CRITICAL ANALYSIS OF THE 2007 PUBLIC SERVICE STRIKE AND ITS IMPACT ON THE EVOLUTION OF FORMALISED COLLECTIVE BARGAINING IN SOUTH AFRICA

by

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SUMMARY

Section 213 of the Labour Relations Act defines ‘strike’ as the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and employee, and any reference to “work” this definition includes overtime work, whether it is voluntary or compulsory.

According to Mcllroy:

“As long as our society is divided between those who own and control the means of production and those who only have the ability to work, strikes will be inevitable because they are the ultimate means workers have of protecting themselves.”

The Constitutional Court justified the exclusion of a constitutional right to lock out and the inclusion of a constitutional right to strike by indicating that the right to strike is not equivalent to a right to lock out and is essential for workplace democracy. According to the Constitutional Court employers enjoy greater social and economic power compared to individual workers and may exercise a wide range of power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace. To combat this and have a say in the workplace, the Constitutional Court held that “employees need to act in concert to provide them collectively with sufficient power to bargain effectively with employers and exercise collective power primarily through the mechanism of strike action”. The importance of the right to strike in creating workplace democracy is also reflected in a number of Labour Court and Labour Appeal Court judgments.

The right to strike is essential to bolster collective bargaining and thereby to give employees the power to bargain effectively with employers. The employers on the

1 Mcllroy Strike! How to Fight. How to Win (1984) 15. A similar viewpoint is expressed by the Constitutional Court.
2 In Ex parte Chairperson of the Constitutional Assembly (1996) ILJ 821 (CC).
other hand have economic strength that is used to bargain effectively. That is why the strike enjoys constitutional protection, whereas the lock-out does not.
The 2007 public service strike in South Africa marked an important turning point in the relationship between the state, as employer and public service unions. Being the longest public service strike in the country’s history, it has dispelled the notion that public servants will not go out on strike for more than a day or two as has been the practice in the past.

It has revealed not only the challenges facing both sides in moving forward but has highlighted the dynamics influencing the collective bargaining process within the Public Service Co-ordinating Bargaining Council (PSCBC). The PSCBC, established just over 10 years ago, is the central institution which co-ordinates collective bargaining within the public service.

This paper, based partly on research on the evolution of formalized collective bargaining in the public service, is focused on the meaning of a strike in South African law as its starting point. The paper also explores the collective bargaining framework in which the 2007 negotiations took place. This includes a brief look at the formation of the PSCBC, the configuration of unions within the PSCBC and the interplay between the formal PSCBC negotiations and the informal which tends to play itself out within the tripartite alliance structures. The second part of the paper explores the collective bargaining challenges facing the parties in the PSCBC.

Jurisprudence in managing the strike has taken a great deal in identifying and interpreting the impact of the strike law regime. The paper further gives an overview of the contributions made by the Labour Courts in developing strike law from the inception of the Act. The Labour Courts have handed down a number of judgments that have guided in clarifying the provisions of the Labour Relations Act 66 of 1995 and the International Labour Organisation (ILO) Conventions and Treaties in relation to strikes. It will further be discussed in this paper whether the actions of the parties at the PSCBC complied with both the International law and the labour legislation.
CHAPTER 2
DEFINING AND ANALYSING A STRIKE

Cognisance will be given to section 213 of the Labour Relations Act, No 66 of 1995 (hereinafter “the LRA”) and an analysis of its elements, viz: an action or omission of a prescribed nature, concerted, against an employer or an ex-employer, for a prescribed purpose, for the purposes of remedying a dispute and matter of mutual interest.

Section 213 of the LRA defines a strike as

“the partial or complete concerted refusal to work, or the retardation or obstruction of work, by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work whether it is voluntary or compulsory”.

It is important to unpack the above elements by giving meaning to the words used in the definition of strike in section 213 of the LRA,\(^3\) and further establish its relevance and implications to the public service strike.

Concerted refusal to work in the context of the 2007 public service strike means all registered trade unions admitted to the Public Service Co-ordinating Bargaining Council (PSCBC), in terms of section 6 of the PSCBC Constitution,\(^4\) a single trade union party may apply for admission to the Council if it meets the threshold requirement of 50 000 members. Eight (8) trade unions admitted to the PSCBC acted with a common purpose to engage in strike action with an aim to coerce the employer to accede to their demands.

In Schoeman v Samsung Electronics SA (Pty) Ltd\(^5\) it was held that an individual employee cannot take strike action. In Co-operative Worker Association v Petroleum

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\(^3\) Labour Relations Act 66 of 1995.
\(^4\) PSCBC Constitution.
\(^5\) [1997] 10 BLLR 1364 (LC) at 1367.
Oil & Gas Co-operative of SA,\(^6\) without referring to the above ruling, the court came to the opposite conclusion. It was further substantiated that in Schoeman v Samsung Electronics\(^7\) is consistent with the characterization of a “strike” as “concerted” action which, by definition appears to require more than one participant.

Retardation or obstruction of work occurred during the public service strike as numerous incidents of blockages to access entrance to premises was witnessed. The occurrence of this nature affected the public and the normal flow of service provision.

The SA Breweries Ltd v SACWU\(^8\) has relevance to the public service strike. The Appellate Division held that the phrase “retardation … of the progress of work” refer to work to rule, a situation where work is done but at a substantially reduced levels of activity and productivity. Strikers in the public service pretended as being keen to access office to continue with daily activities, this pretence was a means to threaten and intimidate those who genuinely wanted to provide service.

One of the grounds for the public service strike implied that employees in the bargaining unit, employed by the same employer had a common and direct interest in their dispute for substantial wage increase.

I agree with Landman in Afrox Ltd v SACWU v Afrox Ltd\(^9\) that even a protected strike may only be pursued in respect of the original issue in dispute and not in support of any new demand. The latter was exactly the case in the public service where the labour organizations kept on shifting and escalating their wage demand even when a principle of indirect remuneration and trade off was reasonably explained.

Although the dispute was arbitrable and/or adjudicable the conduct by the labour organisations could be viewed as having an intention to advance power play and furtherance of strike.

\(^6\) [2007] 1 BLLR 55 (LC) at 23 PSCBC Constitution.
\(^7\) Supra.
\(^8\) 1990 (1) SA 92 (A) at 100.
\(^9\) [1997] 4 BLLR 382 (LC).
Indeed the purpose of the public service strike was used as remedial effort and coercion to resolve a dispute in respect of wage demands and other benefits demanded by trade unions admitted to the PSCBC. This is a dispute of interest as the employer is not compelled to accede to employees wage demands, however section 64(1) of the LRA and section 23(2)(c) of the Constitution\textsuperscript{10} give employees the right to embark on protected strike if the terms of the above section have been exhausted. Section 36 of the Constitution makes provision for limitation of rights where human dignity, equality and freedom as spelt out in the Bill of Rights would be infringed.

The public service strike regarding wages related to economic demands which constitute a matter of mutual interest between the employer and employees. The object of promoting “economic development” in \textit{Foodgro v Keil}\textsuperscript{11} is qualified by the injunction that it must be done in conjunction with other goals such as promoting labour peace and effective resolution of labour disputes. Although this cannot be achieved easily without power play at times, the principle is sound in that when employers can afford to offer descent wage increases to employees, they should do so to minimize chances of jeopardizing long term relationship with their employees.


\textsuperscript{11} [1999] 9 BLLR 875 (LAC) at par 11.
CHAPTER 3
STRIKES: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE

South Africa as a member state to International Labour Organisation (ILO) has adopted international labour law obligations in its Labour Relations Act, to give effect to its ratification of two ILO conventions, *ie* the Freedom of Association and Protection and the Right to Organise, Convention No 87 of 1948 and the Right to Organise and Collective Bargaining Convention No 98 of 1949. These conventions guarantee the right of employers and employees to join, form and partake in the activities of trade unions and employers’ organizations, as well as their independent existence.

3.1 PROMOTION OF COLLECTIVE BARGAINING

The rights to collective bargaining are *sine qua non* conditions for a trade union to play its role of promoting and defending the interests of its members.

Although the majority of States recognize the principle of collective bargaining, they have varying approaches to its implementation.\(^{12}\) ILO Convention No 98, Convention No 154 and Recommendation No 163 on the promotion of collective bargaining (1981), call on the States to take positive measures to enable all employers and all categories of workers to negotiate at all levels. Although Convention No 98 allowed exception to the defence force, police and the public servants, the ILO’s aim is to extend bargaining to all employees in respect of conditions of employment. In response, South Africa became progression in accomplishing this aim through the inclusion of the Police Service and public servants in collective bargaining in line with the terms of the Labour Relations Act.\(^{13}\)

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\(^{13}\) 66 of 1995, Part D.
3.2 COLLECTIVE BARGAINING IN THE GLOBE – A PERSPECTIVE

Belgium has provided for the establishment of joint committees in companies, regions or sectoral levels. These structures have a duty to conclude collective agreements.

In Ireland and Italy the specialized institutions have a duty to promote social dialogue between the partners. Belgium, France and Germany adopted procedures to extend collective agreements to employers and employees who are not represented in collective bargaining, however the provisions of the collective agreements are binding to non members.

