AN EVALUATION OF THE APPROACHES OF THE ARBITRATORS TO THE PROMOTION OF DISPUTES RESOLUTION IN PUBLIC EDUCATION

by

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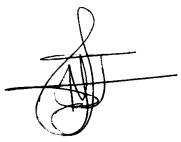
DECLARATION

I, NKOSANA DOLOPI, S211293385, 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

Public Education like other sectors such as Health, International Relations, Finance, Local Government and Environmental Affairs that fall under Public Administration as well as business in private, factory and industrial institutions are embraced or characterized by the concept of employer and employee relationships. These relationships are not always wholesome and harmonious but are overshadowed by disputes and strikes which bring about paralysis and polarization of the operation of business and educational stability in public service and administration sectors as well as at learning institutions.

These disputes arise from *inter alia*, disagreements regarding wage negotiations, unfair dismissals, unfair labour practice involving appointments, promotions and transfers, mutual interest, severance pay, automatically dismissals, operational requirements dismissals (both single and multiple), disclosure of information disputes, organizational rights disputes, agency shop disputes, picketing disputes, unfair discrimination disputes in terms of the Employment Equity of Act[1] as amended, and disputes involving the enforcement of collective agreements or the non-compliance with the Basic Conditions of Employment Act[2] and others.[3]

Whilst there are similar trends and patterns of disputes in all these sectors, they are, however, not only differ in intensity and rapid occurrence but also in how they are negotiated and settled because the work environments are different at the level of operation, administration and management. What is common in all disputes is that they are all conciliated and arbitrated by arbitrators at the Commission for Conciliation, and Arbitration (hereafter referred to as the CCMA), Education Labour Relations Council (ELRC), Private Resolution Agencies and the Labour Court. The

[1] 47 of 2013

[2] 75 of 1997

[3] Brunton *ELRC's Arbitrators Reference Handbook* (2008)

Apartheid era administration had labour laws which dealt with these disputes, but were not progressive and effective in handling them. This placed a heavy burden on the new ANC led government to change the laws of the previous regime. Most of these changes happened in the labour relations and the labour policies.[4]

In view of the above situation, the new political dispensation that came into existence and operation in 1994 developed a new labour legislative framework with specific focus on the review of the collective bargaining dispensation. Of significant importance was the entrenchment of labour rights in the Constitution of the Republic of South Africa, 1996. Section 23 of the Constitution is extensive in highlighting the importance to protect amongst others, the right of every trade union to organize and engage in collective bargaining, disclosure of information, restricted rights in domestic sector, rights to establish threshold of representativeness, organizational rights in collective agreements and disputes about organizational rights[5]

[4] Kruger and Tshoose, 2013.

[5] Budeli, 2014; Kruger and Tshoose …

CHAPTER 1

PUBLIC EDUCATION IN SOUTH AFRICA AND HOW THE LABOUR LAWS IMPACTS ON ITS FUNCTIONS

1 1 INTRODUCTION

In this chapter public education will not be discussed as a whole because it is a vast and a complex sector. Like other sectors such as health, international relations, finance, public works, environmental affairs, local government, safety and security, defense and military veterans, just to mention a few, falls under the scope of Public Administration.

Public education is divided into two parts, namely: basic education and higher education and training, each with its own ministry and budget. This public education is composed of personnel administrators, general workers, academic staff and office based management. All these sectors belong to different trade unions. Educators at school level belong to teacher unions of their own whereas public administration sectors are governed by the same labour laws and legislation as educators such as the Labour Relations Act[6] 66 of 1995 as contained in the Labour Relations Amendment Bill of 2012 when it comes to dealing with labour issues.

1 2 THE CONSTITUTIONAL IMPERATIVES RELATING TO INDIVIDUAL RIGHTS AS THEY IMPACT ON PUBLIC EDUCATION AND ITS FUNCTIONS

This section critically discusses the most important labour laws embodied in the Constitution[7] and the Labour Relations Act[8]. Inclusive in these discussions will be how these laws impact on the teacher unions, learners and School Governing Bodies. The

[6] 66 of 1996
[7] The Constitution
[8] 66 of 1995

other aspects to be covered will be the Collective Bargaining Institutions such as the CCMA[9], ELRC[10], and the Labour Courts as well as various Bargaining Education Councils and how they function.

1 2 1 The Constitution's enshrinement of individual rights

The dawn of the new democratic dispensation in 1994 created lots of expectations. Citizens were aspiring to have a better life and a change in the country's previous segregation legislation and oppressive laws. They wanted better human rights laws that guaranteed individual rights. The working class fraternity expected to have better labour laws and labour policies that guaranteed the right to strike, and also collective bargaining to address their labour issues.

The new South Africa introduced a progressive Constitution that entrenched the people's aspiration as highlighted above. This Constitution in terms of section 23[11] embodies various legislations that govern the country. These laws provide amongst others, the rights of every one to have freedom of association and fair labour practice. The laws guarantee the right of employees to join and form trade unions of their own. They protect them when they are engaged in legal strikes. They also stipulate that every trade union and every employer organization must have the right to organize and engage in collective bargaining. The rights of learners to basic education, learning and teaching are also guaranteed (section 29 of the Constitution).

1 2 2 Unionization of teachers and its impact on Public Education

Unionism is always thought of or associated with workers in factories, industries and other business sectors across the world. The teacher in economic and labour analogy is considered a worker as well. This is confirmed by educational researchers on teacher effectiveness and professionalism such as, Hargreaves (1994) and Kelly (1997, pp.15-28)[12]. Unionism is closely associated with aggressive industrial action. This also

[9] Commission for Conciliation, Mediation and Arbitration

[10] Education Labour Relations Council www elrc.org.za

[11] The Constitution s 23

[12] Changing Teachers' Work and Culture in the post-modern age and Teacher compensation and organizations, Educational Evaluation Policy Analysis.

applied to teacher unions in public education who also on some instances embark on annual strike actions.

There are four teacher unions that are considered major role players and their activities have an impact on the right of learners to basic education. These unions are as follows:

- South African Democratic Teachers Union (SADTU)[13],
- National Professional Teachers Associations of South Africa (NAPTOSA)[14],
- Suid-Afrikaanse Onderwysunie (SAOU)[15]
- And the National Teachers Union (NATU)[16].

(Kruger and Tshoose, 2013)

There are however, some minority unions that do not enjoy the same rights and privileges as accorded to the above major unions. Of all these unions, SADTU is by far the biggest union with a total membership of 245 000 in the year 2004 **(Zengele, 2009)**. It is affiliated to the Congress of South African Trade Union (COSATU), which is an umbrella body of various workers' unions. COSATU, is in fraternal alliance with the ruling African National Congress and the South African Communist Party. It is known for its militancy and radicalism that dates back to the years of anti-apartheid struggle. Despite its political ties with the ruling party, it often gets into robust discussions and engagement with the government over education labour issues that relates to issues such as salaries, basic conditions of employment, severance packages amongst others in the bargaining councils which in most cases results in disputes and strikes.

During the struggle against apartheid and even when the new democratic dispensation came into effect, unions were vocal and upfront in the call for new education labour laws and education labour policies to be reviewed.[17] It was as a result of these demands that the new Department of Labour paid urgent attention to the amendments of the

[13] South African Democratic Teachers Union www.sadtu.org.za (last viewed 23 October 2015)
[14] National Professional Teachers Associations of South Africa www.naptosa.org.za
[15] Suid-Afrikaanse Onderwysunie www.sauo.org.za
[16] National Teachers Union www natu.org.za
[17] Kruger and Tshoose, 2013.

labour laws and policies. These new amendments were introduced to make it easier for unions to unionize the workers. Established sectorial collective agreements on the other side were intended to cover and protect vulnerable workers to ensure that they have the right to permanent employment[18]

The above situation caused the Economist (2011)[19] to develop a perception that the South African labour environment is highly unionized. The Economist (2011)[20] asserts that SADTU periodically organizes strikes and protest marches to demand salary increases and related benefits, often above market value. This argument is supported by the National Treasury in the finance Department. According to this department, public service wages amount to 32% of the country's annual budget, over and above other sectors. According to Monana and Hlongwane (2010)[21], this union huge salary demands hinders the government to embark on its programme to reduce spending and budget deficit, which was by the year 2011 at 6.2% of gross domestic product.

This negative perception about SADTU leads Fleisch (2010)[22], to believe that South Africa is probably one of the few countries in the world where the unions rather than government run the schools. It is again considered as the single, most prominent hindrance to quality education in South Africa because of its periodic strike actions against the Department of Education. Economists[23] attribute this to the influence of unionism in schools and the alliance of SADTU with the ruling African National Congress. Others like Rosouw perceive this to be influenced by a high percentage of politicians who spend state funding on super luxury vehicles and the renovation of their personal housing facilities. The Auditor-General, Mr. Terence Nombembe's revelation that more than R4 billion was wasted irregularly and fruitlessly by government department in the 2009-2010 tax year further increased the negative perception of the labour unions and the public in general against the government.

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[18] Labour Ministry, 2012. Give name of article

[19] The Economist 2011, 8-14 January, Briefing Public Sector Workers.

[20] The Economist 2011, 8-14 January, Briefing Public Sector Workers.

[21] Monana and Hlongwane (2010) Strike violence muddles image of teachers. Sowetan, 30 August 2010.

[22] Fleish B. (2010). The politics of the Governed. South African Democratic Teachers' Union. Soweto Strike, June 2009. South African Review of Education, 16, 117-131.

[23] The Economist 2011, 8-14 January, Briefing Public Sector Workers.

It is also worthwhileness to mention that the strike actions of teacher unions cast great aspersion on the South African Education System. It is unfortunately described by many academic scholars as depicting and characterizing South African Education as "a crisis"[24], or a "national disaster"[25], whereas Monare (2010)[26] referred to it as "in tatters". It is perceived as an education that is inefficient and ineffective, performing poorly as compared to other countries in maths and science in grade 6 at primary level. It is in a sense using its resources ineffectively[27] and that it is far more inferior than compared to other less resourced countries[28]even though it receives the bigger slice of the national budget. This assumption is necessitated by the fact that there is perpetually an ever rising demand for wages by unions that have already far outstretched the financial capacity of the state. It is also again fueled by the negative perception from the public and academia that SADTU's annual strike actions, such as the longest national strike that occurred during the 2010 soccer world cup period and other strikes that take place towards examination time, severely damages the educational prospects of thousands of learners.

Michael Hammer and James Champy (2003)[29], jumping into this fray of criticism, suggest that South African Education System needs what they call "reengineering", which basically means redesigning to bring a new look, developing thinking, approaching and implementation. This is thinking and a language borrowed from technology and used in the business environment when business is not yielding profit or is dysfunctional. Bloch (2009) somehow in another thinking and analysis, sees the whole situation differently from other academic scholars. He is not blaming teachers' strikes as the main course of the education crisis. His assertion is that South Africa's education weaknesses are due to lack of inspired, knowledgeable, dedicated and committed teachers to staff the schools. He considers the effort to improve the quality of teachers and helping them to teach well as the most urgent task to be addressed by the

[24] Fleisch, 2008.
[25] Bloch (2009).
[26] Monare
[27] Centre for Development and Enterprise, 2007
[28] Van der Berg, 2007 and Moloi, 2005
[29] Michael Hammer and James Champy 2003

government. According to him what happens at the coalface of interaction between teachers and pupils is the key (Bloch, 2009).

The above criticisms consist of innumerous shades of opinions with lack of intellectual balance of critical observation and perception as well as countless contradictions because the country is surely not in turmoil. It is in transition and change. The change process according to Fullan (2001)[30] is by nature very slow, uneven and fraught with difficulties and disappointments. He furthermore, goes on to say that conflict and strikes happen because people in authority often do not listen to the opinions of those they govern, and are only concerned with implementing their own ideas. There is again a tendency to overlook certain concrete nature of circumstances. Some of the lamentations can be taken to constitute an adequate expression of anger rather than sober rational assessment and different analogy. The fact of the matter is that the Constitution recognizes the right of teachers like other workers to strike in order to have their working conditions and salaries improved. The angry accusations that the education system is dysfunctional and throws these outburst emotions that fall on SADTU like a ton of bricks is an act of desperation.

