 consecutive days.

The South African Schools Act[229] (hereinafter referred to as the "SASA) provides for the employment of educators by School Governing Bodies, and also confers on them powers to play an agency role on recruitment processes on behalf of the Head of Department who employs educators. This aspect has always been one of the areas that has posed a challenge to the ELRC with reference to the resolution of disputes, wherein the SGBs will conduct the process of recruitment in a manner that the applicant finds unfair, thereby resulting in their referring a dispute to the ELRC as provided for by clause 14.3[230] of the constitution. This clause has been found to be problematic as the School Governing Body is a non-party to the ELRC and therefore is not bound by ELRC constitution. This has required the ELRC to adopt a different approach of dealing with disputes on appointment and promotions.

The involvement of the SGB is not only posing a problem in this regard but difficulties arise also in relation to the implementation of collective agreements of the ELRC. Collective agreement number 3 of 2003[231] deals with the transfer of serving educators for operational requirements. In instances where educators are declared additional to the post establishment due to a variety of reasons, the employer has an obligation to find them alternative employment in another school. This process is subject to the School Governing Body giving consent for such a "displaced" educator to be placed in a school. Often the SGBs have been found to be a stumbling block in the smooth implementation of this collective agreement in that at times they object to such educators being placed in schools where they are responsible for the governance thereof. This is an example of the potential difficulty in a relationship with an SGB since it is not represented at or a party to the ELRC.

This exemplifies another challenge posed by the different pieces of legislation within the sector that affects the conditions of service.

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227 *Supra.*
228 *Supra*.
229 Act 84 of 1996.
230 ELRC Constitution.
231 ELRC collective agreement 3 of 2003.

Another example is that of a situation wherein within the education system there are other professionals who are not necessarily educators but whose appointment is in terms of Employment of Educators Act.[232] Examples of such are psychologists, therapists and counselors. This category of employees was confronted with a very difficult situation wherein in terms of PSCBC Resolution, their Occupation Specific Dispensation would have been concluded at the PHSBCBC. However, by virtue of this bargaining council's mandate to exclude these types of professionals it meant that they could not be covered by such a dispensation concluded at the PHSDBC.

On the other hand, the ELRC which should have been the rightful forum to conclude a collective agreement to cover such employees, the employer at this council argued that these employees were not educators by profession; therefore they did not have the mandate to conclude an OSD for them. This problem took three years to be resolved at the expense of the employees only due to the mandate of the ELRC as well as the legislation governing their employment descriptions.

A similar situation prevails within the FETC[233] sector, wherein the legislation has been amended three times within the space of seven years, and in turn adversely affecting the conditions of service of the employees as well as disrupting the operations of the ELRC.

The promulgation of the Further Education and Training Colleges Act[234] (hereinafter referred to as the "FETC Act") which led to the transfer of lecturers previously employed by the State in terms of the EEA[235] to be in the employ of the College Councils, saw the amendment of the ELRC scope to be extended to cover this category of employees, which subsequently meant that the ELRC had to establish a bargaining unit for these employees as well as for the FETC Employer's Organisation which was recognised as the employer at the ELRC.

The constitutional amendment effected by the ELRC in its scope has been questioned at several forums, determining that the ELRC did not comply with the requirements of the Act[236] as a result of the amendment not having been endorsed by the PSCBC as the structure that had been empowered by the Act[237] to designate bargaining councils within the public service. Whilst the council through the FETCBU was still attempting to deal with residual matters

232 Act 76 of 1998.
233 *Supra*.
234 Act 16 of 2006.
235 *Supra*.
236 LRA 66 of 1995.
237 *Ibid.*

regarding the implementation of the FETC Act,[238] the FETC Act was amended,[239] thereby providing for the migration of the lecturers which were previously transferred by the FETC Act to the employ of the Colleges, now to the employ of the Minister of Higher Education in terms of the PSA.[240]

The conundrum created by these amendments led to a provision being made in the Amendment Act that the ELRC "shall continue being a bargaining council for the College employed lecturers, whilst by virtue of these migrated lecturers not belonging to any of the other bargaining councils in the public service, the GPSSBC[241] will be a bargaining council for them".

The question that has to be asked in this case is how feasible it will be to have the same category of employees having two bargaining councils to deal with their conditions of service. And having asked such the other question arises: Which of these bargaining councils' agreements will take precedence over the other? These questions are posed in order to endeavor to explain the challenges that have been brought about by the legislation.