This practice exists in the South African labour law with the exclusion of employers in which section 23(1)(d) of the LRA states

“collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if …”.14

The public service is no exception to this rule. There are a number of the collective agreements concluded by the majority trade unions registered with the PSCBC which bind small unions and non union members, for an example, multi term wage agreements which include remuneration and conditions of service and an agency shop agreement, which requires the employer to deduct an agreed agency fee from wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.15

The United States, Japan and Sweden subscribe to an obligation to bargain.16 Parties discuss issues pertaining to claims against each other, the public authorities would ensure that parties negotiate in good faith and strive to reach an agreement. This practice resembles to resolution of disputes through conciliation in terms of section 135 of the LRA.17

15 Supra.
16 France see Morin: Le droit des salaries a la negociation collective principe general du droit (Paris), LGDJ, (1994).
The ILO Recommendation No163 calls for the parties to have access to information for meaningful negotiations, this practice is regulated by the law in most countries including those cited above. In South Africa this requirement is regulated by “Disclosure of Information”, section 16(2) of the LRA\textsuperscript{18} which bears the same principle as discussed above. The public service also subscribe to the principle of section 16(2) mentioned above, more over transparency is one of the elements contained in Batho Pele principles of the Government, meaning that all citizens should have access to information.

3.3 THE INTERNATIONAL POSITION

The laws governing strikes depend on the political system and vary considerably throughout the world. Strikes can have a revolutionary approach and work against social and production relations, this is anathema to the authorities, even if they are not totalitarians. We have seen this happening in the public service during 2007 strike, but strikers articulated that, “the strike for them was primarily a reaction to deteriorating living and working conditions and not about party politics or tensions which existed around the succession debate within the ANC”.

More often than not a strike expresses an irritation, a spontaneous revolt against what are deemed to be unacceptable employment conditions. The International Covenant on Civil and Political Rights makes provision for strikes. Convention No 87 gives entitlement to trade unions to formulate their programmes and organize their activities.\textsuperscript{19} In the United Kingdom strike is regarded as freedom in that the essence of the contractual responsibility is observed. Employees reserve the right to strike and the employers are not expected to take punitive measures against the striking employees.

In Sweden only trade unions are authorized to strike. France recognizes strike for individual workers and only allow them in the classic form such as slowdown, rotating strikes, work-to-rule, boycotts and direct action.

\textsuperscript{18} Supra.  
The ILO supervisory bodies have restrictions to strike that hinders security in companies while voluntary conciliation and arbitration is ongoing or the collective agreement is in force. Purely political strikes may be prohibited, or the right to strike can be suspended where economic or national crisis is acute.

The ILO has made provision for the minimum service rather than prohibiting strikes. The ILO is not distinct in prohibition of strike in essential service, but to say strikes may be prohibited, in the essential service, however a provision prevails for disputes to be settled through rapid and effective procedures for conciliation and arbitration between the parties.20

The laws, regulations and practices to deal with strikes in many countries are similar to what is enforced in the South African labour law. Convention No 87 which gives an entitlement to trade unions to formulate their programmes and organize their activities is related to section 14(4) of the LRA which makes provision for trade unions to perform their functions as spelt out in (a) to (d) of this section. The United Kingdom practices are similar to section 4 of the LRA, which provides “employees right to freedom of association”. The nature and the form of strikes in Sweden are not different to South Africa.

The LRA makes provision for trade unions to refer disputes on matters of mutual interest to conciliation, if the matter remains unresolved fourteen (14) days notice to embark on strike can be given, alternatively a dispute can be resolved through arbitration. Section 72 makes provision for the Essential Services Committee to ratify a collective agreement that provides for the maintenance of minimum services in an essential service institution. Furthermore, section 74 of the LRA precludes employees in an essential service to participate in a strike, instead make provision for speedy resolution of disputes for employees in an essential service.

The above conforms to provisions made by the ILO in terms of minimum service agreement and matters affecting employees in an essential service. In a nutshell

practices in the globe as directed by the ILO and the International Labour Committee (ILC) are not different to South Africa. This is confirmation that South Africa as a member state to the ILO has adopted these practices. The public service strike was also guided by the same principles and laws governing strikes in terms of the Constitution and the LRA.

Arendse AJ noted in *FAWU v Pets Products (Pty) Ltd*\(^{21}\) that

> “whereas under the unfair labour practice regime, the courts had to interpret and give effect to the intention of the law-giver by often convoluted and complex routes, by, for example, reference to the ILO conventions and recommendations, the situation currently is that the Act expressly incorporates such instruments by reference. It can now be taken for granted that the conduct of employers and their organizations and employees and their trade unions, will be judged according to the Constitution and according to ILO standards.”\(^{22}\)

\(^{21}\) [2000] 7 BLLR 781 (LC).
\(^{22}\) 788(B-C).
CHAPTER 4
THE LEGAL FRAMEWORK GOVERNING STRIKES IN SOUTH AFRICA IN TERMS OF THE CONSTITUTION AND THE LABOUR RELATIONS ACT

4.1 CONSTITUTIONAL RIGHT TO STRIKE

In *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA*\(^23\) it was held that strikers have two avenues of ensuring that their strike is protected. One is to comply with the provision of section 64(1); the other is to comply with the procedure contained in a collective agreement. The choice rests with the would-be strikers. Once they have complied with the provision of section 64(1), even though they failed to comply with the collective agreement, the strike will be protected.

In the public service strike, trade unions complied with both section 64(1) of the LRA as well as the collective agreement in terms of the PSCBC Constitution which states that, a dispute of mutual interest includes a dispute\(^24\)

\(a\) that is declared by a party to Council in terms of clause 16.6 of its constitution;

\(b\) between the employer and a party to the Council or the employer and a non-party to the Council, which concerns a matter of mutual interest contemplated in section 134 of the LRA.

Trade unions at the PSCBC exhausted both avenues, hence their strike action was protected. This argument goes along with the Labour Court decision in *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA*.\(^25\)

In *County Fair Foods (Pty) Ltd v FAWU*\(^26\) the Labour Appeal Court confirmed that employers and employees are not required to comply with the pre-strike provision of a collective agreement if they have compiled with provision of the Act.

\(^{23}\)[1997] 10 BLLR 1292 (LC).
\(^{25}\) Supra.
The Labour Appeal Court argument in County Fair Foods (Pty) Ltd v FAWU\textsuperscript{27} that employers and employees are not required to comply with the pre-strike provision of a collective agreement if they have compiled with provision of the Act is sound because the two processes are mutually exclusive. In Columbus Joint Venture \textit{v} Columbus Stainless Steel \textit{v} NUMSA, the Labour Court held that “even though they failed to comply with the collective agreement, the strike will be protected”. Both the Labour Court and the Labour Appeal Court expressed the notion of compliance to the Act as the legislative framework which carries more power compared to the collective agreement.

In Ceramic Industries Ltd \textit{v} Betta Sanitaryware \textit{v} NCBAWU\textsuperscript{28} the Labour Appeal Court held that the purpose of section 64(1)(b) is to “warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer can deal with that situation”.\textsuperscript{29} That purpose is defeated if the employer is not informed when the proposed strike will commence. A notice that fails to state when the strike will commence is therefore defective. In determining whether there has been compliance with section 64(1)(b) of the Act an interpretation must be sought which best gives effect to the broader purpose of the Act and the specific purpose of the section itself.\textsuperscript{30}

However, in Tiger Wheels Babelegi (Pty) Ltd \textit{v} TSW International \textit{v} NUMSA\textsuperscript{31} Zondo J (as he then was) found that nothing in the Act requires strikers to commence their strike on the day stipulated in the notice. Whether employees had waived their right to strike under these circumstances was a question of fact that had to be determined inter alia by the length of the delay in commencing the strike. In County Fair Foods (\textit{a division of Astral Operation Ltd}) \textit{v} Hotel Liquor Catering Commercial and Allied Workers Union,\textsuperscript{32} where the notice identified the date of the commencement of the strike and was given some 13 days in advance, Murphy AJ

\begin{footnotesize}
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\item[26] [2001] 5 BLLR 494 (LAC).
\item[27] \textit{Supra}.
\item[28] [1997] 6 BLLR 697 (LAC).
\item[29] 670B.
\item[30] \textit{Supra}.
\item[31] [1999] 1 BLLR 66 (LC).
\item[32] [2006] 5 BLLR 478 (LC).
\end{itemize}
\end{footnotesize}
held that it would be formalistic in the extreme to declare the notice invalid because it failed to specify a time. The primary question, it was held, is whether the strike notice gave the employer proper warning and the opportunity to take other steps to protect its business.

In *Adam v Coin Security Group (Pty) Ltd*[^33] the court noted obiter that a strike notice which did not say that the workers would go on strike or when the strike will commence might not have complied with the section 64(1)(b) but, since the parties accepted it as a being valid, did not need to rule on the question.

Where notice of a strike by all employees in an industry was given to the bargaining council, such notification was held to be sufficient for purposes of section 64(1)(b), also in respect of employers that were not party to the council. Non-party employers therefore did not have to be given notice individually[^34].

We should establish whether obligations required by section 64 of the LRA were observed during the strike action in the public service. A notice of the strike action from SADTU, NEHAWU and SASAWU was forwarded to the Minister of Department of Public Service and Administration and the PSCBC. This notice stated that “all the unions have indicated that the strike action will commence from 07:00 on 25 May 2007”.

Let us consider this issue in the context of the LRA and the relevant case law which have been cited above. Section 64(1)(b) of the LRA states without ambiguity that, “in the case of a proposed strike, at least 48 hours’ notice of the commencement of the strike, in writing, has been given to the employer”.