These accusations ignore or lack understanding of certain trends that are fundamental to countries that came into existence as a consequence of violent conflict, and where subsequent political and social history have been characterized by struggle and totally embraced the assumption of a functionalist/equilibrium explanation for this social change[31].

Sobel (1985)[32] who expresses this ideological argument holds the view that such social historical systems turn towards a state of orderly integration, and that despite occasional disturbances in the interaction among its parts, the system in time normally returns to a state of normality which is not a quick solution. In many countries in the world, particularly Africa, it takes years. Some of the developed countries like America and Britain which South Africa should be learning from are still struggling to grapple with other concepts, like performance based reward and the best way to make it

[30] Fullan (2001) The meaning of educational Change.
[31] Sobel, 1985.
[32] Sobel, 1985.

acceptable to the teachers and how to provide better teacher salary wages, just to mention a few.

The historical reality is that to build a new education system from the ashes of past educational injustice that left heaps of challenges cannot be fixed easily over night as has been experienced in many countries in the world which were in similar situation as South Africa before. Many are still struggling to fix their education problems such as lack of financial and physical resources. These are compounded by political instability in their countries. The government has to go through trials and tribulations in South Africa to develop a teacher with a new mentality, patriotic spirit and a new professional ethos, as well as a new curriculum with a strong content on the creation of knowledge and skill development. There is a need to address the educational dichotomy and unevenness between rural and urban, predominantly affluent and developed schools and the less resourced and poor schools in both the townships and rural areas.

The sooner there is an acceptance in South Africa of the fact that the teacher is the barometer of social change who determines the type of intellectual power and quality, knowledge and skills the country will have, the better[33]. Other role players like parents, learners, government and business who believe that the future development destiny of the country lies in the education system that the country has, must begin to invest in the professional development of teachers to increase their content knowledge and pedagogical skills, in preparing learners on how to think and generate new knowledge as well as their teaching techniques or styles. The international report by Mckinsey (2007)[34] on world school systems also captures the above hints succinctly when he says:

> "The quality of an education system cannot exceed the quality of its teachers".

This implies that teachers must be highly developed and capacitated to have quality content knowledge and pedagogical skills. Schools must as well resourced and well build.

[33] Mckinsey, How the World's best-performing school systems come out on top, September 2007.
[34] Mckinsey, How the World's best-performing school systems come out on top, September 2007

His[35] reports further alludes that,

> "if one should remove all equipment (computers, interactive boards, chairs and tables) from a classroom, and be left with nothing but a dedicated educator, education will still take place."

Education is therefore not possible without the educator.

1 3 THE TEACHERS RIGHT TO STRIKE VS THE CHILDREN'S RIGHT TO BASIC EDUCATION

As much as the Constitution[36] recognizes the rights of teachers to strike and picket, it also enshrines children's right to basic education[37]. A teacher's strike according to Grogan (2010)[38] consists of the withdrawal of labour or a retardation of work. This right is also recognized by the International Labour Organization as one of the fundamental means available to workers to promote their interest. On the other side some academics say the child has no collective voice, and the teacher is organized in a union[39]. This opinion does not take into account the fact that the learners have a collective voice in the name of student organizations, such as Congress of South African Students COSAS[40] and Pan African Student Organization PASO[41], who unfortunately, do not have collective bargaining chambers of their own to negotiate their issues. Perhaps this refers to the primary school children. Even then the parents are the collective voice of these children and they are protected by the Constitution.

Deacon (2014)[42] compares the above situation to two opposites within an education sector, which has its own complex constitutional, educational, labour and politics issues.

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[35] Mckinsey How the World's best-performing school systems come out on top, September 2007.
[36] The Constitution ss 17, 23 and 29
[37] The Constitution
[38] Grogan, Collective Labour Law
[39] Deacon, South African Journal of education, 2014; 34(2)
[40] Congress of South African Students http://www.cosas.co.za
[41] Pan African Student organization, panafrican.weebly.com
[42] Deacon, South African Journal of education, 2014; 34(2)

Whilst this right is entrenched in the Constitution[43], the Labour Relations Act[44] includes certain limitations that render strikes unprotected. This applies to situations where the prescription of legislation or collective agreement was not followed. (The Labour Relations Amendment Bill of 2012, section 64 of the Principal Act)[45] stipulates that in order to act lawfully, a number of requirements must be met and certain procedures have to be followed by those planning to take industrial action. This legislation is enhanced by the Code of Professional Ethics of the South African Council for Educators (SACE)[46] which specifies that all educators registered with SACE[47] have to:

- Acknowledge the noble calling of their profession to educate and train learners of our country.
- Acknowledge, uphold and promote basic human rights as embodied in the Constitution of South Africa.
- Commit to do all within their power, in the exercising of their professional duties, to act in accordance with the ideals of their profession.

The above however, does not diminish the strikes, because unions make sure that they follow the prescripts of the law. The LRA[48] does not stipulate the time period for the strikes. Under extreme circumstances, when union emotions are high, they disregard the law and their Code of Professional Ethics which they signed and go on unprotected strikes. Even when salaries are affected when the state make deductions on the number of days those teachers have been on strike, teachers are still prepared to face this bullet. Unfortunately, such strikes have serious consequences for teachers.

The above situation brings to the fore, other aspects of argumentation and debates which begin to interrogate this situation with a critical eye. Deacon (2012)[49], Mahlangu,

[43] The Constitution
[44] 66 of 1995
[45] 66 of 1995 add the section of the LRA
[46] South African Council for Educators www sace.org.za (last viewed 27 September 2015)
[47] see fn 45
[48] 66 of 1995
[49] Deacon South African Journal of education, 2014; 34(2)

& Pitsoe (2011)[50], Govender (1996)[51], just to mention a few are of the view that the teachers' right to strike and the children's right to basic education as it is enforced by the Constitution create conflict of interest. Conflict breeds violent activities. The worst scenario is when certain union members intimidate and harass fellow educators and learners. Horsten and Le Grange[52] , like Letseka *et al* [53], express a concern that this conflict that arises as a result of teacher strike actions diminishes the quality and duration of learners' classroom education. Oosthuisen[54] echoes the same sentiments when he agrees that, "…while the educators exercised their constitutional right to express their dissatisfaction through strike actions, thousands of learners were deprived of teaching." Du Plessis[55] takes a radical view and proposes harsh measures against striking teachers as thugs who should have appeared today in the criminal court on charges of intimidation, assault and vandalism. Teaching is the last place to be."

It is a situation like the one above that influences other education academic researchers such as Irvin Illich[56], to come with a de-schooling theory. In the 1970's he advocated for the abolition of schools. He argued that the relationship between teachers and learners in the standard of setting of compulsory schooling characterized by a pre-determined syllabuses and graded examination, contaminate the entire learning process. Furthermore he mentioned that schools are like concentration camps which proceed on the assumption that children must be policed because they have no rights and innate curiosity.

The remedy according to Illich (1971) was to abolish schools and replace them with what he termed repressive education by a self-motivated learning entered into by both teacher and taught. Illich's ideological position was fueled by people who when they were pressed to specify how they acquired what they know and value, readily admits that they learned them more often outside than inside the school. Their knowledge of

[50] Mahlangu, V, & Pitsoe, V.J(2011) Power struggle Government and Teacher Unions in South Africa. Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS), 2 (5), 365-371)
[51] Govender (1996
[52] Horsten and Le Grange
[53] Letseka *et al*
[54] Oosthuisen
[55] Du Plessis
[56] Irvin Illich

facts, their understanding of life and work came to them from friendship or love while viewing television or while interacting with peers or the challenge of street encounter.

Others, like Calitz and Conradie (2013)[57]maintains that "the right to strike as opposed to the right to education is a "a political hot ball". They allude that this happens when politicians in government begin to entertain the idea that teaching should be legislated to be an essential service like nurses, police and the army. When this is tabled in parliament for debate it sparks critical discussion among the various political parties with the opposition parties making the loudest noise. In one such debate, according to them, the Democratic Alliance took the centre stage in the discussion and called for the establishment of a Private Members' Bill[58] to be used to limit the teachers right[59].[16] They also allude that a further attempt to declare teaching an essential service was proposed by the established ministerial review committee appointed by the Minister of Science and Technology. SADTU regarded this as a strategy intended to limit educators' right to strike according to Modjadji and Tau Naptosa vehemently rejected such thinking[60]. These authors argue that [61] to strike is wrong when one's decision to strike causes someone else's vulnerability. It is also considered wrong when people that cannot solve their own problems affect the others with their strike action and that is it is also wrong that people who are not involved in a dispute between an employer and employee or do not have any say in the solution become affected[62].

The Constitutional[63] scenario discussed above does not provide a route to lighten the hearts of those of an imaginative or nervous disposition. It is a difficult situation of imaginable proportion that places the work of arbitrators on the cutting edge when arbitrating and conciliating the disputes. They need to provide a balancing act, a call to reason and an appeal for the spirit of patriotism, unity and calmness. Both actors in the

[57] Calitz and Conradie (2013)
[58] Labour Relations Amendment Bill 2014
[59] [16] James, 2011
[60] O'Connor, 2012
[61] Modjadji and Tau
[62] Horsten and Le Grange, 2012:516 Horsten and Le Grange "The limitation of the Educator's right to strike by the child's right to basic education" 2012 27(2) *Southern African Public Law* 509 516
[63] The Constitution

teaching and learning educational environment have rights, but it appears as if the teacher's right to strike has an upper urge over and above the children's right to basic education. There must be a balance here. It is only through a constitutional amendment that this matter can be sorted out. In arbitration situation a lot of compromises are needed. Thus, constitutional imperatives as discussed above have a strong bearing on this research study because it tests the effectiveness and efficiency approaches of arbitrators in the resolution of disputes or the promotion of them.

1 4 EDUCATION'S LABOUR LAWS AND HOW THEY IMPACT ON SCHOOL GOVERNING BODY'S FUNCTIONS IN RELATION TO APPOINTMENT AND PROMOTION OF STAFF

School Governing Bodies, like learners and teachers, are also central to this research study. These are democratic institutions that are composed of parents, teachers and learners. They are established in terms of the South African School Act 48 of 1996 to support management in the governance of the schools. Their activities in terms of taking part in the appointment and promotion of teachers as guided by the Employment Equity Amendment Act[64], the Employment of Educators Act[65] and the Personnel Administrative Measures[66] (PAM) in many instances place them in many disputes and arbitration. Appointment and promotion of disputes constitute approximately 80% of the disputes that are referred to the ELRC. They emanate from the public education sector and arise out of appointments and promotions that take place at school level. Disputes arise when the process of short-listing, interviews and recommendation for appointments are made. The following are the procedures to be followed when short-listing, interviews and promotions are conducted in order to avoid disputes.

1 4 1 Short-listing;

It is done by the interview committee established by the SGB. These powers derive from section 30 of the South African Schools Act[67]. The interview is appointed by the SGB and it is accountable to the SGB. The short-listing is guided by the criteria set out in the advertisement. Sometimes it becomes very difficult

[64] 47 of 2013
[65] 76 of 1996
[66] Personnel Administrative Measures
[67] 84 of 1995

to find suitable candidates that match the criteria that will enable them to find the best candidate for the post when short-listing. The interview committee in this instance is forced to introduce new, additional criteria. By so doing, a perception is created by some unsuccessful applicants that these additional criteria have been introduced to suit a candidate of their preference and immediately lodge a dispute. The argument here is that the new additional criteria must be introduced before the applications are scrutinized.

1 4 2 Conducting the interview

This must be conducted in accordance with Regulation B 3.3(g) of the PAM[68] agreed upon by the employer and the trade unions in the Provincial Chambers. Some of the requirements are that parties should be given fair notice of the interview date, which is five (5) working days in terms of the PAM chapter B Item 3.3(e). It also states that if trade union representatives have been given notice and fail to attend it would not make the interview procedurally unfair.