4.3.2 MANDATING PROCESSES

The Constitution of the Republic of South Africa, 1996, is the supreme law of the country. In terms of Chapter 3 of the Constitution of the Republic of South Africa, 1996, Government comprises national, provincial and local spheres which are distinctive, interdependent and interrelated. Notwithstanding this provision for separate and distinct spheres, government institutions are expected to work together collaboratively to ensure that policies and programmes are designed, implemented and monitored in an effective manner.

The Constitution also identifies functions of each sphere of government amongst of which some are classified as concurrent functioning bodies of which education is part of and which requires that there is coordination between the National Minster and the nine provincial Members of the Executive in Education (hereinafter referred to as "the MEC's").

238 Act 16 of 2006.
239 FETC Amendment Act 23 of 2012.
240 *Supra*.
241 *Supra*.

In giving effect to the above constitutional provision the Minister of Education (now referred to as "Minister Basic Education" as per Proclamation 44 of 2009[242]) is required to consult the nine provincial MECs on any policy matters in education, including conditions of service. The National Education Policy Act[243] (hereinafter referred to as the "NEPA") confers powers to the Minister of Education to determine a policy on salaries and conditions of employment for educators whilst at the same time the provincial departments of education have the powers of being the employers for educators.

This background is important for the mandate-seeking processes of the employer at the ELRC, as it entails that until such time that these internal consultation processes are exhausted, no collective agreement can be concluded. Coupled with this is the challenge that is imposed by the powers provinces have to pass provincial laws in education.

This has been witnessed in the Western Cape Province, wherein some aspects that would have been regulated by National legislation would find expression directly or indirectly in the Provincial Act,[244] thereby causing labour unrest, as the trade unions will always contend that such matters are the competency of the National Minister.

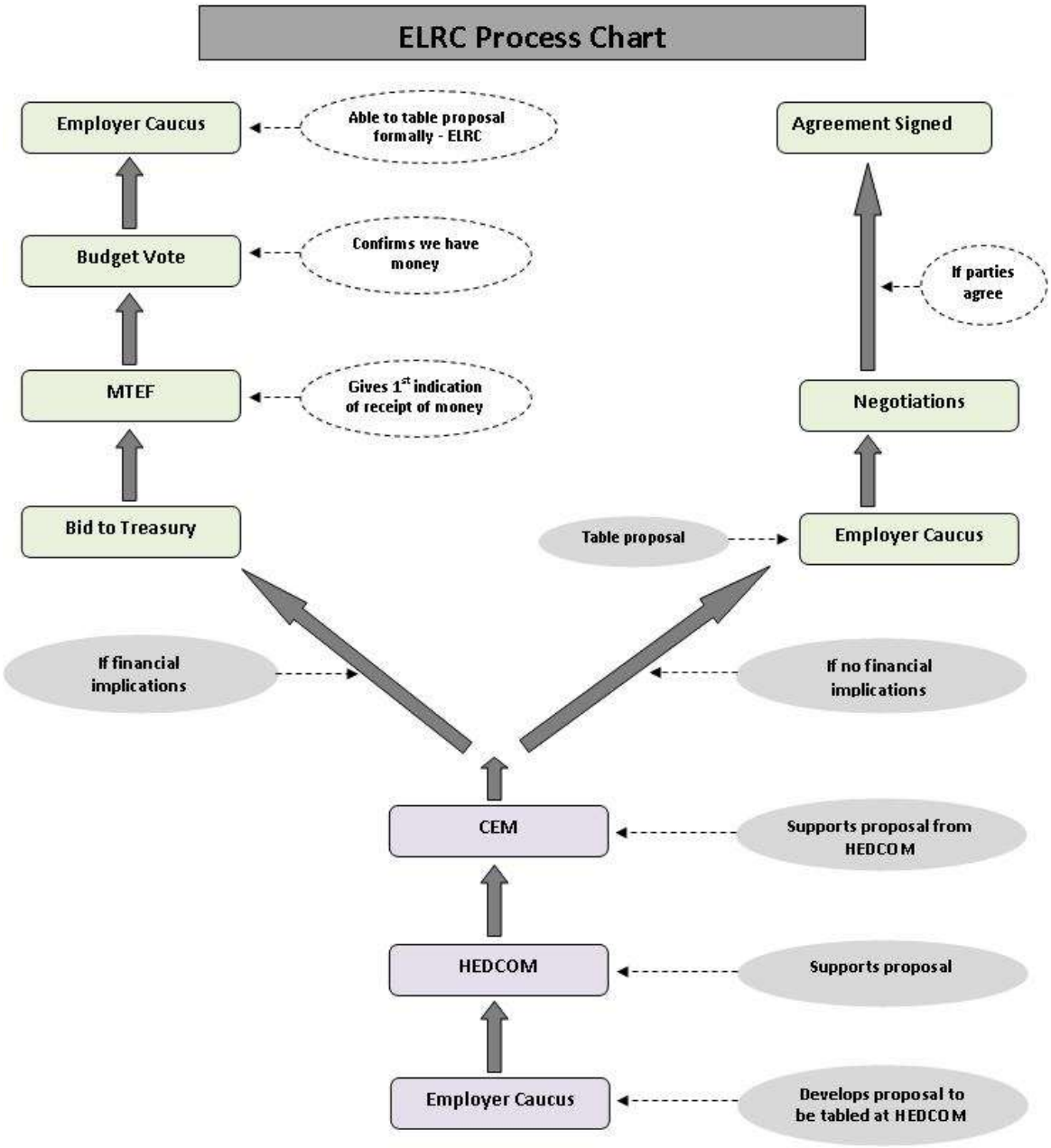
The diagram below illustrates the DBE's mandate seeking processes before they can make a decision either to adopt a collective agreement or not.[245]