The Labour Appeal Court held, in *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU*, that the purpose of section 64(1)(b) is to “warn the employer of collective action and when it is going to happen”. It is emphasised in this judgment that a notice that fails to state when the strike will commence is therefore defective.

[^34]: *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA* [1999] 1 BLLR 66 (LC).
The public service trade unions complied with section 64(1)(b) of the LRA and the LAC judgment in the *Ceramic Industries* case\(^{35}\) because the Government was given a notice on 25 May 2007 in respect of the strike action which commenced on 1 June 2007. This notice exceeds the minimum of 48 hours notice of the commencement of the strike as required by the LRA.

I agree with the argument of Zondo J (as he then was), in *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA*,\(^{36}\) that nothing in the Act requires strikers to commence their strike on the day stipulated in the notice, because the Act stipulates that at least 48 hours’ notice of the commencement of the strike, in writing, must be given to the employer. Zondo J was correct to say that the question whether employees had waived their right to strike under the circumstances was a question of fact that had to be determined *inter alia* by the length of the delay in commencing the strike.

Zondo’s argument applies to the circumstances in the public service where the strike notice of the 25th May was delayed for a week. These circumstances are similar to *County Fair Foods v Hotel Liquor Catering Commercial and Allied Workers Union*\(^{37}\) where the notice was given some 13 days in advance. The primary question Murphy AJ asked in his judgment was whether the strike notice gave the employer proper warning and the opportunity to take other steps to protect its business. This judgment carries the same tone as the judgment of Zondo J in *Tiger Wheels Babelegi*.\(^{38}\)

It is submitted that the court, in *Adam v Coin Security Group (Pty) Ltd*\(^{39}\) was correct to say that a strike notice which did not mention that the workers would go on strike or when the strike will commence, might not have complied with the section 64(1)(b). However, where a notice of a strike by all employees in an industry was given to the bargaining council, such notification was held to be sufficient for purposes of section 64(1)(b)(i) of the LRA. This was also the case in the public service strike.

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35 \textit{Supra.}

36 \textit{Supra.}

37 \textit{Supra.}

38 \textit{Supra.}

39 \textit{Supra.}
4.2 LIMITATION OF THE RIGHT TO STRIKE IN TERMS OF THE CONSTITUTION

In *Adonis v Western Cape Education Department*,\(^{40}\) Mlambo J ruled that the LRA excludes from its application the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National academy of Intelligence, therefore the LRA applies to all other sectors.

In *Member of the Executive Council for Transport: KwaZulu-Natal v Jele*\(^{41}\) the Labour Appeal Court explained the exclusion of the above-mentioned categories by stating that

“[t]he excluded employees may well be adequately provided for in another Act and, if that is so, they could not have any cause for complaint about unfair discrimination on the basis that they are excluded from [the protection of the LRA].”

The limitation of the right to strike for the job categories mentioned above in the public service takes cognisance of the sensitivity and the nature of jobs in these categories, which forms part of security services in terms of the Constitution,\(^{42}\) for example, the security services of the Republic consist of a single defence force, police services and any intelligence services established in terms of the Constitution.

In *Murray v Minister of Defence*,\(^{43}\) in the matter of allegedly constructive dismissal of a member of the South African National Defence Force, the court ruled that an excluded employee may approach the High Court to claim damages based on breach of contract, in which event the court is enjoined by section 8(3) of the Constitution to “apply and develop the common law to the extent that legislation does not give effect to a particular right”, provided that the limitation is in accordance with section 36(1) of the Constitution.

\(^{40}\) [1998] 6 BLLR 564 (LC).
\(^{41}\) [2004] 12 BLLR 1238 (LAC) at par 37.
\(^{43}\) [2006] 8 BLLR 790 (C) at par 22.
4.3 CONSTITUTIONAL RIGHT TO STRIKE DISTINGUISHED FROM RIGHT TO PROTEST ACTION

In *Government of the Western Cape Province v COSATU*\(^{44}\) the applicant asked the court, should it find that the proposed protest was lawful, to order that it take place on a non-school day. Mlambo J held that this would amount to a limitation of the first respondent’s constitutional right to strike. To the extent the Act permitted the court to limit the nature or duration of a strike protest action, it should do so on the basis of proportionality, that is by weighing the importance of the matter giving rise to the action against the nature and duration of the proposed action. In this case it was held that the matter giving rise to the protest action was of fundamental concern not only to workers but to society as a whole. To limit protest action over such an issue would require compelling reasons, which had not been provided by the applicant.

In the earlier matter of *Business SA v COSATU*,\(^{45}\) however, the Labour Appeal Court had explicitly distinguished the right to take protest action from the constitutional right to strike, which is an aspect of the right to bargain collectively. While this in itself does not render the right to protest action any less important, it was held, the interpretation and application of that right needs to be assessed in a broader context than the fundamental “labour rights”. The parties to collective bargaining are primary restricted to employers and employees. Not so in the case of the protest action. Collective bargaining is not at stake. The extent of the right to protest action involves the weighing up of that right, taking not only the rights of employees and employers into consideration, but also, importantly, the interest of the public at large and, in a case such as this, the effect of the national economy. In a nutshell: the purpose of the Act does not necessarily require an expansive or liberal interpretation of section 77, in the sense that the exercise of the right to protest action must be restricted as little as possible.

The right to protest action as enshrined in the Constitution and the Act, this freely took a form of mass action when the unions mobilised on 25 May 2007, although various attempts were made by the employer to stop the mass action. This protest action did not comply with the requirements of section 77 which were enacted to

\(^{44}\) [1998] 12 BLLR 1286 (LC).

\(^{45}\) [1997] 5 BLLR 511 (LAC) at 517.
promote and defend socio-economic interests of workers. It concerned the demand on the state as employer. The Minister of Public Service and Administration Geraldine Fraser-Moleketi argued that the unions had not exhausted the bargaining process. Following action on 25 May, the parties met again on the eve of the strike on 28 and 29 May in an attempt to break the impasse.

The strike went ahead on 1 June and received overwhelming support from the majority of the unions. Countrywide marches and demonstrations took place while government services were almost brought to a standstill despite attempts to prevent essential service workers from going out on strike.

The right to strike enshrined to every employee in terms of section 23(2)(c) of the Constitution of the Republic does not replace citizens rights in terms of the Bill of Rights, such as the right to life provided for in section 11, and the right to health care in terms of section 27(1)(a) of the Constitution. The nurses in the public service are designated as an essential service in terms of section 71 of the LRA. Their participation in strike action was in violation of chapter 2, of the Bill of Rights and also in breach of section 77(4)(a) of the LRA in which the order was made by the Labour Court to refrain from participating in protest action in the government institutions.

The above debate further extend to the application of section 36 of the Constitution where their right to participate in strike was limited in terms of the law as this limitation was reasonable and justifiable based on protection of violation of human dignity.

Mlambo J’s argument in Government of the Western Cape Province v COSATU, where he is making reference to a limitation of the first respondent’s constitutional right to strike is based to lawful proposed protest action, which situation in the public service where nurses participated in protest action outside the working hours was permissible in terms of the law, however participation on strike was in breach of the law. Consideration should be given to the fact that the court took cognisance of the facts presented during the set down in consideration of the application for the interdict, hence the Labour Court issued an interdict in favour of the Government that the nurses action was unlawful. The court therefore could not find any fundamental
reasons compelling it to grant the nurses action as lawful, which judgment would be in breach of the Bill of Rights and sections 71 and 77 of the LRA.

In *Business SA v COSATU*, the Labour Appeal Court had explicitly distinguished that collective bargaining is not at stake. The extent of the right to protest action involves the weighing up of that right, taking not only the rights of employees and employers into consideration, but also, importantly, the interest of the public at large. This judgment directly conforms with the earlier argument which gives priority to citizens’ rights in terms of the Bill of Rights, such as the right to life provided for in section 11, and the right to health care in terms of section 27(1)(a) of the Constitution.
CHAPTER 5
THE COLLECTIVE BARGAINING FRAMEWORK IN THE PUBLIC SERVICE AS DETERMINED BY LAW

5.1 PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL (PSCBC)

The Public Service Co-ordinating Bargaining Council was established with the aim of creating a culture of engagement and dialogue between public service unions and the State. The desire to create a culture of social dialogue is embodied in section 36 of the Labour Relations Act (LRA),\(^46\) which laid the foundation for the establishment of the Council.

Prior to 1993, no formalized collective bargaining existed in the public service, with employees denied basic labour rights such as the right to bargain collectively, to join unions and the right to strike. The State Advisory Board, the Joint Advisory Council (JAC) merely consulted traditional white unions on issues of collective bargaining affecting the employees, who were allowed to make written submissions while black unions were excluded from this process.

As the country moved towards the first democratic elections and worker mobilization intensified in the public service, the first formalized collective bargaining structures were established in terms of the Public Service Labour Relations Act (PSLRA) and the Education Labour Relations Act promulgated in 1993. The PSLRA established the Public Service Bargaining Council, a Central Chamber at a national level while the Education Labour Relations Act established a sector specific bargaining council for educators. Instability in police and prison departments led to the passing of the regulations\(^47\) which established the National Negotiation Forum (NNF) for the South African Police.

One of the first pieces of legislation promulgated by the newly elected democratic government post-1994 was the Labour Relations Act. It sought to ensure that for the

\(^{46}\) Labour Relations Act 66 of 1995.

first time, public servants would be governed by the same labour legislation as workers in the private sector and provided for the establishment of a statutory bargaining council in the public service known as the Public Service Co-ordinating Bargaining Council (PSCBC). After almost nine months of negotiations, an agreement was reached, the PSCBC Constitution was ratified and the Council was registered on 13 October 1997.