At the interview, a scoring system is used. The challenge of the SGB interview committee comes when a candidate who was scored the highest is not recommended. According to Brunton & Associates, the law does not inhibit the interview committee to recommend a candidate who was not scored the highest. This is allowed is such a decision is done to address the issue of transformation or some operational issues.

At the end of the interview process, Regulation 3.3(i) and (j) of the PAM stipulates that the interview committee should rank candidates in order of preference, attaching a brief motivation and submit this to the SGB. The SGB after applying its mind would make a final recommendation to the Head of Department. The SGB in terms of PAM Resolution No. 5 of 1998[69] has the right to exercise an independent choice and is not obliged to "rubber stamp" the recommendation of the interviewing committee. In making a decision on recommendation, it must be guided by the following principles as are

[68] PAM r 3.3(i) and (j)
[69] ELRC resolution 5 of 1998

contained in section 6(3)(b) of the Employment of Educators Act[70] which are stipulated as follows:

(1) Affirmative action or employment equity principles have been followed;

(2) A fair procedure was followed, i.e. there was no procedural defect;

(3) The candidate met the minimum requirements;

(4) The candidate is either registered or qualifies for registration with South African Council for Educators (SACE).

(5) There has been no improper conduct on behalf of the interview committee such as bias or undue influence.

If it is found that the above principles have not been fully complied with or satisfied, the SGB may order the interview be redone.

1 4 3 Appointment to be made by Head of Department

For the HOD to make an appointment he/she too must have satisfied himself or herself that the above criteria are fully met. The Education Law Amendment Act[71] and section 6(g) of the Employment of Educators Act[72] allow a HOD to appoint according to the recommendation of the SGB or not according to the recommendation of the SGB ranking. Alternatively, the HOD may appoint a candidate who was not even recommended by the SGB. The above section of the law also allows the SGB to make an appeal if such an appointment is effected. Whilst the appeal is being attended to or heard? The appointed candidate will be employed in a temporary capacity until the hearing is completed. In the appeal process, the candidates should be allowed to be present to hear his or her case. This process is called the principles of a Joinder.

[70] 76 of 1998 s 6 3 b
[71] 76 of 1998
[72] ibid

Use the Point high judgment to illustrate the powers of the head of education. The court ruled that the head of department could only select from candidates which were recommended by the School Governing Body.

In conclusion it needs to be pointed out that most of the unfair labour disputes or practices emanate from the appointment made by the HOD. The union will always try to identify defective reasoning on the part of the appointing authority. Unless the appointing authority was shown not to have applied its mind in the selection of the successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whom it considers to be the best candidate.

1.5. THE LABOUR RELATIONS ACT[73]

The Labour Relations Act a it is known today was first established as the Industrial Conciliation Act of 1925. The Act was established to resolve disputes of interest which are understood to be disputes about the creation of new a right. From its inception, the Act excluded African employees. From then it has been refined many times. As a result of the African workers in Durban, increasing suppression at the workplace and the broader political oppression, the then Apartheid government established the Wiehahn Commission[74] in 1977. The mandate of the commission was to revisit the country's labour legislation. One of its accepted recommendations was the amendment of the Industrial Conciliation Act of 1956[75] which was renamed the Labour Relations Act[76]. The exclusion of Africans from the 1956 Act was removed.

The new democratic government that was established in 1994 further refined it in 1995. The Labour Relations Act No 66 of 1995 was amended by the Labour Relations Amendment Act, No 42 of 1996 Proclamation, No 66 of 1996 to change the law governing Labour Relations and for that purpose to amongst others, regulate the

[73] 66 of 1995

[74] Wiehahn Commission to investigate how to regulate labour legislation. The growth of unregistered trade unions, inadequate control over them, their unchecked receipt of funds and support from abroad was unacceptable to the State. http://www.sahistory.org.za/article/wiehahn-commission#sthash.H1HIeAN2.dpuf

[75] 28 of 1956

[76] 66 of 1996

organized rights of trade unions, to promote and facilitate collective bargaining. This LRA's[77] purpose was to promote an effective and efficient labour disputes resolution mechanism and became a system to encourage co-operation as opposed to confrontation.[78]

The LRA[79] established institutions and processes for disputes resolutions. These institutions were the CCMA, the Labour Court and Labour Appeal Court which were established in 1996. The CCMA as a statutory and independent body was provided with the mandate to license Private Agencies and the Bargaining Councils. Its main function is to conciliate and arbitrate disputes and is funded by the state[80].

The Labour Relation Act[81] has also given birth to the Education Labour Relation Council[82], with specific focus on the state and the various teacher unions in public education. What follows is a brief discussion of this body and how it functions.

1.6. THE EDUCATION LABOUR RELATIONS COUNCIL (ELRC)[83]

This body is primarily responsible for conciliation and arbitration of disputes in the public education sector. According to Rossouw (2012)[84] it is a legal structure that should be recognized as a potential source of remediation. It is a bargaining council, which has been established in terms of section 37(3)(b) of the LRA[85]. Section 28 of the LRA[86] provides for the powers and functions of bargaining councils, namely, the conclusion and enforcement of collective agreements, the prevention or solving of labour disputes and the development of proposals for submission to the National

[77] 66 of 1996
[78] Bhorat, Pauw and Mncube Understanding the Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data (2007).
[79] 66 of 1995
[80] Bhorat et al., 2007 Subsequent reference – Bhorat et al Understanding the Effectiveness of the Dispute Resolution System in South Africa page number.
[81] 66 of 1995
[82] Education labour Relations Council www.elrc.org.za
[83] ibid
[84] Rossouw 2012
[85] 66 of 1996 s 37 3 b
[86] 66 of 1996 s 28

Economic Development and Labour Council (NEDLAC)[87]. Although educators normally approach the ELRC[88] for education specific matters, they also fall within the Public Service Co-ordinating Bargaining Council (PSCBC)[89] when matters that concern two or more public sectors are negotiated.

The ELRC appoints a panel to preside over disputes between the parties. According to the ELRC Constitution (under objectives of the council), the council functions to maintain and promote labour peace in education. It is also tasked with the prevention and resolution of labour disputes in education. The findings and decisions of arbitrators are binding on the parties involved. This makes the arbitration process similar to the process followed in a court of law. The ELRC's[90] procedures are guided by the various legislations that are subsidiary to the Constitution of the Republic of South Africa . Some of these are as follows:

- **Employment Equity Amendment Act[91]**
- **The ELRC Constitution**

  Outlines how the ELRC functions. It also covers the Code of Conduct for Arbitrators.

- **Employment of Educators Act[92]**

  This law regulates the employment relationship between educators and their employer.

- **Labour Relations Act[93]**

  It regulates the relationship between employer and employee.

- **South African Schools Act[94]**

[87] NEDLAC www nedlac org.za
[88] ELRC www.elrc.org.za
[89] PSCBC www.pscbc.org.za
[90] ELRC www.elrc.org.za
[91] 55 of 1998
[92] 76 of 1996
[93] 66 of 1996

This law enables the School Governing Bodies (SGB) to recommend to the Head of Education which educator to appoint.

- **Education Policy Act**[95]

- **South African Council of Educators Act**[96]

  It is an independent statutory body with representatives from Education Department and Teacher Unions to regulate the teaching profession. Its main focus is to develop in conjunction with teachers, professional standard, codes and values.

The following discussion is based on the function of the Bargaining Council and how it functions and is structured.

1 7 PUBLIC SERVICES COORDINATING BARGAINING COUNCIL[97]

This chapter focuses on the nature and functioning of the various bargaining structures. These are joint employer and union bargaining institutions. In terms of the Labour Relations Act[98], the basis of the establishment and functioning of these structures is to promote collective bargaining as a means of regulating relations between management and labour, and as a means of settling disputes between them. They resolve disputes between parties that arise from collective agreements concluded in the Council and other statutory instruments. They deal with issues such as minimum wages, hours of work, overtime, leave pay, notice period and retrenchment pay amongst others.[21] According to Brand[99](2000), there were about 55 bargaining councils in 2002 in South Africa. Their jurisdictions were in a way sectorial, regional or industry wide and vary in size and quality of dispute resolutions. He points out that one of their weaknesses was that they were fragmented in nature and poorly resourced.

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[94] 84 of 1996
[95] 48 of 1996
[96] 31 of 2000
[97] PSCBC www.pscbc.org.za
[98] 66 of 1996
[99] Brand, J (2000) CCMA Achievements and Challenges-Lessons from the First Three Years. Industrial Law Journal, 21(1-3)

Section 35 of the Labour Relations Act[100] created collective bargaining structures for the public sector as already indicated. This resulted in the establishment of the Public Service Co-coordinating Bargaining Council to ensure that issues are determined centrally. At the same time, the collective bargaining structures that had been created for educators (the Education Labour Relation Council) and the National Negotiating Forum for the police, the national departments and the provincial administrations continued to exist.

Effectively, the LRA[101] created 36 bargaining councils in the public sector. It also entrenched the departmental and provincial bargaining chambers as they were previously defined in the Public Service Labour Relations Act[102]. These were deemed to be sectorial bargaining councils in their own right, which is a status they never enjoyed before. In real terms the departmental and the provincial administration bargaining chambers were not sectorial councils, as many straddled different sectors. For instance, a provincial bargaining council covered several sectors such as health, welfare, transport or agriculture and all the employees employed by the provincial administration. All in different departments and this did not provide a good rationale for this. Similarly, a national department and provincial administration employed employees in the same industry, with the same terms and conditions of employment, to perform similar work, like the Department of Health. These employees were not covered by the same bargaining council. Instead, in terms of the Labour Relations Act[103], they fell into ten different bargaining councils, nine provincial bargaining councils and one departmental council.

In an endeavor to create a more structured collective bargaining environment, the PSCBC in terms of section 138 of the LRA[104], designated four sectors for the establishment of sectorial bargaining councils. These sectors designated are:

- The Public Health and Social Development Sectorial Bargaining Council[105]

[100] 66 of 1996 s 35
[101] 66 of 1996
[102] Act 105 of 1994
[103] 66 of 1995
[104] 66 of 1995 s 138
[105] The Public Health and Social Development Sectorial Bargaining Council

- The Safety and Security Sectorial Bargaining Council[106]

- The Education Labour Relations Council[107]

- The General Public Service Sectorial Bargaining Council[108].

As stated before, the departmental and provincial bargaining chambers that were established prior to the establishment of the PSCBC (and the above mentioned Sector Councils), however, still continued to exist in their own right and the PSCBC found that they did not have the power to disestablish these Departmental Bargaining Councils. This resulted in collective bargaining taking place and collective agreements being signed under the auspices of different structures with little regard to duplication or possible conflict between agreements signed in the different structures.

1 7 1 THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL: AN OVERVIEW

The PSCBC Constitution was registered on the 13 October 1997. An amendment to the PSCBC Constitution was finalized by Council on 9 October 2002, and registered by the Register of Labour Relations on the 30 March 2003. In 2005, further amendments were made to the Dispute Resolution Procedure, which forms an annexure to the Constitution, and these amendments were registered by the register of the Department of Labour on 28 June 2005. The PSCBC may perform all functions of a bargaining council in respect of those matters that:

(a) Are regulated by uniform rules, norms and standards that apply across the public service; or

(b) Apply to terms and conditions that apply to two or more sectors; or

(c) Are assigned to the State as employer in respect of the public service that is not assigned to the State as employer in any sector.