242 Proclamation 44 of 2009: Transfer of administration, powers and functions entrusted by legislation to certain cabinet members in terms of s 97 of the (RSA) Constitution.

243 Act 27 of 1996.

244 Western Cape Provincial Education School Education Act 12 of 1997.

245 Adapted from the Employer's presentation at the ELRC EXCO Lekgotla held in December 2012.



Equally the employee parties to ELRC have their own mandate-seeking processes that are time-consuming due to the various structures that such are subjected to. In the case of SADTU it might not be as complicated as it is for the CTU ATU formation; within SADTU information is disseminated *via* the National Executive Committee constituted by representatives from all nine provinces who in turn disseminate the information within their provincial, regional and branch structures, and eventually a final decision may be adopted at the level of the NEC meeting. Whilst this process might be similar for the CTU ATU (the only difference being the name of such decision-making structures) the complication presents

itself at the level of consolidating the position of all individual trade unions that constitute the CTU ATU.

Whilst some trade unions within the CTU formation may receive a mandate to adopt a collective agreement, in the event that there is or are one or two which do not support the conclusion of the collective agreement, it means that the CTU ATU will not adopt such a collective agreement. Should this not be a great problem for the ELRC processes due to the small vote weight of these unions, the requirement is that the employer and the majority trade unions (SADTU) adopt the collective agreement in order for it to be concluded, which therefore entails that there will still be a collective agreement without the agreement of CTU ATU. However, for the purposes of labour peace it is not an acceptable situation wherein any formation of organised labour is not accommodated in agreements despite the fact that the Act provides for such.

4.3.3 WEAKNESSES ON MONITORING, PROMOTING AND ENFORCING COMPLIANCE WITH COLLECTIVE AGREEMENTS

As highlighted in chapter three of this paper, despite the constitutional provision on the enforcement of compliance of collective agreements, the ELRC constitution does not provide for a procedure to ensure monitoring and promotion of implementation of collective agreements. This results in incorrect or non-implementation of collective agreements and as such increasing the number of referrals received by the ELRC in this regard, and in turn resulting in a high level of discontent by employees.

4.3.4 CAPACITY OF PARTIES TO BARGAIN

The capacity of negotiators has been a constant problem and has been downplayed by the affected parties. Parties to the ELRC need to find ways of dealing with this issue, especially as the turnover of negotiators and negotiating teams, more on the side of labour, continues to be a challenge. Part of the challenges attached to this factor is the absence of evidenced-based policy-making wherein proposals tabled in the ELRC for conclusion in the form of a collective agreement are based on well researched recommendations. Whilst the ELRC invests in this area by setting aside funding for the research to be conducted to enhance the policy-formulation exercise, little is done to implement the research recommendations by drafting proposals that are based on such recommendations.

This is also evident from the types of collective agreements that are concluded. However, it becomes practically impossible to implement the agreements, resulting in a huge number of disputes referred regarding interpretation and application of collective agreements. The source for this challenge is two-fold as it relates to the manner in which agreements are crafted in terms of implying certain aspects that are to be attended to in implementing the agreement as well as the technicality of the language used in the agreement itself.

Another crippling factor in terms of the failure to conclude collective agreements, is the adversarial type of bargaining that is witnessed at the ELRC, wherein the attitude of a win-win situation is prevalent with little or no room for flexibility displayed by either party which often results in tensions and thereby compromising the realisation of the desired outcome of the process of collective bargaining.