The PSCBC sought to deal with the fragmented system of collective bargaining created by the three separate statues namely the ELRA, PSLRA and SA Police Regulations. Hence, the LRA proposed the establishment of the PSCBC to be a forum for negotiating issues affecting the entire public service. The LRA made provision for ensuring that structures such as the ELRC and the NNF were all deemed to be sectoral bargaining councils of the PSCBC as provided in section 37 of the LRA. The PSCBC was designed to cover all employees across the public service including educators and police. Aside from regulating and setting employment conditions, the PSCBC's key function is to create a platform for developing sound labour relations. In pursuance of this objective, the PSCBC has, over the last ten years, created a rather sophisticated three-tier system of bargaining. The PSCBC is comprised of a central bargaining structure with four designated sector councils, known as Education Labour Relations Council (ELRC); Public Health and Social Services Bargaining Council (PHSSBC); Safety and Security Sector Bargaining Council (SSSBC) and General Public Service Sector Bargaining Council (GPSSBC) as well as nine provincial chambers. The PSCBC pivotal role and main function is to ensure the application of section 36(2)(b) of the LRA, in matters which apply to terms and conditions of service that apply to two or more sectors.

The overarching framework for conditions of employment and regulations pertaining to employment for the public sector are negotiated at PSCBC level. As most of the agreements negotiated at PSCBC level are framework agreements, the details and implementation are discussed at a Sector Bargaining Council.
5.2 CONFIGURATION OF UNIONS AT PSCBC

“… In practice ensuring the solidarity of workers is problematic … On the other hand there are forces which encourage sectionalism and self-interest amongst specific groups of workers, such as skilled workers, who may believe they have the power to improve only their own situation.”

The vast majority of public servants are union members. This is partly a result of the Agency Shop agreement which was concluded between the parties at the PSCBC in terms of section 25(1) of the LRA, which “requires the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof”. At the time of its establishment, twelve (12) trade unions were granted admission. The council was registered with a threshold of 20,000. This was subsequently increased in 2003 to 50,000, with the result that there are now eight (8) admitted unions, with some having acting together agreements with a number of smaller unions. The eight admitted unions are divided into three main power blocs and include the following:

COSATU AFFILIATES: National Education Health and Allied Workers Union (NEHAWU), South African Democratic Teachers Union (SADTU), Democratic Nurses Organisation of South Africa (DENOSA), Police and Prisons Civil Rights Union (POPCRU)

FEDUSA: Hospersa (together with Nupsaw and Natu)

INDEPENDANTS: Public Service Association (PSA), National Professional Teachers Organisation of South Africa (NAPTOSA) (was linked to Consawu) and South African Police Union (SAPU)

Clause 11(1) of the PSCBC Constitution states that, “the voting rights of an

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48 Finnemore and Van der Merwe Introduction to Industrial Relations in SA.
50 Constitution of the PSCBC, Application of trade unions for admission to Council, s 71(a).
51 Constitution of the PSCBC.
admitted trade union in the Council must be determined on the basis of the number of members in good standing of such a trade union who are employees as on 31 December of the previous year in proportion to the number of members who are employees represented by all the trade unions admitted to the Council”.

As at 31 December 2008, configuration of unions at PSCBC were as follows:52

<table>
<thead>
<tr>
<th>Trade Union</th>
<th>Membership</th>
<th>Vote Weight</th>
<th>Reps. at the PSCBC</th>
</tr>
</thead>
<tbody>
<tr>
<td>SADTU</td>
<td>239 095</td>
<td>23.208%</td>
<td>5</td>
</tr>
<tr>
<td>PSA</td>
<td>185 281</td>
<td>17.984%</td>
<td>5</td>
</tr>
<tr>
<td>NEHAWU</td>
<td>171 565</td>
<td>16.653%</td>
<td>5</td>
</tr>
<tr>
<td>POPCRU</td>
<td>131 285</td>
<td>12.743%</td>
<td>5</td>
</tr>
<tr>
<td>HOSPERSA</td>
<td>101 872</td>
<td>9.888%</td>
<td>5</td>
</tr>
<tr>
<td>SAPU</td>
<td>79 895</td>
<td>7.755%</td>
<td>4</td>
</tr>
<tr>
<td>NAPTOSA</td>
<td>64 612</td>
<td>6.272%</td>
<td>3</td>
</tr>
<tr>
<td>DENOSA</td>
<td>56 636</td>
<td>5.497%</td>
<td>3</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>1 030 243</td>
<td><strong>100.000%</strong></td>
<td><strong>35</strong></td>
</tr>
</tbody>
</table>

* The above information was provided by an independent Auditor to the PSCBC, these figures represent all employees that contribute to various trade unions as at 31 December 2008.

Five (5) is the maximum number of representation at the PSCBC. The PSCBC determination comply with the provisions of section 18(1), “Right to establish thresholds of representativeness” of the LRA.53

These unions were historically divided along racial, ideological and occupational lines which meant that co-operation proved to be extremely difficult even amongst unions within the same trade union federation. This generally suited the State, as the employer to adopt a divide and rule approach towards the unions if the employer had chosen to do so. During the early years of the PSCBC, unions remained largely fragment but by the 1999 strike, later on the unions took a first step to realizing the

benefits of working together. This does not discount the fact that unions representing similar workers such as SADTU and NAPTOSA shared common positions and forged an alliance in their sector council.

By the start of the 2004 negotiations and the subsequent strike, the unions were holding joint meetings and sought to co-ordinate industrial action. The same was the case during the 2007 negotiations with the unions tabling a consolidated set of demands and agreed on a joint programme of action. Over the years, various realignments have taken place within the three groupings. The COSATU BLOC now makes up the majority within the Council. This was not always the case. In the early years, the FEDUSA BLOC held some influence because of the PSA. The COSATU BLOC only obtained a majority in 2004, of which its affiliates constituted 54% at the PSCBC. Prior to that COSATU needed some of the independents to support them in order to get majority. During that period, the independents did not have any firm alliances and tended to vacillate between the two union blocs. However, more recently, some of the independent unions have moved over to COSATU whilst last years’ negotiations revealed an attempt by the independents to form themselves into a more organised bloc, which if sustainable, could have future implications for the alignment of unions in the PSCBC.

During 2006, the PSA with a membership then of 195 000 (now claiming over 200 000) decided to disaffiliate from FEDUSA – a move which had been on the cards for some time. The PSA subsequently entered into informal talks with various public sector unions such as the independent SA Police Union (SAPU) and the National Professional Teachers Organisation of SA (NAPTOSA) with the aim of exploring closer working relations in the build up to the negotiations.

The informal discussions between the PSA and the independents led to the signing of a Memorandum of Understanding which facilitated the formation of the Independent Labour Caucus (ILC). The ILC comprises PSA, NAPTOSA, SAOU and SAPU as the four larger unions and four smaller unions (Peu, Nupsaw, Npswwu and Unitsa) who form part of acting together as a single party (referred to as a combined
trade union party) in terms of the PSCBC Constitution. Together these unions make up 40% of votes to the Council.

The situation amongst the COSATU affiliates has been no less complicated with similar tensions and divisions existing. For example, the 2007 strike revealed, yet again, the cleavages which exist not only between NEHAWU and DENOSA and POPCRU but also between NEHAWU and SADTU. Over the years, NEHAWU and SADTU have sought to work together however, the differences between the two have, in the past, largely stemmed from the “different dynamics of the sectors in which they operate and the type of workers they represent”.

Differences between the two unions can be traced back to the early years of wage negotiations in the public service even prior to the formation of the PSCBC. NEHAWU and SADTU not only represent different kind of workers but their histories and traditions differ. NEHAWU was formed in 1987 during the height of struggles in support of union recognition while SADTU was formed in 1990 through an amalgamation of fifteen (15) organizations, some being traditional staff associations. SADTU organises and represents only one category of workers, educators and not general workers who are considered to be skilled and classified as professionals. NEHAWU is effectively a general union and represents workers across a range of government departments and skills levels from unskilled (cleaners) to skilled and middle management level. Whilst the union has a diverse membership, its base is predominantly lower paid workers.

The situation between SADTU and NEHAWU is further complicated by the fact that in the early years of the PSCBC, NEHAWU always held the leadership position within the PSCBC negotiations. NEHAWU negotiators were the main spokespeople for the COSATU BLOC with SADTU playing a subordinate role. During the 2007 negotiations, both the chief negotiator for all the unions and the spokesman for the COSATU unions came from SADTU.

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54 Constitution of the PSCBC, Application of trade unions for admission to Council, s 7.2(a).
5.3 ENVIRONMENT IN WHICH NEGOTIATIONS TOOK PLACE

A clear distinction should be made between negotiation and simple consultation. The duty to negotiate is far more onerous than the duty to consult. A decision of the Appellate Division in *Atlantis Diesel Engines (Pty) Ltd v NUMSA*[^56] and jurisprudence in terms of the 1995 LRA, which render it doubtful whether the process of consultation can still be distinguished from “negotiation” in any meaningful sense except, possibly, with regard to the question whether industrial action is permissible in the event of deadlock.

The political and economic context in which the public service negotiations occurred might have influenced the dynamics which were to unfold during the nine month process. For employees, there was a real sense that the economy was growing and that some sections of the population were becoming more prosperous, leading to a view that income inequality was on the rise.