[106] The Safety and Security Sectorial Bargaining Council
[107] The Education Labour Relations Council
[108] The General Public Service Sectorial Bargaining Council

The aim of the PSCBC[109] is to maintain sound labour relations in the public service. The PSCBC provides a platform for the parties to Council (the State as employer and the public service unions representing approximately 1 million employees to engage constructively over matters of mutual interest. The PSCBC[110] thus plays a coordinating role between various bargaining councils in sectors of the public service. The PSCBC Constitution also states that one of its sectorial council's objectives is to cooperate and coordinate with, and contribute to, one another. PSCBC 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 Sectorial Bargaining Council. 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 decision of the council, in as far as they affect the sectorial councils, bind such councils. Sectorial councils cannot make decisions that bind the PSCBC. However, a sectorial 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 signed in the PSCBC automatically binds the sectorial councils, unless a sector signs its own agreement addressing the same issues, in which case, the sector agreement will take precedence in that sector. Here a question arises as to "how does this impact on the dispute resolution?"

If a PSCBC agreement covers a particular issue, for instance, acting allowance and a dispute arises pertaining to acting allowances, and then the first question that must be asked is, "is there a sector agreement that addresses the same issue?" If the dispute arises in the public health sector, the dispute must be referred to the PSCBC as an interpretation or application dispute of their resolution as the PHSDSBC does not have their own resolution on acting allowance. If the dispute for instance arises in the

[109] Public Service Coordinating Bargaining Council
[110] Public Service Coordinating Bargaining Council

department of Labour, then the dispute cannot be referred to the PSCBC as an interpretation or application dispute of their resolution, as the GPSSBC has their own resolution on acting allowances and the dispute must thus be referred to the GPSSBC as an interpretation or application dispute of their own resolution covering this issue (own interpretation).

The amendments to the Labour Relations Act[111] addressed this problem by giving the PSCBC the power to disestablish the Departmental Bargaining Councils. In 2004, all Departmental Bargaining Councils were indeed disestablished and new structures were created to replace these Departmental Bargaining Councils, namely the Chambers of the PSCBC and Sectorial Bargaining Councils (Resolution 9 of 2003). In practice this means that negotiations can still take place and agreements reached on the various levels. But now these agreements must be ratified by the overarching structure (for example, the PSCBC or the relevant sectorial council, which creates a higher level of synergy throughout the public service).

It must be noted though that some of the collective agreements that were signed in the old Departmental Bargaining Councils are still in force. Disputes pertaining to the interpretation and/or application of these agreements can however, not be referred to the PSCBC or the sectorial Councils for conciliation or arbitration, as these agreements were not signed under the auspices of the then PSCBC or the sectorial Councils. Disputes pertaining to these agreements must thus be referred to the CCMA, unless the PSCBC or the relevant sectorial bargaining council has ratified the agreement.

[111] 66 of 1996

This chapter has given the legal bounds and limits of the situation in which arbitrators' are trapped. It is indeed a complex situation abound with laws, negotiating chambers and many other role players with competing interests that conflict each other. The many and different bargaining councils as discussed and illustrated in the above diagram shows that transformation of the labour situation in South Africa is still not above board. A number of grey arrears still need some fine tuning. The system must be continuously revised and amended to be in line with or able to meet the ongoing challenges that emerges all the time in the labour environment.

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CHAPTER 2

TYPES OF DISMISSALS THAT ARE CONCILIATED, MEDIATED AND ARBITRATED BY ARBITRATORS AT THE LEVEL OF CCMA'S

2 1 INTRODUCTION

Dismissals have a strong bearing on this research study. Disputes that are conciliated and arbitrated by arbitrators emerge in some instances as a result of employers having dismissed the employees unfairly. There are a number of disputes that are lodged and referred to the ELRC and CCMA to deal with. Unfair dismissals disputes account for the largest share of referrals at the CCMA and ELRC[112]. The nature of these disputes and circumstances under which they occur will be analyzed and unpacked in this chapter. Some of these disputes emanate from the disciplinary hearings that are conducted at the workplace. Disciplinary hearings might come with the outcomes that are unfair to the employees or workers such as dismissals. No matter how hard the employee who is subjected to the disciplinary process tries to prove his or her innocence or case, at times it becomes clear that the employer has already made a decision that an employee has

[112] Bhorat, Pauw and Mnucbe, 2007

committed a crime that is punishable by dismissal and this has a bearing on the employee's future. Employers tend to have an impression that if they follow procedure, this then justifies the dismissals or makes the dismissal fair. If a dismissal is found to be automatically unfair, the consequences, according to Laura Mseme, a spokesperson for the CCMA, for the employer could be very severe[113] (The Citizen, November 17 2014).

Every employee is protected by the Constitution[114] and the Labour Relations Act (LRA)[115] from being unfairly dismissed. A dismissal is deemed unfair if an employee is dismissed without a valid reason. Employees who feel that they are being victimized because they know their rights, seek arbitration from the CCMA by lodging a dispute.

2 2 PROCEDURES TO BE FOLLOWED WHEN DEALING WITH GRIEVANCES

Every working institution is expected to have disciplinary procedures and code, understood and signed by the employee. These outline the procedures to be followed and actions to be embarked upon when a case of misconduct against the employee emerges. If the employee belongs to a trade union, he or she should take the matter to their local official or shop steward. Employees who are not unionized could talk to an independent labour consultant or an attorney.

2 3 UNFAIR DISMISSAL

A dismissal is deemed unfair if an employee is dismissed without a valid reason. These include termination of contracts without notice, dismissals relating to incapacity, misconduct, pregnancy or operational requirements (mainly redundancies), and constructive dismissals[116] (Mseme, 2014). The latter occurs when an employer deliberately makes the work environment unbearable for an employee, thus forcing him

[113] The Citizen, November 17 2014
[114] The Constitution
[115] 66 of 1995
[116] Mseme, 2014

or her to resign.

It is important to point out that every employee is protected by the Constitution[117] and the Labour Relations Act[118] from being unfairly dismissed. The following highlights factors that could be deemed unfair grounds for being dismissed.

- Taking action, or indicating an intention to take action against an employer by exercising, or wanting to exercise any right to participate in any legal activity.
- Being pregnant, planning to become pregnant, or any other reason related to pregnancy.
- Belonging to or participating in the activities of a trade union.
- Participating in or supporting a protected strike.
- Refusing, or indicating an intention to refuse, to do the work of another worker taking part in a protected strike, or who is legally locked out, unless the work is necessary to prevent danger to life, personal safety or health.
- Refusing to accept an employer's demand related to a matter of mutual interest, e.g. refusing to accept a reduced wage demand from an employer and being dismissed for such refusal.
- Any reason based on direct or indirect discrimination on any arbitrary ground, including, but not limited to, race, gender, sex, ethnic or social origin, colojur, sexual orientation, age, disability, religion, conscience, faith, political opinion, culture, language, marital status or family responsibility.

[117] The constitution
[118] 66 of 1995

The Labour Relations Act[119] (schedule * code of good practice: dismissal). Recognizes four grounds on which a termination of employment may be fair. These are the following:

(a) The misconduct or behavior of an employee;

(b) The capacity of an employee to undertake the work;

(c) Ill-health, injury or poor performance and

(d) Operational requirements of the employer.

2 4. UNFAIR LABOUR PRACTICE INVOLVING APPOINTMENTS

These are disputes that include a variety of 'general' discrimination disputes, as well as unfair suspension or discipline and unfair conduct relating to promotion, demotions or training.

2.5. MUTUAL INTEREST

These are disputes arising when employers and employees have mutual interest.

2.6. SEVERANCE PAY

This includes instances where a dismissal is deemed fair (for example operational requirements) but employees feel that they have been treated unfairly with respect to severance pay packages offered.

2.7. REFFERAL OF DISPUTES

The ELRC has introduced a prescribed Referral Form 1 to be completed by the aggrieved employees. The first two pages of the form are intended to assist the aggrieved employee with regard to the first step to be taken to have an efficient and effective way of resolving his or her dispute. Section 3 of the referral form requires the employee to categorize the nature of the aggrieved employee of his or her dispute.

2.8. DISPUTE RESOLUTION PROCEDURE.

This is outlined in the ELRC Constitution[120] as contained in chapter 4 and it is as follows:

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[119] 66 of 1995

It is important to note that disputes have to be conciliated before they can proceed to arbitration or adjudication. Conciliation involves the use of a neutral or acceptable third party to assist parties to arrive at a mutually acceptable, enforceable and binding solution.[23] This Constitution sets out a procedure for negotiations for parties and a procedure to deal with a dispute that emanates from the negotiations.

The first step in all disputes is to refer same to conciliation in the CCMA. The CCMA will appoint a commissioner to attempt to resolve it. The commissioner is required to resolve the dispute within 30 days of its referral date. The commissioner determines the process to attempt to resolve the dispute. No legal commissioner is allowed in conciliation proceedings. At the end of the conciliation proceedings, the commissioner issues a certificate stating whether or not the dispute has been resolved.

Unlike conciliation, arbitration proceedings are more formal. If there is a request for arbitration, the CCMA will appoint a commissioner. The commissioner hearing the dispute makes a decision, which in most cases is final, binding and may be made an order of the Labour Court.

2.8.1. Procedure for disputes of interest

The Constitution sets out a procedure for negotiations for parties and a procedure to deal with a dispute that emanate from the negotiations.

2.8.2. Negotiations Procedure

Any party to the Council may submit a proposal for the conclusion of a collective agreement. Within seven (7) days of receipt of the proposal, the General Secretary must serve copies of the proposal to all parties to council.

Within ten (10) days of receipt of the proposal, the Chairperson of the Council must call a meeting of the Executive Committee of the Education Labour Relations Council (EXCO). The EXCO is responsible for setting up an agenda for Council and determines which item should be excluded on the agenda for Council. The Council however, still

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[120] Education Labour Relations Council Constitution, 1999

makes the final decision. If a party does not agree with the decision of the council with regard to the exclusion or inclusion on the agenda, that party may refer the matter to the Dispute Resolution Committee established in terms of section 38(1) of the Act[121]. The Council must attempt to agree on a negotiation process which may include a counter proposal, the establishment of a negotiation committee and the appointment of a conciliator to facilitate the negotiations and chair the meetings. If the Council fails to agree on a negotiating procedure, negotiations must commence within two days in the Council. If a collective agreement is not concluded after 30 days from which the matter was first included on the agenda of Council, any party may declare a dispute.

2 8 3 Resolution of Dispute

The dispute must be referred to the General Secretary who must appoint a conciliator and convene a meeting to conciliate the dispute. If conciliation fails an attempt must be made to reach agreement on:

- Further conciliation meeting;
- Referral of the dispute to voluntary arbitration; and
- If agreed, the appointment of an arbitrator.

In the absence of any collective agreement on rules about the conduct of a strike or lockout and picketing, the conciliator must attempt to reach an agreement on it. If the dispute remains unresolved the parties to it may exercise their rights in terms of the Act. A party must give the Council at least seven (7) days' notice in the case of a lockout.[122]

2.8.4. Procedure for the dispute of rights

The Constitution of the Council identifies three categories of how disputes must be resolved, namely those through conciliation, then arbitration or conciliation and

[121] Act 66 of 1995
[122] constitution of the ELRC

arbitration.

A party to a dispute may refer the dispute to the General Secretary within 90 days of becoming aware of the matter. If the dispute is about a dismissal it must be referred within 30 days of the date of the dismissal. The general secretary must be satisfied that a copy of the referral has been served on all the parties to the dispute. If satisfied, the General Secretary must then appoint an arbitrator and set the matter down for arbitration within 30 days of the referral. A conciliator must also be appointed and the matter must be conciliated not later than four days before the arbitration. The same person may conciliate and arbitrate the matter. (The Constitution of the Labour Relations Council. Section 30(1)

In conclusion therefore, it is of absolute necessity that negotiators must have the legal experience and a thorough knowledge of these various disputes, their causes and how to deal with them legally so that when they negotiates the disputes, they do so effectively, with confidence and satisfaction that appease both conflicting parties. Not all these disputes feature strongly in the educational context. The most prominent of these disputes in education are dismissal disputes and unfair labour practice. The following chapter will focus on those selected types of disputes that are successfully negotiated and arbitrated by experienced arbitrators.

CHAPTER 3

SELECTED CASE STUDIES THAT SHOW HOW APPROACHES OF ARBITRATORS ARE SUCCESSFUL IN RESOLVING DISPUTES IN PUBLIC EDUCATION.