4.3.5 COLLECTIVE BARGAINING AND THE BUDGETARY PROCESS

A key challenge in this area is the fact that negotiations on matters that have financial implications are not aligned to budget processes of Government. When proposals are tabled there is no alignment of such proposals with the budget. Therefore months at times, up to a period of a year, will be spent on negotiations and at the time when parties have agreed on the principles of the agreement, only then will it be discovered that the budget has not been provided for to cater for the provisions of the agreement. This situation as well as the mandating process referred to in the previous section of this chapter is the cause of the withdrawal of a collective agreement by the employer at the ELRC and in turn creating more tensions that have ever arisen within the ELRC. Protracted negotiations are also another contributing factor to this situation.

There are quite a number of strategies that the parties to the ELRC may employ with a view to enhancing the performance of ELRC such as by building on the achievements they have reached thus far, whilst at the same time endeavouring to address the challenges identified above.

4.4 RECOMMENDATIONS ON ADDRESSING THE CHALLENGES

4.4.1 REVIEW OF THE ELRC'S SCOPE AND THE MOTIVATION FOR AMENDMENT TO THE APPLICABLE LEGISLATION

The first recommendation that may be considered by the ELRC is that of amending its scope to be a true sector council and accommodate all employees in the education sector, thereby promoting a strong motivation for the review of certain pieces of legislation that are currently posing this challenge. An example of such being one legislation for office-based educators as opposed to the "PSA" and "EEA".

4.4.2 ALIGN BARGAINING TIMELINES WITH THOSE OF BUDGET PROCESSES

Ensure that strategic planning and formulation processes are aligned with identification of agenda items for bargaining. For this to be achieved the employer representatives would have to take the lead as they are the only ones who have access to the Government's budget processes. This could be achieved by introducing seasonal bargaining periods wherein intense bargaining is to take place in the months preceding the finalisation of the budget by the State.

4.4.3 ADHERE TO PRINCIPLES OF BARGAINING IN GOOD FAITH

Parties to ELRC must ensure that all of them adhere to the principles of good faith and thereby engage in the process of collective bargaining with open minds with the view of reaching the middle ground by adopting a "win-lose" approach as opposed to "win-win situation". High levels of tolerance and respect for each other to avoid creating unnecessary tensions due to the rigid mandates opposing parties are carrying, are imperative.

4.4.4 ADOPT A MORE INTENSE FOCUSED APPROACH TO BUILDING CAPACITY REGARDING POLICY FORMULATION AND NEGOTIATION SKILLS

Since the constitution provides for any party to submit proposals in the form of a collective agreement, it is of great importance that the ELRC as a matter of urgency builds capacity of the negotiating team regarding the above aspects. Another aspect that has to be addressed is the need to build capacity of a pool of negotiators as opposed to concentrating on few individuals who leave a vacuum once they exit the system; therefore the best approach

would be to develop a sufficiently representative team with the provision made for alternative representatives.

4.4.5 DEVELOP A PROCEDURE IN REGARD TO PROMOTION, MONITORING AND ENFORCEMENT OF COMPLIANCE WITH COLLECTIVE AGREEMENT

It is recommended that a detailed procedure on the above, including introducing heavy penalties when non-compliance has been detected, should be developed. Attached to this, should be a procedure to be followed when a collective agreement has to be withdrawn. It submitted that this conduct has to be discouraged. However, a provision has to be built into the constitution with a view to accommodate instances where it does happen, as it is provided for by the LRA.

4.4.6 MAKE USE OF THE INFORMATION OBTAINED FROM THE MONITORING OF IMPLEMENTATION PROCESS

It is recommended that the ELRC utilise the information gathered from the implementation of collective agreements to determine which collective agreements require review or replacement. This can be achieved through the utilization of the provincial chambers wherein the employer would have to be present during chamber reports on the implementation of collective agreements concluded at national level. However, for this exercise to achieve its intended outcome, the ELRC would have to draw up business rules for the implementation of any agreement that is concluded, with clear specific timeframes, and in turn provincial chambers would have to adopt management plans and monitoring tools to ensure that implementation is adhered to by the implementing party. Detailed reports on implementation of collective agreements would also assist ELRC to revise or amend a collective agreement where it is detected at the early stages of implementation that the particular collective agreement is not implementable. This in turn will prevent and minimize disputes that are referred to the ELRC.