Overall, there was a feeling that workers, especially public servants, have largely been ignored as reflected in the perception that real worker gains have been eroded by inflation. More importantly, public servants revealed during interviews that they felt they had borne the brunt of government’s inflation targeting drive, which did not appear to be applicable to their counterparts in state owned enterprises and elsewhere. Workers across the board, including public servants, face increased financial commitments which inadvertently led employers, in a number of sectors, to become complacent about the possibility of strike action.

The nursing fraternity, educators and general public servants revealed the extent of their financial constraints and growing dissatisfaction with their employer and the state of their workplaces.

One of the employees is quoted saying:

“I have been working in the public service for 30 years and have been on the same level for the last 12 years… We see senior management are being..."

upgraded (and compensated) and we feel there are inconsistencies and a growing feeling of inequality.”

There has been growing dissatisfaction and frustration amongst public servants for some time now, former COSATU and FEDUSA negotiators in the PSCBC argued. “This, they claim, could partly have been reflected in the strikes of 1999 and more so in 2004. The 2007 negotiations, therefore, took place within the current discourse which is one of deep frustration with the states’ approach to service delivery as reflected in the deteriorating material conditions of public servants who feel they have been ignored.” As employees articulated, the strike for them was primarily a reaction to deteriorating living and working conditions and not about party politics or tensions which existed around the succession debate within the ANC. COSATU official said,

“The strike was about reclaiming back our dignity. It was not about supporting Zuma or anyone else but about a government that is attacking us. This wage negotiations was now or never. If we do not turn around the whole salary negotiations and get more favourable dispensation for workers it will never happen again.”

Having said that however, it should be acknowledged that:

“One couldn’t divorce politics from collective bargaining in the public service by virtue of the nature of the dynamics. It is inevitable that public service negotiations by their very nature are bound to be political.”(Former government negotiator)

Public service unions at all times engage with an employer who is the state. It is through this engagement that a government’s spending priorities are brought into question and hence, potential ideological and political differences. The situation in South Africa is complicated by the fact that the state’s ruling party is in an alliance with the majority unions within the PSCBC. These dynamics have informed previous negotiations and settlements.

“The 2007 negotiations took place at a time when COSATU felt deeply marginalized in the alliance and sought to grapple with issues around the governance of the state”, said COSATU official. Hence, from a leadership level, the negotiations and subsequent strike might have been viewed as a political response to a particular political environment which was exacerbated by tensions which existed in the build-
up to the ANC’s Polokwane Conference.

These dynamics should have been factored into the 2007 round of negotiations by the employer. However, in doing so, the employer labeled the strike as being purely “political”, thereby ignoring real valid worker grievances and discontent. The level of discontent resulted in many public servants going out on strike for the first time in their lives. Hence, the political labeling given to the strike, does not fully explain away real worker issues, which exist.
CHAPTER 6
WAGE NEGOTIATIONS AND 2007 STRIKE IN THE PUBLIC SERVICE

6.1 NEGOTIATING PROCEDURE ON MATTERS OF MUTUAL INTEREST

The PSCBC Constitution,\textsuperscript{57} states, in clause 16.1 that, “any party to the Council may submit a written proposal regarding a matter of \textit{mutual interest} to the Secretary for consideration by the Council. The Council must determine the procedure for placing a proposal on the agenda of the Council”. Clause 16.2 states, “if it is decided that the Council will deal with a proposal, it must meet within 21 working days after receipt of a proposal submitted in terms of clause 16.1 or any time thereafter, if the party who made the proposal agrees thereto”. Clause 16.3 states, “at the meeting referred to in clause 16.2, the Council must attempt to agree on a negotiation process which may include the following:

(a) The submission of counter proposals;

(b) The establishment of a negotiation committee;

(c) The appointment of one or more facilitators, if necessary, to facilitate the negotiations and chair the meetings; and

(d) The timetable for negotiations”.

Clause 16.4 says, “if the Council agrees to facilitate in terms of clause 16.3(c) but fails to agree, within a period of 5 working days from the decision to appoint, the Secretary must in his or her own discretion decide how many facilitators to appoint and appoint the facilitator(s), taking into consideration the views of the parties”. Clause 16.5 says, “in the event of the Council not meeting within the period provided for in clause 16.2, or at the meeting not agreeing upon a negotiating procedure in terms of clause 16.3, the parties must within 2 working days from the expiry of the period provided for in clause 16.2 commence negotiations”. Clause 16.6 states, “if

\textsuperscript{57} Constitution of the PSCBC, clauses 16.1; 16.2; 16.3; 16.4; 16.5; 16.6; 16.7.
the parties do not conclude a Resolution of Council during a period of 21 working
days from the date of the expiry of the period referred to in clause 16.2, or such
longer period as agreed between the parties, and the matter is not settled, any party
may refer the matter for conciliation in terms of the dispute resolution procedures”.
Clause 16.7 says, “if the matter is not resolved during the conciliation process,
parties to the Council may exercise their rights in terms of the Act” (“the LRA”).

6.2 WAGE NEGOTIATIONS

All trade unions admitted to the PSCBC submitted their consolidated demands on 24
October 2006 which included a salary increase of 12%; revised salary structures for
specific occupational classes to address career pathing, pay and grade progression,
retention of professionals and scarce skills, various allowances, leave matters,
medical aid subsidy, housing allowance, long service awards, filling of vacant funded
posts and compliance with BCEA with regard to Sunday work and public holidays as
it is stipulated in clause 16.1 of the PSCBC Constitution.

Union organizations and negotiators claim that overall their consolidated demands
tended to focus on financial improvements as opposed to forwarding any political
agenda such as promoting service delivery or transformation.

At the time the unions tabled their demands they also submitted a timetable for the
negotiations in order to comply with clause 16.3(d) of the PSCBC Constitution, which
they hoped to have completed by the end of March 2007 as they requested
implementation on 1 April 2007. Unions such as NEHAWU indicated that they were
conscious of the fact that during the 2004 negotiations the employer had unilaterally
implemented the 3 year multi-term wage agreement. Hence, unions wanted to
complete negotiations well ahead of the termination date of the previous agreement.
The employer refused to agree to this timetable and argued that the unions had
effectively predetermined the negotiation process. The negotiator from the COSATU
bloc said:

“When people say there were no negotiations before the dispute was declared,
they are right. Negotiations means there must be a possibility of convincing each
other. Even though the unions submitted a consolidated set of demands and a number of meetings were held, there was no negotiations in terms of meaningful engagement because of the constraints government imposes on its negotiators in relation to budget allocation and inflation targeting ... We felt we were going nowhere until a dispute was declared. Only then did the employer start negotiating.”

Formal negotiations started on 6 November 2006 but it was only in February 2007 when the employer tabled its first offer of 5, 3% effective from 1 July 2007 or 4% effective from 1 April 2007. The employer can be accused of failure to comply with clause 16.3 (a) of the PSCBC Constitution and negotiating in bad faith as the first counter proposal was tabled two months later after 21 days as stipulated in clause 16.2 of the PSCBC Constitution. Negotiations continued with the unions having formally declared a deadlock on 20 March 2007. Following a meeting of all the unions on 11 May, they unanimously rejected the 6% offer and indicated their intention to mobilise members for a strike. On 15 May 2007, the COSATU unions announced a programme of action culminating in an indefinite national strike starting on 28 May 2007. Following a meeting with the FEDUSA and independent unions, all agreed to a national programme of mass action, starting with marches on 25 May in all provinces, and culminating in a legal, protected, indefinite, national labour action, beginning on 1 June 2007.

Giving consideration to sequence of events, starting with a deadlock on 20 March 2007, a programme of action announced on 15 May 2007, mass roll out action with effect from 25 March 2007 and indefinite national strike starting on 1 June 2007. In respect of all the events mentioned above, the required compliance in relation to law has not been demonstrated, the requirements of section 64(1)(b) of the LRA 58 which state that

“in the case of a proposed strike, at least 48 hours notice of the commencement of the strike, in writing, has been given to the employer.”

In Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU 59 the Labour Appeal Court held that the purpose of section 64(1)(b) is to “warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer

deals with that situation”. That purpose is defeated if the employer is not informed when the proposed strike will commence. A notice that fails to state when the strike will commence is therefore defective.

One of the COSATU bloc members said:

“The unions agreed on common dates for action and resolved that we shall move into action totally united … If we are all together in solidarity action, may be government will take us seriously.”

As the unions mobilised for countrywide industrial action on 25 May 2007, various attempts were made by the State to stop the mass action. The Minister of Public Service and Administration Geraldine Fraser-Moleketi argued that the unions had not exhausted the bargaining process. One could guess the Minister meant that unions did not move from their initial wage demand of 12 percent tabled in October 2006 to respond to the employer offer of 5.3 percent. Following action on 25 May, the parties met again on the eve of the strike on 28 and 29 May in an attempt to break the impasse.

The strike went ahead on 1 June and received overwhelming support from the majority of unions. Countrywide marches and demonstrations took place while government services were almost brought to a standstill despite attempts to prevent essential service workers from going out on strike.