3.1 INTRODUCTION

It is argued here that successful resolution of disputes by arbitrators is also a promotion of disputes in public education. This will be demonstrated by the number of statistics of cases that is dealt with by arbitrators in the bargaining councils and other negotiating

forums as shall be analyzed in this chapter. Looking at the volume of these cases, and the successful manner in which they are arbitrated and negotiated it becomes clear that unions and workers in general have confidence in these types of negotiating institutions that the government has established. The more cases are successfully resolved the more unions and workers in general are encouraged to deal with grievances through this arbitration and negotiation channels.

The CCM institution receives a huge volume of disputes cases and as much as many are resolved much more still remains unresolved because of lack of availability of additional arbitrators. Because of the enormity of cases successfully resolved, there will be no attempt to analyze all of them. Tables of statistics that shows the number of cases and their nature and how they are handled and resolved per province and nationally will be highlighted.

4.2 CASE NUMBER:PSES6.15/16
PROVINCE: WESTERN CAPE
APPLICANT: SADTU OBO MAGUSHA, S
RESPONDENT: DEPARTMENT OF EDUCATION WESTERN CAPE
ISSUE: UFAIR LABOUR PRACTISE-REFUSAL TO RE-INSTATE i.t.o. AN AGREEMENT
ARBITRATOR: JACQUES BUITENDAG

BACKGROUND TO THE ISSUE:

The applicant applied for the advertised post of Head of Department for Life Orientation and History. He has been teaching Life Orientation and History for grade 8 and 11. He has 22 years' experience as an educator. He was shortlisted and interviewed. Unfortunately the applicant was not recommended. Instead, Mr. Mandita became the preferred candidate and the applicant was considered for the second best to Mr. Mandita. Subsequently, Mr. Mandita was appointed in the post with effect from 1 April 2015. The applicant as a result, lodged a dispute and referred an unfair labour practice dispute to then ELRC. The applicant was seeking an order to the effect that the appointment of Mr. Mandita be set aside and that he be appointed to the position. The respondent opposed the dispute of the applicant and maintained that a fair procedure was followed.

The arbitrator in listening to all evidence from both sides, and considering all the interview procedures that ensued, pointed out the following legal facts. That is,

- There is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. The exception are when there is a contractual or statutory right to promotion.

- If the employee is not denied the opportunity of competing for a post, the only justification for scrutinizing the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason.
- The corollary of this principle is that as long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.
- It must be stated that the employer cannot be said to have committed an unfair labour practice simply because it makes an unwise choice of candidate.
- The decision to appoint or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promote is seriously flawed, the court and arbitrators should not readily interfere with the exercise of the discretion.
- The role of the commissioner is to oversee that the employer did not act unfairly towards the candidate that was not promoted.

The arbitrator concluded the case as follows:

- That there is no evidence that Mr. Mandita does not have the qualifications, experience and attributes that is required for the HOD position. He outscored the applicant as well as the other candidate in the interview process and there is no justifiable reason to set aside his appointment. The arbitrator therefore, found that the applicant has failed to discharge its onus in proving an unfair labour practice relating to promotion and dismissed the dispute of the applicant.

The sad irony is that the applicant has 22 years' experience and has been teaching Life Orientation and History as the requirements of the promotional post at the same school. There has been no proving that throughout all his evaluation processes by his seniors he has proved to be incompetent to occupy such a position. The second point is that the final decision to appoint is the prerogative of the Head of Department. If the HOD could have applied his or her mind correctly, considering that the applicant served the Department for 22 years and has that fast experience, he or she could have set aside the decision of the Interview panel and appointed the applicant. The SGB as the body to make such a recommendation should have done the same as well. This unfortunate decision leaves behind bitter tastes and polarizes relation in the school setting. It de-motivates and brings disunity in the school.

CASE NUMBER: PSES 614-14/15LP
PROVINCE: LIMPOPO
APPLICANT: N.A MANGANYI
RESPONDENT: DEPARTMENT OF EDUCATION
ISSUE: UNFAIR DISMISSAL EDUCATIONAL OF FIXED TERM CONTRACT
ARBITRATOR: ELIAS KHUTSO MPAI

BACKGROUND TO THE ISSUE:

The applicant was employed by the respondent in terms of a fixed term contract as an educator for the period of 03 February 2014 to 2014 to 20 April 2014. Her salary notch was R198 888-00 per annum. The respondent was not paid for the services that she rendered to the respondent for the duration her employment contract and subsequently referred a dispute to the Council concerning an unfair labour practice in terms of section 186(2)(a) of the LRC. The applicant followed the internal grievance procedure; however, it was in vain. Notwithstanding that the Respondent agreed that the Applicant was entitled to payment, one year and three (3) months had elapsed without the matter being resolved. The Applicant was no longer in the employ of the Respondent. However, during the period in question a contract was in effect between the Applicant and the Respondent.

The Arbitrator in finalizing this case came to the following conclusion:

- The Respondent failed to pay the Applicant Salary due to her.
- There was no justifiable reason for the non-payment of the Applicant 'here was no justifiable reason for the non-payment of Conditions of Employment of Educators (BCEA) provides that: -or the non-p must pay remuneration not later than seven days after the completion of the period for which the remuneration is payable, or the determination of the employment. "educators (BCEA) provides that: -or the non-p must pay remuneration not later than seven days salary on or before the 22nd day of each month for the services that she rendered for the Respondent, however, that never happened. That being the case, the respondent of each month for the services and in contravention of the section 32 of the BCEA and acted to the prejudice of the Applicant.
- The Applicant salary notch was R198 888-00 per annum as indicated earlier. That will be R16 574-00 per month. For the period 03 February 2014 until 03 April 2014, her total salary was R33 143-00 [2 x R16 574-00], while for the period, 04 April 2014 until 20 April 2014, 17 days 917/30 X 16 574-00) = R9 391,93, the total salary due to her being R42 539,93
- The Applicant was not entitled to the benefits enjoyed by permanent employees because she was a temporary employee on a fixed term contract. She was however, entitled to 37% salary in lieu of "the Applicant was not entit42 539,93 x 37%]. Accordingly, the total amount due to the Applicant was calculated as R59 113.93 which in final the Applicant was to receive.

The Arbitrator concluded that the Respondent 'he Arbitrator concluded that the Respondent was calculated 2014 until the 20 April 2014 was unfair. The Respondent being the Department of Education Limpopo was hereby ordered to pay that amount to the Applicant not later than 25 August 2015 at 15H00.

In conclusion the arbitrator resolved this case in a fair and unbiased manner. The resolution of these disputes served as a motivation to all educators and workers in general and increased their confidence in the system of arbitration in the resolution of their disputes.

CASE NUMBER: PSES 758-14/15
PROVINCE: WESTERN CAPE
APPLICANT: NAPTOSA obo MARIETA TERBLANCHE
RESPONDENT: DEPARTMENT OF EDUCATION WESTERN CAPE
ARBITRATOR: HILARY MOFSOWITZ

BACKGROUND TO THE ISSUE

The dispute concerns the department WESTERN CAPE short list the applicant to the post of Deputy Chief Education Specialist: assessment coordinator metro north education district (post level five) (post B 8). The Applicant applied for the post and was not sort listed. The Applicant argued that the Department 'education district (posher when she adequately meets the criteria for the position, constitutes an unfair labour practice in relation to promotion. The Applicant had 25 years in experience and possesses a Master degree as well as the relevant training she had undergone. She met all the criteria as per the requirements of the post. The arbitrator in the final analysis of all evidence given, came to the conclusion that;

- The evidence does not support the applicant's allegation that the department committed an unfair labour practice in relation to its failure to short list the Applicant for that post.
- The Applicant was scored against the agreed criteria and there was no evidence that the process was conducted in an irregular, capricious or deliberate manner to exclude the applicant from participating in the interview. The Applicant did not sufficiently provide a detailed application and the deficiencies of her application resulted in the lower score.
- I have therefore accepted the department' evidence that the Applicant did not make the top six based on objective and reasonable grounds.
- I have therefore, concluded that the Applicant failed to discharge the onus that the department' have that was unfair or that the department committed an unfair practice in relation to promotion.
- There was insufficient evidence to interfere in the department 'here was in
- The arbitrator came to the conclusion that the Applicant has failed to discharge the onus that the department committed an unfair labour practice in relation to promotion. The short-listing process was fair.

It is also reasonable to conclude that this is another successful case that the arbitrator resolved easily to the benefit of all the parties. Analyzing all the evidence given and the process which was followed, the arbitrator arrived at the correct decision that is fair and unbiased. It is clear that there were more experienced and

qualified competitors who impressed the panelist in the short-listing process. The competition was stiff.

CASE NUMBER; PSES237-15/16
PROVINCE: WESTERN CAPE
APPLICANT: CAIL WILLIAMS
RESPONDENT: DEPARTMENT OF EDUCATION WESTERN CAPE
ISSUE: UNFAIR DISMISSAL – CONSTRUCTIVE DISMISSAL
ARBITRATOR: Gail McEWAN

BACKGROUND TO THE ISSUE

The applicant was a post level one employee teacher at the Department of education who started working on the 1st January 2010. She received a letter from the Principal that informs her that she has been terminated from her employment because she failed to report for duty since 16 February 2015. The letter was dated 10 March 2015. His termination of employment was in terms of Section 14(1)(a) of the Employment of Educators Act and that she is deemed to be discharged from service on account of misconduct through her absence from work since 16 February 2015. The applicant confirmed that she has been absence for 14 working days. The Applicant did not have the consent of the employer for her absence and the head of education had confirmed her discharge in writing in the letter dated 10 March 2015.

The arbitrator was to determine on a balance of probabilities whether the Applicant was dismissed and if found whether her dismissal was fair or whether her services terminated in terms of Section 14(1)9a) of the Employment of Educators Act of 1998. The arbitrator found that whilst it is true that she was dismissed in terms of this Act. She was not summarily dismissed. The Education Labour Relations Council lacks jurisdiction to arbitrate the matter given the nature of the discharge of the Applicant by operation of law.

The arbitrator therefore, advised the applicant to approach the Head of Education to show good cause and if shown may result in the approval of her re-instatement to

her former post or in any other post on such condition relating to the period of absence from duty or otherwise as the employer may determine.

In conclusion, this case exposed the gap that exists between the Education Labour Relation Council and the Employment of the Educators Act which put a strain on the arbitrator to adjudicate the case sufficiently and effectively. But the arbitrator followed the prescript to arrive at that decision.

CASE NUMBER: PSES 133-15/17 EC
PROVINCE: EASTERN CAPE
APPLICANT; SADTU obo P MPOMPI
RESPONDENT: DEPARTMENT OF EDUCATION EASTERN CAPE
ISSUE: UNFAIR LABOUR PRACTISE- PROMOTION/ DEMOTION.

BACKGROUND TO THE ISSUE

The Applicant referred a dispute to the ELRC through his union; SADTU regarding an alleged unfair labour practice based on the respondent's to appoint him to a position of a Principal at Upper Nqculu Junior Secondary School. The dispute could not be resolved at conciliation level. The Applicant then filed a request for arbitration.

The position of Principal for the above-mentioned school was advertised. The Applicant duly applied and was interviewed on the 19th of November 2014. During the interviews, both teacher unions, SADTU and NAPTOSA were present and questions relating to scores were raised by NAPTOSA. As a result, the process was not signed off by NAPTOSA. Furthermore, as a result of NAPTOSA's action, the Respondent instituted a fresh process with an independent panel. The Applicant was not shortlisted in the second process and another person Mr. Tokwe was duly appointed to the position.

The Applicant complained that he did not understand why he was not shortlisted. He believed that the first process in which he was shortlisted was free and fair. As such by not being shortlisted for the second process, he felt disadvantaged. He argued that the department should not have allowed the action of NAPTOSA.