4.4.7 STRENGTHEN THE ROLE OF THE PROVINCIAL CHAMBERS

The national ELRC is responsible for policy formulation. However, implementation takes place at a provincial level which therefore requires that the role to be played by the provincial chambers has to be strengthened in order to ensure that the ELRC is able to measure at national level the impact of collective agreements it has concluded.

4.4.8 STREAMLINE THE BUREAUCRATIC PROCESSES LINKED TO MANDATE-SEEKING PROCESSES

There is an urgent need for all parties to consider a proposal that will shorten the mandate-seeking process so as to ensure that the bargaining process is not delayed due to mandates not having been obtained in time to guarantee that collective agreements are concluded in the shortest possible space of time.

4.5 CONCLUSION

The LRA abolished the broadly formulated unfair labour practice which accorded the industrial court the ability to create a judicially enforceable duty to bargain. Nevertheless, the LRA encourages collective bargaining especially at central or sectoral level. The LRA has a strong theme of majoratarianism running throughout it, and the creation of large majority representative trade unions is encouraged. Various motivations have been put in place to encourage trade unions that represent a majority of the workforce, either alone, or by joining forces with other trade unions.

Whilst the current LRA provides for a progression towards greater organisational rights, thus incentivising higher levels of organisation, and promoting strong majority trade unions, **it should be noted that s**everal amendments are proposed to section 21 which currently deals with the application and enforcement of organisational rights which accrue to registered trade unions in terms of Chapter III of the LRA. The nub of the proposed amendments is aimed at the expansion of the application of organisational rights, probably to enhance the ability of trade unions with sufficient membership to bargain with employees**. Whilst this would ensure that the current principle of majoritarianism is minimised, it is submitted that** there may be challenges, though if these amendments were to be enacted as they currently stand, an example of such could be the case in which a workplace has multiple “strong” trade unions, and especially where such unions are more or less equally matched.

The LRA encourages collective bargaining by providing machinery for the creation of bargaining forums such as workplace forums, bargaining councils and statutory councils, and by providing for the acquisition of organisational rights. In seeking to promote a framework within which employees and employers may collectively bargain, the LRA adopts an unashamedly voluntarist approach as it has been shown by the various arguments put forward by different authors. The LRA does not prescribe to the parties whom they should bargain with, what they should bargain about, or whether they should bargain at all. In this

regime the courts have no right to intervene and influence collectively-bargained outcomes. These actions depend on the relative power of each party to the bargaining process.

This preference for majority representative trade unions and an abhorrence of a proliferation of trade unions are further testimony to the LRA's preference for and encouragement of central- or sectoral-level collective bargaining instead of plant-level collective bargaining. The previous dispensation displayed no such bias in favour of central-level collective bargaining. A legally enforceable duty to bargain "commits a society to a collective-bargaining regime centred on the workplace rather than on the industry". Clearly, such a plant-level collective bargaining system was not what the legislature intended in drafting the LRA 66 of 1995. This *inter alia* is the reason why the legally imposed duty to bargain was abolished. However, the preference for collective bargaining for the ultimate purpose of attaining labour peace remained. What has changed in this respect is the means used to encourage, perhaps even enforce, collective bargaining. Instead of a broadly-formulated unfair labour-practice jurisdiction, organisational rights for representative trade unions coupled with the right to strike provide the key for the encouragement or even enforcement given in certain circumstances of participation in collective bargaining.

Although the LRA does not provide for a justiciable duty to bargain, it renders the imposition of such duty possible by the use of economic or industrial muscle: In terms of the LRA, a trade union is entitled to strike where an employer refuses to bargain, provided an advisory (not binding) arbitration award on whether bargaining should take place is first obtained. This provision iterates the LRA's unwillingness to allow courts or other tribunals to impose a duty to bargain. Clearly, the legislature perceived the use of industrial muscle in the form of a strike as the most suitable or appropriate means of forcing the employer to bargain collectively.

The bargaining-council system remains the pillar of collective bargaining in South Africa. It is by no means about to collapse, on the contrary it has displayed considerable resilience. However, it is submitted that while the bargaining system has survived, it is largely confined to those sectors of the economy where there are well established traditions of trade union organisation and collective bargaining as well as where the standard employment relationship predominates such as in the public sector in general and the education sector in particular for the purposes of this study.

It is further submitted that collective bargaining is a function of trade unions' strength, and trade unions' strength is a function of their existing a significant number of workers in

standard employment, massed together in the same workplace. Where these conditions prevail, as in the education sector, it is possible to maintain labour peace.

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