Former Naledi researcher Ebrahim-Khalil Hassen, now an independent policy analyst and researcher argued:

“The most important outcome of the public service strike is that there has been a reconfiguration of power and a new policy agenda. Most obviously, the unions have managed to reassert themselves after the unilateral implementation of wages in 1999. This is an important victory for trade unions, as equalising power relations was a central requirement to shifting focus towards institutional issues.”
Section 135(3)(a)(b)(c) of the LRA makes provision for the commissioner to attempt to resolve the dispute through mediation, conducting a fact-finding exercise and making a recommendation to the parties, which may be in the form of an advisory arbitration award.

In *GIWUSA obo Heyneke v Klein Karoo Kooperasie Bpk*⁶⁰ the Labour Court made emphasis that the commissioner must determine the process for attempting to resolve the dispute.

Clause 16.3(c) of the PSCBC Constitution further states that, at the meeting referred to in clause 16.2, the Council must attempt to agree on a negotiation process which may include the appointment of one or more facilitators, if necessary, to facilitate the negotiations and chair the meetings.

The employer revised its offer from 5.3% to 6%. On 11 May 2007, unions unanimously rejected the 6% offer and indicated their intention to mobilise members for a strike.

In an attempt to break the impasse on salary negotiations, parties agreed to establish a technical task team with nine (9) members a side from both Labour and Employer. This group produced a draft agreement with exploratory options to be considered by Council. The Chairperson of the PSCBC then called a meeting on the 30th May 2007 to prevent parties from reverting to their original positions in terms of Clause 15.2 of the PSCBC constitution. At that meeting it was resolved that the technical task team document will be recognized as a working document for the purpose of discussion and/or exploring means for settlement without any prejudice to any party’s rights.

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⁶⁰ [2005] 8 BLLR 791 (LC).
Council then resolved that on the basis of the document being a working document, any party may submit any further proposals for consideration and parties will not be bound by the working document.

1 June 2007 saw the start of industrial action in the Public Service. On 4 June 2007 parties met to break the impasse on salary negotiations. The employer tabled a revised offer of 6.5% salary adjustment and improved conditions of service. Labour did not accept the revised offer and indicated they will propose a counter offer to the Employer in due course.

On 8 June, the employer and trade unions agreed that a mediator be appointed to assist in resolving the salary dispute in the Public Service. The PSCBC then appointed Mr Charles Nupen and Meschack Ravuku as mediators. On 9 June 2007 parties reconvened under the auspices of the mediators. The employer indicated that they are not moving from their position of 6.5% salary offer, but indicated that the offer could be improved if parties agree to shift funds within the package. The mediators were requested to draft and submit a proposal to parties on a range for settlement. The mediators’ proposed an adjustment of 7.25% for 2007/2008 financial year.

On 14 June 2007 parties met, at the meeting the employer indicated that they concurred with the mediators proposal as a basis of settlement of the matter. They also submitted proposal in respect of a possible return to work, application of no work no pay rule and a minimum service level agreement. Unions reiterated their position of 10% increment for 2007/2008. Unions proposed that a working group be established to deal with the issue of return to work, no work no pay deductions and minimum service level agreement.

The working group met on 15 June 2007 and compiled a document on the aforesaid matters with the assistance of the mediators for consideration by the parties. Parties met on 17 June 2007 whereby labour indicated that it would submit proposals in response to employer’s proposal of 14 June 2007. The working committee was requested to reconvene to rework the return to work, no work no pay deductions and minimum service level agreement.
On 19 June 2007 parties reconvened whereby the employer responded to labour’s proposal in respect of the employer’s proposal of 14 June 2007. Labour indicated that the 7.25% proposed salary adjustment was not acceptable and that unions were prepared to decrease their demand to 9%.

On 22 June 2007 the employer tabled the revised offer of 7.5%. Parties agreed that the mediation process has come to an end. Labour did not accept the revised offer and indicated that would table their position after consultation with their constituencies.

By the end of the third week of the strike, unions were facing rising pressure from some members who wanted to return to work and others who wanted to continue striking until their demands were met. Union members and officials have indicated that it was during the third week that the strike began to take a dip. The ineffectiveness of the strike became apparent, therefore there was a valid reason for the unions to call off the strike because it could not achieve its pre-determined goal. On 28 June 2007 labour had a press conference where they announced the end to the strike action. On 5 July 2007 the PSCBC Resolution 1 of 2007 (Agreement on improvement in salaries and other conditions of service for the financial years 2007/2008 to 2010/2011) was signed by majority of labour parties except for SADTU. Workers were advised to return to work from 29 June onwards. The process around the signing was not without its problems and reveals some of the underlying tensions that exist between the unions. It was revealed that no union wanted to be the first to sign. “Neither party wanted to be looking like they were selling out” said the COSATU official. In the aftermath of the strike, differing views exist as to whether the final agreement was a victory for workers. Some members felt that workers, especially in health, had gained and achieved a number of their core demands. Educators remained frustrated and demoralised.
CHAPTER 8
THE EFFECT OF THE STRIKE IN ESSENTIAL SERVICE: LEGAL PERSPECTIVE

Section 213 of the Act\textsuperscript{61} defines “essential service” as

(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;

(b) the Parliamentary service;

(c) the South African Police Service.

Section 72(a)-(b) of the Act\textsuperscript{62} makes provision for “minimum services” in that the essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service, in which case

(a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and

(b) the provisions of section 74 do not apply.

In the public service section 74 does apply because parties at the PSCBC and any of its sector councils did not conclude any minimum service level agreement, however the dispute at the PSCBC remained unresolved at mediation level, therefore section 74(4) of the LRA which states that

“any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission”

\textsuperscript{61} Labour Relations Act 66 of 1995.
\textsuperscript{62} Supra.
should have kicked in to address a dispute on behalf of the employees who are engaged in an essential service.

Because the parties at the PSCBC did not conclude the minimum service level agreement, the Government chose to define certain job categories as being an essential service, hence its urgent application to the Labour Court to interdict employees in the essential service who were engaged in a strike action, included the following:

Department of Public Service and Administration (DPSA) was the applicant, COSATU, the first respondent, NEHAWU the second respondent and DENOSA the third respondent. Before the Honourable Mr Justice Francis, on 31 May 2007, the ruling summed that trade unions mentioned above were interdicted and barred by the Labour Court 63 from promoting, encouraging or supporting participation in the strike by employees engaged in the essential service and interdicting from participating in the strike.

The identified categories of employees engaged in an essential service listed in the Labour Court interdict were as follows:

- The supply and distribution of water;
- The security services of the Department of Water Affairs and Forestry;
- The services required for the functioning of the courts;
- Correctional services;
- The collection of infectious refuse from medical and veterinary hospitals or practises;

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• Emergency health services and the provision of emergency health facilities to the community or part thereof;

• Nursing;

• Medical and paramedical services;

• Catering, medical records, security, porter and reception, pharmaceutical and dispensary, medicine quality control laboratory, forensics, laundry, clinical engineering, waste removal, mortuary, pest control;

• Computer services provided or supported by the state expenditure, persal system, social pensions systems, hospital systems, flood control systems.

Ahead of the strike, the Government obtained a court interdict preventing essential service workers from going on strike. After the first day of the strike, Denosa and Hospersa who represented the nurses instructed their members to return to work. This created tension on the picket lines at some of the main hospitals with claims of intimidation emerging.

Section 65(1)(d)(i) of the Act,\textsuperscript{64} states that

\begin{itemize}
  \item[(1)] no person may take part in a strike or a lock out or in any conduct in contemplation or furtherance of a strike or a lock out if –
  \begin{itemize}
    \item[(d)] that person is engaged in –
    \begin{itemize}
      \item[(i)] an essential service; or …”
    \end{itemize}
  \end{itemize}
\end{itemize}

In \textit{South African Bus Employers’ Association v TGWU}\textsuperscript{65} it was held that workers who had been classified as essential services workers in terms of the previous Act were precluded from participating in strike action for a period of six months after the new Act became operative in terms of transitional arrangements in Schedule 7 of the Act.

\textsuperscript{64} Labour Relations Act 66 of 1995

\textsuperscript{65} [1998] 5 BLLR 522 (LC).
Landman J went on to explain the purpose of the subsection as follows:

“Internationally it has been recognized that there should not be a right to strike in ‘essential services’. Societies recognize that the harm which a strike in certain services may inflict are far too detrimental to the life, health and safety of the whole or part of the population of a country. The International Labour Organisation (ILO) recognizes this exception to the right to strike and has defined it in these terms. Employees who render essential services were not to be left out in the cold: compulsory arbitration was to be their substitute for the right to strike.”

The fact that employees engaged in essential services were included among the members of a trade union which has given notice of its intention to strike did not in itself rendered the strike unprotected, even if those employees were not specifically identified and their intentions were stated in the strike notice. An interdict restraining the relevant employees from striking was refused on the strength of lack of facts in the unions’ answering affidavit that, “unless arrangements can be made with the applicant, these employees would not participate in the strike”.

On 3 June Government announced that if all essential service workers did not report for duty the next day they would face dismissal. This coincided with attempts to resume negotiations which continued on 4 June with the employer tabling a revised offer of 6, 5% which was rejected by the unions.

Schedule 8 Item 6(2) of the Code of Good Practice, reads: prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

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66 At 524.
The employer party at the PSCBC complied with this requirement, by advising trade unions participating in wage negotiations that if all essential service workers did not report for duty the next day they would face dismissal. Notices advising of ultimatum were dispatched to all hospitals in the public service, read by management for all employees in essential service and were also placed on notice boards. Although some of the employees in health institutions acceded to management call, those who did not were not dismissed instead final written warnings were imposed by management. The Department of Health was instructed to recall all the salaries of the essential service employees who were issued with letters to face dismissals.