Section 186 (2) of the labour Relations Act of 1995 defines unfair labour practice as, "any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employee relating to the promotion. The arbitrator in determining whether the employer was fair or not took the following into account:

- Whether the employer's decision was arbitrary, or capricious, or unfair or
- Whether failed to apply its mind to the promotion of the employee, or
- Whether the employers decision not to promote was motivated by bad faith
- Whether there was insufficient reasons for the employer's decision not to promote
- Whether the employers decision not to promote was discriminatory
- Whether the employer's decision not to promote was based on a wrong principle
- Whether the decision was taken in a biased manner

The arbitrator dismissed this case on the bases that the purpose of interviewing candidates is to assess the best or most suitable person. It was merely the question of superior qualification and or experience; people would be appointed on the basis of their curriculum vitae and nothing else.

In the final Conclusion, it has been shown how experienced arbitrators successfully resolve disputes in a fair and unbiased manner following a proper interpretation of the various acts in education and not their personal instincts or preferences. They do not merely satisfy the CCMA and the department as their employers. There are however, those inexperienced arbitrators who try to resolve the dispute in a bizarre manner and leave the conflicting parties in a state of full dissatisfaction; this will be shown in the following chapter. It will also be argued that the successful resolution of disputes by arbitrators is in itself a promotion of dispute.

CHAPTER 4

AN EVALUATION OF ARBITRATION CASE STUDIES TO DETERMINE THE EXTENT TO WHICH ARBITRATORS PROMOTE DISPUTES RESOLUTION

1 INTRODUCTION

The three previous chapters have dealt with the legal frame work and other statutory matters as well as the type of disputes that are experienced in the labour environment that impact on the work arbitrators do to bring about labour peace in the workplace. Of most significant is the last previous chapter that showed how experienced arbitrators

successfully resolved the disputes and thus therefore, giving credit to the work of arbitrators and their approaches to resolution disputes.

There are three important aspects in this topic that form the backbone of this chapter and this research study as a whole. They are highlighted as follows:

- Evaluation
- Approach of the arbitrators
- Promotion of dispute resolution

An evaluation is a complex process and it is important to explain and discuss how it is understood in an educational environment because it has its own merit and demerit.

4 2 AN EVALUATION AS A TOOL TO ASSESS THE MERIT AND DEMERIT OF AN EVALUATED OBJECT

Tyler defines the meaning of evaluation in education as the process of learning and how the learning objectives have been achieved.[123] With regard to this research topic, the process of learning is to know, how does the approach of arbitrators promote dispute resolution in public education? The objectives to be attained are the outcomes that emanate out of this evaluation, which is, "arbitrators promote dispute resolution in public education". According to Isnai (1981) there are ten dimensions for the analysis which evaluation rests on and they are as follows:[124]

(a) How is evaluation done?

(b) What are the functions of an evaluation?

(c) What are the objects of an evaluation?

(d) What kind of information should be collected regarding its objects?

[123] Tyler - this does not appear to be in the bibliography,
[124] Isnai, J. Standard for Evaluation of Educational Programme, Projects and Materials.

(e) What criteria should be used to judge the merit and worth of an evaluation object?

(f) Who should be served by an evaluation?

(g) What method of enquiry should be used in evaluation?

(h) Who should do the evaluation

(i) By what standard should evaluation be judged?

(j) Results and how they have been achieved?

There are six kinds of evaluation, which are highlighted as follows:

4.2.1. Formative evaluation

This evaluation begins at the start of the program. It implies that a problem must be attended to early and not wait until the end of the year. Information must be collected and no judgment must be given (Tyler. 1981).

4.2.2. Summative Evaluation

This is an Evaluation model that an evaluator is interested more in the results than the entire progress of the project. At the start of the programme, there is less evaluation.[125]

4.2.3. Socio-Political Evaluation

This evaluation adopts a particular angle, which is to promote the image of somebody. An example would be a politician or a school principal wanting to win the support of parents or the community.

4.2.4. Context Evaluation

This is the type of research to help to identify the needs and to determine if the goals satisfy the needs.

[125] Stafflebean and Shinkdfield, 1985

4.2.5. Participatory Evaluation

Cousin and Earl[126] maintain that it is better to have an external evaluator working with people in the field. This increases the validity of the results.

4.2.6. Meta Evaluation type

This is the process of evaluating the evaluation (self-evaluation). It helps to check the standard of the valuation that is chosen.

(i) The criteria to be used to judge the merit and worth of an evaluated object.

- Norms and Standards.
- Alternative objects.
- Client's needs.

(c) (ii) Who should be served by an evaluation?

- Stakeholders
- Recipient
- Audience e.g. parents

(iii) Who should conduct the evaluation?

- An internal evaluator. He/she knows the problem better and this is subjective.
- An external evaluator. He/she is more objective and looks at the situation from a different perspective. He/she will use summative evaluation. The best in this approach is to use naturalistic participant approach, which will minimize the risk of undermining certain objects.

(iv) Validity of the results.

[126] Cousin and Earl

> The key critical question is how can we increase validity? The evaluator of the project must familiarize him/herself with the project, conditions and other factors associated with the project before evaluating. It is risky to conduct evaluation without interaction with the development of the project.

Further aspects that needs to known about Evaluation are that evaluation is by nature subjective, bias and judgmental. Ogunniyi[127] argues that evaluation and measurements are inextricably linked to each other in the process of curriculum planning. When standards of education, such as critical skills and knowledge which members of society are expected to have are falling or not being developed, then evaluation is used not only to objectively identify the weakness, but to allow all affected participants time for reflection and transformation. It enables or assists in determining which remedial measures are needed to improve the situation.

4.3. EVALUATION CRITERIA AND THE ELRC'S ARBITRATION APPROACHES WHEN THEY DEAL WITH DISPUTE CASES

The Education Labour Relation Council[128] which is responsible for the appointment of arbitrators that falls under its operational jurisdiction highlights the following that appear in its Constitution[129] which should form the basis of the criteria on which arbitrators can be evaluated. They are captured under the Code of Conduct for conciliators and arbitrators. ELRC Constitution, section 30(1) state that in order for conciliation and arbitration processes to be seen to be fair and just, conciliators and arbitrators must:[130]

(a) Act with honesty, impartiality, due diligence and independent of any outside pressure in the discharge of their functions.

(b) Conduct them in a manner that is fair to all parties and shall not be swayed by fear of criticism or by self-interest.

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[127] Ogunniyi
[128] ELRC www.elrc.org.za
[129] Resolution 1 of 2006
[130] Chapter 9, section 23

(c) Not solicit appointments for themselves. This shall not however, preclude conciliators and arbitrators from indicating a willingness to serve in any capacity.

(d) Accept appointments only if they believe that they are available to conduct the process promptly and are competent to undertake the assignment.

(e) Avoid entering into any financial, business or social relationship which is likely to affect their impartiality or which might reasonably create a perception of partiality.

(f) Not influence any of the parties in disputes by improper means, including gifts or other inducements.

(g) Support sound labour relations in the education sector.

The above are general attributes of Conciliators and Arbitrators. They are followed in this code of conduct by conflict of interest and disclosures which emphasizes the following:

(1) Conciliators and Arbitrators should disclose any interest or relationship that is likely to affect their impartiality or which might create a perception of partiality. The duty to disclose rests on the conciliators and arbitrators.

(2) Conciliators and arbitrators appointed to intervene in any matter should, before accepting, disclose this to the General Secretary of the Council.

(a) Any direct or indirect financial or personal interest in the matter.

(b) Any existing or past financial, business, professional, family or social relationship which is likely to affect impartiality or may lead to a reasonable perception of partiality or bias.

(c) If the circumstances requiring disclosure are unknown to conciliators and arbitrators prior to accepting appointments, disclosure must be made when these circumstances become known to the conciliators and arbitrators. The disclosure in this regard could in arbitration

proceedings, include witnesses who may have relationship with the conciliators and arbitrators.

(d) After appropriate disclosure, conciliators and arbitrators may serve if both parties so desire but should withdraw if they believe that a conflict of interest exists irrespective of the view expressed by the parties.

(e) In the event where there is no consensus on whether conciliators and arbitrators should withdraw or not, conciliators and arbitrators should not withdraw if the following circumstances exist:

- If the terms of reference provide for a procedure to be followed for determining challenges to the conciliators and arbitrators then those procedures should be followed.

- If conciliators and arbitrators after carefully considering the matter, determine that the reasons for the challenge is not substantial and they can nevertheless act impartially and fairly, and that the withdrawal would cause unfair delay or would be contrary to the ends of justice.

In terms of hearing conduct the following are stressed[131]:

(1) Conciliators and arbitrators should conduct proceedings fairly, diligently and in an even-handed manner,

(2) Conciliators and arbitrators should have no casual contact with any of the parties or their representatives while handling a matter without the presence or consent of their other.

(3) Conciliators and arbitrators should be patient and courteous to the parties and their representatives or witnesses and should encourage similar behavior by all participants in the proceedings.

[131] Schedule 1 of the ELRC constituion

(4) Agreements by the parties for the use of mechanical recordings should be respected by arbitrators.

(5) In determining whether to conduct an *ex parte* hearing, an arbitrator must consider the relevant legal, contractual and other pertinent circumstances.

(6) A conciliator or arbitrator must be satisfied before proceeding *ex parte* that a party refusing or failing to attend the hearing has been given adequate notice of time, place and purpose of hearing.

(7) In the event of more than one conciliator or arbitrator acting as a conciliator, mediator or arbitrator, the conciliator or arbitrator should afford each other a full opportunity to participate in the proceedings.

(8) Conciliators and arbitrators should not delegate their duty to intervene in any matter to any other person without prior notice to and the consent of the General Secretary.

In terms of Post Hearings the following are stated[132]:

(1) Arbitrators should not disclose a prospective award to either party prior to its simultaneous issuance to both parties.

(2) Arbitrators' awards should be definite, certain and as concise as possible.

(3) No clarification or interpretation of an award is permissible without the consent of both parties.

(4) Under agreements, which permit or require clarification or interpretation of an award, arbitrators shall afford each party an opportunity to be heard.

Jurisdiction Clause demands that:[133]

[132] Schedule 1 of the ELRC constitution
[133] Schedule 1 of the ELRC constitution

(1) Conciliators and arbitrators must observe faithfully, both the limitation and inclusion of the jurisdiction conferred by an agreement or by state under which they serve...

(2) A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by conciliators and arbitrators as relieving him or her of further jurisdiction in respect of such issues.

4. 4. ANALYSIS AND EVALUATION OF VARIOUS CASE STUDIES DEALT WITH BY ARBITRATORS

The intention here is to analyze cases that have been arbitrated to determine if successful outcomes have been reached to the satisfaction of conflicting parties and the reasons why they are not resolved and why unions declare further disputes. One reason could be that the employer is refusing to meet the demands of unions in full. Another could be dissatisfaction of unions relating to the type of approaches used by arbitrators when they arbitrate in dispute cases. Unions might feel that arbitrators are not fair, impartial, effective and efficient or lack experience. The following highlight some of the reasons:

4 4 1 Cases that are handled with approaches that promotes disputes in public education

In the case of Voorbrug Secondary School in Delft, Cape Town charged Mr. Hoffman with misconduct in 2002. He was subsequently dismissed after an appeal on 28 March 2002. On 16 April 2002 Mr Hoffman lodged an unfair dismissal dispute. On 4 October 2002 the arbitrator found that Hoffman was not guilty and made the following significant statement:

> "I also have to record that it is my considered opinion that it is in nobody's interest for Mr Hoffman to return to Voorbrug Secondary. Having said that I also have to note that Mr. Petersen's evidence was that Mr. Hoffman was one of the best mathematics teachers that the school has ever had and that he made a significant contribution to the school during the first number of years of his employment there. Somewhere along the line things went horribly wrong. Surely some

creative action can be taken by the parties to ensure that Mr. Hoffman can be gainfully employed within the education system where he can make a positive contribution."