Prior to the start of mediation, Fraser-Moleketi, the Minister for Public Service and Administration mentioned that picket lines would be removed from hospitals and other institutions. On the same day, COSATU general secretary Zwelinzima Vavi addressed a rally at Chris Hani Baragwanath Hospital and “calls on workers to shut government down”.68

What the Minister implied was that employees involved in essential services were not allowed to strike and this is further clarified in South African Bus Employers’ Association v TGWU above.

The Minister was in effect expressing trite law as stipulated in section 74 of the LRA on how disputes in essential services should be dealt with. Landman J expressly echoes this view.

Vavi’s statement in a rally at Baragwanath hospital call that workers to shut government down could be viewed as unlawful conduct in contemplation or furtherance of strike in an essential service. In Sappi Fine Papers (Pty) Ltd (Adamas Mill) v PPWAWU69 it was held that unlawful conduct in contemplation or in furtherance of a strike “could never be said to be conducive to orderly collective bargaining nor the effective resolution of labour disputes”. The Labour Court has exclusive jurisdiction to grant urgent interim relief or an interdict to prevent such

unlawful conduct and thereby promote orderly collective bargaining and the effective resolution of the dispute between the employer and the striking employees.
CHAPTER 9
MISCONDUCT DURING THE PUBLIC SERVICE STRIKE

One of the reasons why the Government lodged an interdict with the Labour Court was to restrain the striking employees from engaging in acts of intimidation, violation of other employees’ rights and breach of the public service disciplinary procedures through engaging in acts of misconduct during the strike action.

Item 6(1) of the Code, 70 “Dismissals and Industrial Action” states:

“Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. Substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case.”

This precisely mean that any act of misconduct having taken place during the strike action in the public service should be dealt with in line with a set disciplinary procedure of the Government, Resolution 2 of 1999 as amended. Employees can be disciplined and even dismissed on the basis of their individual or collective acts of misconduct based on the seriousness and gravity of the act of misconduct.

During the public service strike action a number of incidents regarding the conduct of the employees participating on strike were observed and reported. Among the other were:

• Denying management and employees who are not on strike access to the Government premises.

• Blocking entrances and demanding identity from employees and members of the public who wish to access the Government buildings and institutions.

• Engaged in acts of intimidation and threatening employees who are at work and those who wish to have access to their offices.

• Access to the Government property and hospitals without permission by the strikers, threatening and forcing staff to leave their workplaces.

Although management advised unions and their members with respect to effective use of the right to strike and picketing, however the public service has an obligation and responsibility to provide service to its citizens, preserve human dignity from the acts of violence and protect those employees who wish to serve, the labour organisations were advised that their members should refrain from accessing the Government property and hospitals with an aim of intimidating and threatening employees who are at work and those who wish to go to work, to refrain from engaging in acts of violence and intimidation, recurrence and continuation of such conduct would result to disciplinary action taken against the affected employees.

9.1 PROCEDURAL FAIRNESS

Schedule 8 of the Code requires the employer to conduct investigation to determine whether there are grounds for dismissal. This need not be done through a formal enquiry. Emphasis is made that the employee should be allowed the opportunity to state a case in response to the allegations, employee entitlement to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. The decision taken should be communicated to the employee. The Code, in section 4(4) makes provision that in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures. The latter can refer and accommodate situations were employees allegedly involved in misconduct during the strike action can be dealt with.

The Code requires an employer to contact a union official at the earliest opportunity in order to discuss the course of action it intends to adopt. This allows the union an opportunity to persuade the employer not to dismiss.

The employer is not, however, prevented from summoning employees who conducted misconduct to a formal disciplinary action after they have returned to work and take the necessary action appropriate to misconduct.
In the event an employer deems necessary to discipline a group of employees in terms of the collective misconduct, the discipline should be meted out in a fair and just manner. Like cases must be treated in a similar manner. Selective discipline constitutes an unfair practice. In a case of collective misconduct, the employer is entitled to identify the most serious transgressions, provided no ulterior motive is demonstrated through the employer’s action, but is not entitled to dismiss all employees where the guilty employees cannot be determined. A person is presumed innocent until proven guilty and the employer is entitled to conduct separate disciplinary hearings.

9.2 SUBSTANTIVE FAIRNESS

Section 2(1) “fair reasons for dismissal” of the Code of Good Practice states

"whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty".71

Consideration is given to strikes due to issues of collective bargaining in Mzeku v Volkswagen.72 The significance of giving consideration to this case is to establish why the public service did not take action against employees who were engaged in acts of misconduct, when evidence as stated above constituted prima facie cases against those who were involved. Mzeku and others could probably be used as a test on what would be the court’s judgment against the public service for its action against employees who conducted misconduct while they were on strike. As mentioned unions were warned that all employees in the essential service who did not comply with the ultimatum to return to work would face dismissal. Reasons were not given why employees who did not accede to the ultimatum were not dismissed instead final written warnings were imposed. It is assumed that good reasons prevailed why the Department of Health decision to re-call letters of dismissal and replaced them with the final written warning.

I have given consideration to the Labour Court, Judge Landman’s argument in *Mzeku* and others which could resemble the action of employees in the essential service in the public service that their action did not constitute a strike but rather collective action which constituted a breach of contract and which could be characterised as misconduct. Indeed the contract of employment for employees in essential service contains a clause that they should not participate in strike action as they are involved in an essential service. The latter pre-supposes that letters of dismissals which were replaced by the final written warnings for employees in essential service who participated on strike were incorrectly termed “dismissal in respect of participating in strike action”, which should have read, their action constituted a breach of contract. One could perhaps view that as a reason not to proceed with the dismissals.

The second aspect and point of argument is contained in *Steve’s Spar*73 and the confirmation in *Karras*.74 That was appropriate for the public service to hold an inquiry before the employees were dismissed by issuing letters informing them of such dismissals. In this case Judge Landman made it clear that he associated himself with the minority judgments of Nugent AJA in *Karras* and of Conradie JA in *Steve’s Spar*. They both seem to be saying that if strikers fail to obey a simple ultimatum, it will be even more difficult for them to attend a disciplinary hearing.

In *Mzeku v Volkswagen*, in the Labour Appeal Court, the debate was whether Volkswagen had given workers an opportunity to “state their case” before dismissing them. The Labour Appeal Court found that Volkswagen did observe the *audi* rule since there were a number of meetings between management and representatives of strikers, a meeting with NUMSA officials on behalf of strikers, correspondences between parties and a meeting between management and a delegation from striking workers. The Labour Appeal Court therefore upheld the decision of the Labour Court stating that the *audi alteram partem* rule was observed in Volkswagen. Therefore the dismissal was procedurally unfair.

The above affirms the stance taken by the public service administration when management advised the unions at the PSCBC meeting that failure by the essential

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service employees to comply with the ultimatum to return to work would face dismissal. The final written warnings which were imposed to essential services employees without formal disciplinary hearings were not irregular as this action relates to Landman’s findings in *Mzeku v Volkswagen*.

In *CEPPWAWU v Metrofile (Pty) Ltd*\(^75\) the Labour Appeal Court reiterated that an employer may dismiss an employee for misconduct during a strike, even if the strike is protected. A disciplinary hearing, which could lead to dismissal, may therefore be held while the strike is in progress. If the affected strikers choose not to attend the inquiry, the employer may proceed in their absence.

The above case also strengthens and confirms the argument of difficulty and sometimes impossibility of following the laid down procedure in dealing with discipline during the strike. Although a number of incidents regarding the conduct of the employees participating on strike were observed and reported, no report could be obtained from the public service regarding the employer’s action taken against those who were involved in violence or intimidation. Section 69(1) of the LRA states that a registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstration.

Lawful picketing does not include violence or intimidation. Employees in the picket line, it was held in *Picardi Hotels Ltd v FGWU*,\(^76\) may sing, chant and dance in furtherance of their strike to draw the public’s attention to their strike or to the dispute giving rise to the strike.

\(^75\) [2004] 2 BLLR 103 (LAC).
\(^76\) [1999] 6 BLLR 601 (LC).
CHAPTER 10

IMPACT ANALYSIS OF THE STRIKE ACTION IN THE PUBLIC SERVICE

Generally acts of intimidation and assault were reported in all provinces, employees who did not participate in strike action were forced to join the strike. Employees were refused access to offices by the strikers, in some instances they were chased out of their offices. Water pipes and electricity wires were cut off in some Government buildings. The strikers did not comply with the court order because as they continued breaching many of the laid down conditions.

Two major departments in the public service, Department of Health and Education reported some serious incidents. The department of health ought not to have participated on strike as it is classified as an essential service, however, a number of incidents of intimidation, threatening nurses and assault were reported. Ambulances were blocked access to hospitals until the police intervened. The South African National Defence Force (SANDF) members were deployed in targeted hospitals and assisted in providing elementary services.

The table below reflects the status in the department of education in various provinces during the strike action in respect of attendance.