On 6 February 2003, Mr Hoffman was informed by his employer, that he was to report for duty at Voorbrug Secondary School. During October 2003 Hoffman resigned stating that his employment situation was intolerable. The approach adopted by the arbitrator in finalizing this issue was not in the interest of justice, impartiality and fairness, which in terms of the Code of Conduct, already discussed, arbitrators are expected to uphold at all times. It was also not in the interest of the school to have employees behave in an undisciplined and disrespectful manner that lead to misconduct charges. The fact that a person is considered to be a good teacher does not in any way absolve that person from doing something wrong, particularly with the reasons that the arbitrator had given above. If the dismissal charge was perhaps too heavy and did not equal the nature of the sentence, the arbitrator would have recommended that a lighter sentence be imposed, such as final-written warning. This shall have made Mr. Hoffman would have been made to realize that no matter what a position or status one hold or has in society or at the school level for that matter teachers must act and behave in accordance with their code of conduct that is basic in their conditions of employment. For someone to be charged with misconduct and eventually dismissed, teachers must have received prior warnings, followed by counseling and capacity building. Therefore, a dismissal is unfair if it is not affected for a fair reason and in accordance with a fair procedure.

The arbitrator re-instated Mr. Hoffman and he later resigned at the school. He later resigned sighting unbearable situation, which he had to endure all the time. The fact of the matter was that the other teachers at the school were not happy that a person, who had behaved in a disorderly manner, had not been found guilty of wrongdoing. The aggrieved person or parties could not find it easy to work with Mr. Hoffman in a cooperative and embracing manner. As such, Mr. Hoffman found himself isolated and resigned. Upon the return of Mr. Hoffman to the school, there should have been a teachers meeting organized by the school Principal to address the importance of unity and relationship in the school for the sake of stability and peace and to maintain an environment conducive for teaching and learning.

To re-instate Mr. Hoffman at the school and for him to be subjected to an unbearable situation that forced him to resign opened another can of worms. In terms of section 188(1)(e) of the LRA[134], Hoffman even though he voluntarily resigned, could lodge an unfair dismissal dispute. This type of dispute occurs when an employer deliberately makes the work environment unbearable for an employee, thus forcing him or her to resign. The approaches and judgment of the arbitrators assigned to this case create a fertile ground for the promotion of disputes in public education.

4.4.2. In the matter *SADTU obo T Reddy v KwaZulu-Natal Department of Education and Others*[135]

This was a case where the union represented both the successful job applicant and the person disputing the appointment - both employees were parties to the dispute. In this case, the employer objected to such representation on the basis that one of the employee parties would not be properly represented and there could be a conflict of interest. On this basis, the arbitrator upheld the objection. In view of Chris Brunton & Associates, a firm of lawyers respectfully disagrees with Reddy's finding as an arbitrator. The disagreement is based on the fact that the Law Society[136] allows a single attorney's firm to represent different parties, provided they consent to the arrangement. This view is supported by ruling 2.2(c) of the KwaZulu-Natal Law Society Practice Handbook which in summary says that a single firm of attorneys may not act for and against the same client without that client's consent.

According to Brunton *et al*[137] the message that is sent in principle says, "We will protect you against a conflict of interest but if the parties who may suffer prejudice waive that protection by agreement we will not interfere". With this type of situation, Brunton *et al* suggest that arbitrators should apply the same principles and ask the parties

[134] 66 of 1995 188 1 e
[135] Arbitration Award

[137] Brunton

represented by the same union, if they consent to such representation. If the parties who stand to suffer the prejudice have no objection, there will be no basis on which the arbitrator or the opposing party could have any valid objection.

The implication of this type of case is that the CCMA sometimes appoint arbitrators to a case, who do not have sufficient labour law experience, or who apply their minds without being guided by what the law says if there is a case of that nature. In the case under discussion, ruling 2.2(c) of the Kwa-Zulu Natal Law Practice Handbook should have been used to guide the arbitrator to arrive at the correct findings. The case also demonstrates that the union SADTU, in providing representation to the two opposing parties in the disputes was aware that they were within legal bounds to do so. This is also indicated by the fact that it was the department of education that opposed this and not the teachers themselves. It is clear under this circumstance that the union obtained the consent of its members that it could go on with their cases.

In circumstances such as shown by this case, the arbitrator's approaches to case that reach wrong conclusions promote disputes in public education. Because of this findings that lack basic legal facts, the union considered the judgment to be unfair, bias and impartial. This judgment lays a fertile ground for the union to lodge a further dispute to the higher negotiating body such as the Labour Court. The Labour Court could arrive at a judgment that would award the union a case, and most probably to rule that the case be started afresh.

4.4.3. In the matter of *Reddy v KZN Department of Education and Culture and others*[138]

In the above case, Reddy as arbitrator ruled that the department of education could not be held responsible for acts of the SGB, at least until such time as an appointment has been made by the Head of Department (HOD). This is another case of incorrect judgment of Reddy which has procedural defects and his judgment lacking the basic legal facts of educational legislative knowledge.

[138] Reddy v KZN Department of Education & Culture 2003) 24 ILJ 1358 (LAC)

The reality of the situation, as stated by Brunton et al (2008),[139] is that the employer initiates the appointment process and through its representation on the SGB (the principal) and through a departmental observer or a resource person, the employer effectively guides the process through to its conclusion which is the recommendation of a particular applicant. The SGB during this process has certain rights that it exercises, but these rights are exercised by the SGB on behalf of the employer. These rights are contained in section 6 of the Employment Equity Act[140]. Again it is a case which will be considered by the union as being unfair, unbiased and impartial. It provides a judgment that is not objective or rationally defensible which the unions will capitalize on and lodge another dispute.

4.4.4. Postponement of cases by contract or part-time commissioners

Bhorat et al (2007)[141], in their research for the efficiency and effectiveness of the resolution system in South Africa and analysis of data, came to this conclusion as quoted underneath:

> "A worrying trend that has emerged at the CCMA in recent years is a seemingly increased tendency for part-time commissioners to postpone cases and utilize other mechanisms for delaying cases. While concrete evidence is lacking, there is a concern that this is being done for financial reasons given that they work on a contract/hourly basis. This is of course a sensitive issue and one that we do not deal with in depth. It does however, for the purpose of this study, point to the importance of possibly including more detail on the commissioners themselves in order to incorporate this evidence into any future modeling",

[139] Brunton 2008
[140] 55 of 1998 s 6
[141] Bhorat 2007

4.4.5. Financial and human resource constraints of arbitrators

According to Brand and Molahlehi[142] , the CCMA, despite its many achievements, has several challenges as well. One of these challenges is that it has not been able to resolve disputes as expeditiously as had been hoped at the time of its establishment. This situation to a great extent has been necessitated by financial and human resource constraints which impact on the quality of the administrative services this body provides. The commissioners or arbitrators of the CCMA and ELRC are under immense pressure with heavy caseloads that need to be solved expeditiously, effectively and efficiently. With a limited number of three conciliators and two arbitrators a day to deal with the heavy caseload, it has been observed that disputes are being settled hastily and, superficial settlements are being reached which fail to address the underlying causes of conflict or satisfy the real needs of the parties.[143]

4.4.6. Problems facing arbitrators who are full-time state paid employees

These arbitrators are not appeased by any arbitration situation that drags for a long period such as in wage negotiations. They would use approaches that may seem to be pressurizing the unions to compromise their demands and to settle for far less than their original demands in the bargaining councils. After all arbitrators have minds of their own that attaches certain values and principles that influence their thinking. They are sensitive human beings. They are citizens and some are parents who have children in schools. The more the strikes are prolonged, the more worrisome these arbitrators become because the right of learners to learning and teaching are compromised. They also become worried that the country's image is put into disrepute in the global international arena. They also become seriously mindful of the fact that they are appointed and paid by the state. It is therefore, inconceivable to think that they can bite the hand that feeds them. They will always look at the side where the bread is buttered. The state on its site too, will not be comfortable to have arbitrators that cause it to lose in arbitration situation because this might have some serious financial repercussions on its side. This situation places the arbitrators in the horns of dilemma. Unions would

[142] Brand and Molahlehi 2005

perceive them as not being neutral or impartial and as a result hardens their attitudes and continue to declare further disputes.

4.4.7. Resolution of disputes: a source for the promotion of disputes in public education

Despite some weaknesses that are identified, unions seem to have a positive recognition and acceptance of the institution of collective bargaining. When considering the number of disputes that are forwarded to the CCMA and ELRC daily and on a yearly basis, it becomes clear that educators and workers in general have confidence in the institution that promotes collective bargaining and its arbitration processes. It was alluded that the CCMA receives 134 943 referrals within one financial year and a minimum of 680 new cases every working day. It is further indicated that the settlement rate amounted to 75% in 2014 alone. In 2002 a total number of cases were successfully dealt with through conciliation and/or arbitration. The rest of the cases were either withdrawn, removed due to lack of jurisdiction or still being processed. There was a 10% increase in referrals compared to 2001[144] (Brand and Molahlehi 2010).

It is apparent that unions and workers in general, whether they lose or win cases, will still take the route of collective bargaining to negotiate their issues. As such, collective bargaining institutions are flooded with disputes. According to Msebe (2014), an analysis of the cases referred to the CCMA showed an increase from 67 319 during the financial year 1997/98 to just under 130 000 in the financial year 2005/2006. Currently, as indicated above, referrals to the CCMA are over 134 000 a year, inclusive of all disputes from the public sector workers, majority of which fall under Public Sector Coordinating Bargaining Council.[145]

For many years prior to 1996, unions or rather African workers did not enjoy the privileges and advantages offered by the new Labour Relations Act[146] and the country's Constitution[147]. When institutions such as the ELRC, CCMA, Private Resolution Agencies and the Labour Court were introduced, these became to the union a new found freedom

[144] Brand and Molahlehi
[145] Venter, 2007
[146] 66 of 1995
[147] Bhorat et al, 2008

to remove the shackles of apartheid segregation in education's labour environment and other sectors. Unions are well informed of their rights and increasingly become better informed.

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

5 1 INTRODUCTION

It is expected that a research study of this nature be able to highlight certain observation or findings, which are either positive or negative. These findings will assist educational policy designers, implementers and developers as well as legislators to address those anomalies or weaknesses relating to certain operational concepts in this research study and fine tune them so that they are in line with education's international norms and standards.

It is not good for any academic researcher to merely pin point problems and leave others to find solutions. An academic researcher must also make recommendations on issues that were found to be problematic or are clouded with contradictions that cause confusion in the educational operating situation relating to this topic. They must also expand the frontiers of the existing knowledge by providing additional knowledge, which is able to meet the challenges of the present and the future. Difference circumstances require different approaches. Knowledge is not static, it is dynamic, ever changing and has needs. It is complex, multi-dimensional, active, dynamic and meaningful, and should be studied in context.

5 2 FINDINGS

The following are some of the critical findings in this research study. Some of the findings are positive and enhance the image of arbitrators of the CCMA, ELRC and other arbitration forums. There are however also other findings that show that the

arbitrators and the system of collective bargaining still needs some fine tuning to make it efficient and effective.

5 2 1 Arbitrators in wage negotiations

Wage negotiations are ongoing annual events between the government and trade unions. Very often these parties reach deadlocks, which leads to the declaration of disputes. These disputes are arbitrated and conciliated by arbitrators. Arbitrators deal with conflicting parties which are unshakable on their position. This implies that they approach the arbitration process being poles apart with the trade unions starting with far more demands and the government offering salary percentage which it regards as above inflation. It is very seldom that these parties move from their positions of demand on one side and offering on the other side quickly. It is a situation that compels the arbitrators to demonstrate their arbitration skills and strategic approaches to the situation bearing in mind their code of conduct as highlighted earlier.

There are other side issues that place arbitrators in an utterly dreadful situation which are of public interest particularly when negotiations are dragging for a long period. One such important issue is the Constitution's enshrinement of the right of learners to basic learning and teaching. This is experienced mostly when unions are on strike that affects the schooling process. The longer it takes for the arbitrators to reach agreement in the arbitration process, public pressure mounts. Parents become concerned with the education of their children being hampered. Society is worried about children roaming the streets and indulging in all sorts of misdemeanor such as alcohol, drugs and other abuses. The government becomes concerned that it pays teachers who are not working and unable to finish the syllabus. This places undue pressure on the arbitrators to find a quick solution. They then adopt approaches that press unions to make compromises.

5 2 2 Unionization of teachers as a strong factor in negotiations

It has emerged in this research study that South African Civil Servants or workers are generally highly unionized. They are militant and revolutionaries. Many know their rights as enshrined within the Constitution and the procedures and processes to follow to address their problems as laid down in the Constitution and Labour Relations Act as it was alluded in chapter one. Union representatives that sit in the various negotiating forums such as the ELRD are equipped with sharpened skills to negotiate and the ability to argue in an intelligible way. They are able to match their counterpart on the side of government. Arbitrators therefore, have a mammoth task of arbitrating the two parties without taking sides. After all unions are the pioneers of these laws. A union like SADTU was in the forefront of the struggle for political freedom and the destruction of Bantu Education.

This education was established, amongst others, to produce black children who would become hewers of wood and drawers of water in a country that was highly segregated and stratified into racial and ethnic groups and discriminated on the basis of skin colour. For SADTU, this was a hard fought struggle. Now it is no longer a situation where teachers and other public servants are obedient civil servants who are easily obliged or succumb to their master's instructions, fired or dismissed at will or coerced into hasty settlements in arbitration arena. The Constitution entrenches their right and curtails this type of a situation.

5 2 3 Established CCMA's Case Management System (CMS) database

This is intended to showcase the efficiency and effectiveness of the CCMA since it has been in existence in 1976/97. CMS is a live database capturing case details for every

case referred to the CCMA and others. Benjamin and Gruen[148] indicate that throughout the whole dispute resolution process, various target dates are captured. These dates are used to calculate various turnaround times for dispute resolution. They say that dates captured include the date on which the dispute arose, the date on which it was referred to the CCMA, and the date on which they were activated by the CCMA. Furthermore, they highlight that if a case is unresolved after the conciliation phase, the arbitration referral date is also captured. The date on which conciliation and arbitration cases are concluded is also captured. Arbitration awards dates are captured as well. Also included, is the number of hearings that have taken place and the current process at which the disputes were resolved. There is also information on whether the award was in favour of the employer or employee as well as the award amount given.

The CCMA publishes an Annual Report as an internal document. This report according to Benjamin and Gruen[149] is not always available to the public and is very useful in giving an understanding of the internal and statutory operation efficiency measures that are in place at the CCMA. Both the CMS and the Annual Report do not deal with the approaches of arbitrators. They are concerned with statics regarding the number of cases the effective and efficient way in which they are handled and resolved.

5 2 4 Major disputes cases

There are many disputes that are referred to the bargaining structures for conciliation and arbitration as alluded to in the introduction and in chapter two. Of all these disputes, only four emerge as the genuine one in education. These are unfair dismissal disputes, unfair labour practice disputes, mutual interest and severance pay.

5 2 5 Labour Court's weaknesses

The Labour Court has difficulty in attracting sufficient judges of high caliber. This, according to Roskam[150], causes the Labour Court to rely on acting judges, some of whom have little experience in labour law. The Labour Court under these circumstances fails to provide supervisory authority over the CCMA given the fact that both CCMA and

[148] Benjamin and Gruen
[149] Benjamin and Gruen
[150] Roskam

Labour Courts have huge caseloads. In addition, according to Benjamin the Labour Courts suffer resource constraints that make it to look inefficient.

5 2 6 Negotiating unions differing approaches to issues

Arbitrators sometimes use arbitration strategies and tactics that divide the unions in the bargaining councils. Arbitrators very often experience a situation where some unions settle issues with the government more quickly than others. Those that have settled end the strike of their members and return to work. This brings about disunity within the schools. The union that is still on strike is viewed in a negative light by the parents and society at large who hurl insults that places the image of that union in disrepute. This again hardens the attitude of the striking union and makes it more resistant and incorporative.

5 2 7 Arbitrators receives Professional Support and Development's

These are positive developments. According to Brunton (2008)[151], the ELRC undertakes a number of initiatives to support and develop arbitrators. On a bi-annual basis it runs professional developments sessions in both legislation and case law. Chris Brunton and Associates run an *Up2speed* legal resource website focusing specifically on the Public Education Sector. It is further made mention by Brunton (2008) that the ELRC has entered into an agreement with *Up2speed* to allow ELRC arbitrators free access to the side. Arbitrators register on the site and get a user name and password.

The Nelson Mandela Metropolitan University in conjunction with ELRC and Chris Burton produces Labour Bulletin on a quarterly basis and arbitrators have access to this document. This Labour Bulletin is designed to update arbitrators with the latest developments in legislation and case law[152].[25]

The ELRC also commissions the ELRC's arbitrators Reference Handbook for distribution. This book is updated from time to time and contains the Code of Good Practice for arbitrators. This also appears in schedule 3 of annexure C to the ELRC Constitution[153].

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[151] Brunton 2008

[152] Brunton 2008 ELRC's Arbitrators Reference Handbook

[153] Resolution 1 of 2006

5 3 RECOMMENTATIONS

The following recommendations arising from some of the weaknesses or loopholes identified are hereafter highlighted.

5 3 1 Wage negotiations between unions and government

These parties always annually start the negotiation late towards the start of the new financial year which is June. This is the time when government implements new salary increases. Negotiations get hurried up and sharper points of disputes are not given adequate time to be debated and negotiated. When arbitrators are called to arbitrate, time is limited and the pressure is mounting. Arbitrators end up using approaches that are forceful and cohesive to the parties to agree to settle quickly.

It is therefore recommended that wage negotiations in the education sector start much earlier, before the compilation of the national budget, so that the unions can be enlightened on the constraints the government will have if teacher salaries are sky rocketed and affect other essential services the government is expected to render on its people. The budget compilation and determination will be done bearing in minds the unions' inputs and demands.

5 3 2 Arbitration job should be made permanent

Currently the CCMA and ELRC have few arbitrators as permanent employees. Many are part-time employees and are paid per hour per case. They do not have many of the benefits that are accorded to fulltime employees of the state such as housing, transport and leave allowance amongst others. Due to this situation, the CCMA is unable to attract quality experienced and skillful arbitrators in labour laws. Some cases are not handled correctly because of poor judgment that lack basic legal facts and legislative knowledge especially as they relate to education dynamics in labour environment. This leads to a situation where some disputes are settled in a hasty manner. Some settlements are done superficially and fail to address the underlying causes of conflict or the real needs of the parties. Over and above, there are many disputes that are referred to the CCMA and remain unresolved or which are not attended to expeditiously because of the few

arbitrators that are available within the CCMA institutions. There is therefore the need to make arbitration a permanent job with attractive packages and incentives. This will help to attract quality arbitrators.

5 3 3 Professional Development and Support for both arbitrators and negotiating parties

It was found that arbitrators are given training by Brunton Associates and through CCMA sponsored workshops and availability of a Hand Book and so forth. It is recommended that law institutions such as Brunton Associates also workshop unions on labour laws and various negotiation intricacies and dynamics. This will help negotiators to understand why certain approaches are followed and decisions are taken. This will minimize the tensions and declarations of strikes by unions. These suggested workshops will help both unions and employers sitting in the collective bargaining councils to understand the various labour laws and to be equipped with negotiation skills. In addition, there must be a consideration to have an annual gathering of panelists to ensure that there is a common understanding on the interpretation of legislation and collective agreements.

5 3 4 Safeguarding of the learner's right to basic education, learning and teaching

Before educators may participate in a strike, the unions must first comply with the provision of section 64 of the Labour Relations Act[154], which in essence provides that the parties must have reached a deadlock in their negotiations; must have referred the matter to the bargaining council for reconciliation and without success, the council must have issued a certificate, and the union must have given the employer seven days' notice of its members' intention to strike[155] .

Although the above process is a long one, it does not in any way address the right of learners to learning and teaching. The teacher's absence during a strike to a large extent affects the process of teaching and not so much the processes of learning. Learning can still take place in the absence of the teacher at high school level and perhaps less so at the primary level. What needs to be done is that once the strike is about to begin,

[154] 66 of 1995
[155] The constitution

teachers must prepare class work for learners that will cover the period of the strike to keep them busy. Learners can be arranged in groups to do assignments and engage in discussion. The School Governing Bodies must be informed so that they can convene parent meetings to inform the parents of the looming teacher strike. The parents must elect unemployed volunteer parents to monitor learning in schools and to bring order. At the primary level, parents can engage learners in extra mural activities which are also a form of learning for the duration of the strike.

5 3 5 Introduction of legislation regulating time period for the teacher's strike

The need to have legislation that stipulates the time period for the teacher's strike should be considered. There should not be indefinite teacher strikes or the strikes longer than three weeks, which have been experienced in South Africa. Legislators can negotiate this period with teacher unions. Once this period has elapsed the Governing Bodies of Schools must organize marches and submit petitions to the department of education on behalf of the teachers. If this does not have an impact, it should be followed by a march of the entire parents of learners throughout the country. To condemn teacher's strike knowing that the Constitution gives them the right to do so and do nothing about their demands is acceptable. Only violent and intimidating strikes can be condemned.

CONCLUSION

This research study has established the facts regarding the approaches of arbitrators in the promotion of disputes in public education. This has been successfully done through identification, analysis and evaluation of the various cases that are handled by arbitrators in the Bargaining Councils and the Labour Courts. The research question has also contributed in guiding the researcher to arrive at the facts and understanding that explains why the approaches of arbitrators promote disputes in public education. This has necessitated the identification of various disputes and the circumstances under which they occur and where they are arbitrated or conciliated. Due to a great number

of disputes that are referred to the CCMA and handled by arbitrators in the bargaining councils and the Labour Court, it was not feasible to analyze all of them except those which were identified to be relevant to the research study. The Code of Conduct for arbitrators as covered in the Constitution of the Education Labour Relation Council proved to be a valuable guiding measure of instrument to evaluate the approaches of arbitrators.

A highlight of the important legislations and laws as covered in the Constitution[156] and the Labour Relations Act[157] gave birth to the Education Labour Relations Act[158]. From the Education Labour Relations Act[159] a number of subsidiary laws governing the function and operation of public education such as the Employment of Educators Act, South African Schools Act[160], and Basic Conditions of Educators Employment Act[161] were identified. The Labour Relations Act[162] again gave rise to various Collective bargaining institutions such as the CCMA, Labour Court and how they function. This has helped to enlighten this research of the enormity of the challenges that arbitrators find themselves engulfed. In the same breathe, the Constitution that enshrines the rights of teachers to strike, accounts for most of the reasons why teacher unions periodically embark on strikes. It has been successfully shown how these strikes weaken the education system and evokes torrents of emotional outburst from academia and society in general.

It has become clear in this research study that the right of teachers to strike and the right of learners to basic education, learning and teaching are two sides of the same coin. The strike situations which involved the withdrawal of labour have placed teacher unions, especially SADTU, which accounts for most of the strikes that happen in education to be in the firing line. Society and academia think that unions in the spirit of patriotism and educational stability must place the learner's rights over and above everything else. It has been suggested that this aspect be given serious circumspection.

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156 The Constitution
157 66 of 1995
158 146 of 1993
159 ibid
160 84 of 1996
161 75 of 1997
162 66 of 1995

Finally, it is undeniable that the institution of collective bargaining as highlighted and the role of arbitrators are the cornerstone of educational stability, democratic governance, and labour peace in the country. Their role must be continuously revisited and evaluated, their skills and knowledge in labour laws be refined and sharpened. It has been shown that whilst in other circumstances their approaches promote dispute, there is also a huge positive factor that they enormously resolve disputes in public education. This resolution of disputes through collective bargaining mechanisms in the bargaining council is a democratic and transparent process that enhances and boosts the confidence of the labour force, the government and business in general. This is attested to by the many dispute referrals to the collective bargaining institutions such as the CCMA, ELRC and the Labour Courts.

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