<table>
<thead>
<tr>
<th>Province</th>
<th>No. of educators</th>
<th>Other officials</th>
<th>Total employees</th>
<th>Employees on strike</th>
<th>Percentage on strike</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>66 083</td>
<td>8 441</td>
<td>74 524</td>
<td>67 071</td>
<td>+ 90 %</td>
</tr>
<tr>
<td>Free State</td>
<td>22 745</td>
<td>4 285</td>
<td>27 030</td>
<td>15 839</td>
<td>58.6%</td>
</tr>
<tr>
<td>Gauteng</td>
<td>50 592</td>
<td>13 526</td>
<td>64 118</td>
<td>60 912</td>
<td>+ 95%</td>
</tr>
<tr>
<td>Kwa-Zulu Natal</td>
<td>77 889</td>
<td>6 484</td>
<td>84 373</td>
<td>78 467</td>
<td>93%</td>
</tr>
<tr>
<td>Limpopo</td>
<td>55 236</td>
<td>6 817</td>
<td>62 053</td>
<td>60 811</td>
<td>98%</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>26 573</td>
<td>2 864</td>
<td>29 437</td>
<td>28 936</td>
<td>98.3%</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>6 513</td>
<td>786</td>
<td>7 299</td>
<td>6 934</td>
<td>95%</td>
</tr>
<tr>
<td>North West</td>
<td>26 920</td>
<td>3 761</td>
<td>30 681</td>
<td>23 010</td>
<td>75%</td>
</tr>
<tr>
<td>Western Cape</td>
<td>30 119</td>
<td>8 231</td>
<td>38 350</td>
<td>13 422</td>
<td>35%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>362 670</td>
<td>55 195</td>
<td>417 865</td>
<td>355 402</td>
<td>85%</td>
</tr>
</tbody>
</table>
Police were deployed at schools where intimidation and assaults incidents were experienced. Ex Model C schools were functioning fairly normally. Matric examinations were postponed indefinitely.

NB: The public service reserves the right to alter the above data if it is deemed to be inaccurate.
CHAPTER 11
IMMUNITY FROM CIVIL LIABILITY DURING THE STRIKE

The main aim of employees embarking on a strike action is to withdraw labour in order to cause an employer economic harm with the objective of exerting pressure to compel the employer to meet employees’ demands. In terms of the common law, an employer can sue strikers or their union for the losses it has suffered as a result of the strike action on the ground that the employees and their union have committed a delict, therefore an employer can approach the courts for an interdict and sue a union(s). The employer can claim damages from the strikers, their trade unions and/or dismiss the striking employees for breach of the contract of employment by refusing to work or interfering with the operation of an institution.

A case in hand refers to a number of incidents which occurred in public health sector during the public service strike. The Public Service Administration advised trade unions representing employees in essential services, such as hospitals and clinics that the Government reserves the right to sue them for damages because of the nurses and other employees in essential service who neglected the patients and participated in a strike action.

The Labour Relations Act has ordered a *sui generis* statutory cause of action. The Labour Court now has jurisdiction to order the payment of “just and equitable compensation” for loss caused by an unprotected strike. The employer must prove it suffered loss and that the loss was occasioned by the strike. In deciding whether to award compensation, regard should be whether attempts were made to comply with the provisions of the Labour Relations Act and the extent of those attempts, if any, whether the strike or lock-out was premeditated, or in response to unjustified conduct by the other party to the dispute, and whether there was compliance with an interdict or order of the Labour Court to restrain participation in, or conduct in contemplation or furtherance of the strike.

The court is permitted to condone minor transgressions of the Labour Relations Act, and more serious transgressions where the strike was a spontaneous response to
unfair conduct by the employer. The court must also take into account the interests of orderly collective bargaining, the duration of the strike or lock-out and the financial position of the employer, trade union or employees. This last factor is unique and wholly unprecedented in South African law. If regarded as conclusive, it could indemnify almost all employees and poor unions. However, none of the factors listed will be individually decisive, but must be considered in conjunction with the others.

The interests of orderly collective bargaining may well inhibit the court from making compensation orders against unions that have a long standing and continuing relationship with the employer and may further mitigate against compensation where the strikes take place over legitimate bargaining issues. A plaintiff has an election either to claim “compensation” under the Labour Relations Act or damages in terms of the common law. By proceeding in the ordinary courts, parties will be able to effectively circumvent the statutory controls that have been placed over the grant of damages by the Labour Court, undermining the very rationale for creating a statutory form of compensation.

In Langeveldt v Vryburg Transitional Local Council\textsuperscript{77} Zondo JP expressed the view \textit{obiter} that relief may be granted in respect of criminal acts such as intimidation, assaults and damage to property although it may well be precluded in respect of acts which are not criminal, such as “chanting”, toyi-toying and demonstrating if strikers may have engaged in furtherance of their protected strike in the vicinity of the landlords’ properties.

Section 67(6)\textsuperscript{78} does not preclude civil action for unlawful actions that may be “in contemplation or furtherance” of protected strike action, for example, criminal conduct during picketing in support of protected strike. In \textit{Lomati Mill Barberton (A Division of Sappi Timber Industries) v PPAWWU}\textsuperscript{79} the Labour Court pointed out that, although actions in furtherance of a protected strike were immunized from civil action, immunity was not conferred on such actions when they amounted to offences.

\textsuperscript{77} [2001] 5 BLLR 501 (LAC).
\textsuperscript{78} Labour Relations Act 66 of 1995.
\textsuperscript{79} [1997] 4 BLLR 415 (LC).
The Labour Court \textsuperscript{80} also held that an alleged contravention of agreed strike rules in the context of a protected strike does not amount to breach of a contract and is not justiciable by way of civil proceedings in any court, provided it amounts to “conduct in contemplation or furtherance” of the strike. It is possible, however, that strike rules which restate rules of criminal law may be enforceable as delicts which also constitute criminal offences.

\textsuperscript{80} \textit{Supra.}
CHAPTER 12
COLLECTIVE BARGAINING CHALLENGES

In view of the country’s current and future challenges, the PSCBC needs to obtain a broader commitment from its key constituencies to ensure its continued growth and maturation. A failure to achieve this, could undermine its future and lead to a scenario, as is reflected in many advanced western democracies, were independent collective bargaining structures do not necessarily exist in the public service. The 2007 strike highlighted rather starkly some of the challenges facing both parties in moving forward. What then are some of these challenges?

- **Radicalisation of public servants**

Interviews reveal that it was not only the employer who was caught off guard by the duration and intensity of the strike but union leaders and members alike. It is inevitable that mobilisation feeds off the negotiation process. Therefore, it is not always easy to determine whether, for example, a strike is pushed by the centre or not. Interviews revealed that once the unions reverted back to members after government tabled its first offer of 5%, the situation changed and the power shifted away from the leadership (centre) to members who claimed in interviews that they felt in control of the process and were telling leadership what to do. This is despite initial resistance from members to going on strike.

The strike revealed that workers, who had no previous history of militancy, began to challenge their leadership and began to hold them accountable.

“The frustration of members has had a radicalised impact on leaders. The membership dragged leaders into more militant conduct, otherwise leadership would have looked weaker.”

This increased militancy, some officials claimed, led to members revolting and purging shop steward structures where they felt that shop stewards did not take a leadership role in the strike. This action reflects a growing militancy and

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consciously which emerged during the strike and raises some serious challenges for union leadership. Firstly, how and whether unions will harness this militancy, energy and consciousness and secondly, when should a union begin to demobilise its members when negotiations are moving towards a possible settlement?

Unions need to explore strategically, what is the impact in terms of demobilizing if a union becomes married to one demand, for example, 12% to the exclusion of everything else and effectively does not demobilize its members? How do unions sustain high levels of militancy but at the same time ensure their members are taken along with the negotiation process? Effectively, how do unions ensure militancy but locate it within the limitations of the negotiation process? Unions need to think strategically about the time to settle, for example, when the strike reaches the point of power and how it will bring its constituency on board to close ranks around a settlement. For example, despite facing some resistance in ending the strike, there were periods when the strike lost momentum. Various interviews of union members revealed that the strike dropped off during the third week by which time a final offer was on the table. Workers effectively lost an additional weeks’ pay because of a lack of decisiveness amongst leadership to take a stand because it seemed everyone wanted to be more militant than the other.

If the strike does point to a move towards the “radicalization” of public servants, then this too poses some challenges for the employer who has to begin to deal decisively with the discontent which exists.

- **Capacity of parties to bargain**

The capacity or lack thereof of negotiators has been a constant problem and has been raised on numerous occasions over the years. The parties to the Council need to find ways of dealing with this issue, especially as the turnover of negotiators and negotiating teams on both sides continues. This not only affects the duration of negotiations but could also affect the working of the PSCBC. “Some of the newer negotiators have no respect for the process and how the PSCBC operates,” said an independent official.
Integrative bargaining approach is crucial for the PSCBC where all parties can benefit and promote sound and effective bargaining platform.

- **Mandating processes**

  The effectiveness or otherwise of the mandating process on both sides need to be reviewed. At the outset, it should be acknowledged, that obtaining mandates within the context of the PSCBC negotiations appears to have been a problem since its inception. An opportunity for the parties to review a mandate while its initial objective is sustained should be adopted. This simply means the principals should create some flexibility which allows the negotiators to make certain decisions which are within the parameters of their mandate and competency.

- **Impact of the informal processes on the formal**

  The informal alliance processes have effectively became part of the formal negotiations in the public service. As a result, the unions need to review how they marry the alliance, informal processes not only with their own mandating structures but with the formal process so that its usefulness is not undermined and ends up impacting negatively on the formal process.

  Clear distinction between the collective bargaining and negotiation processes should be drawn and understood by the parties, in relation to political influence and interest.

- **Wage negotiations and collective bargaining**

  In the early years of the PSCBC (1998-2000), salary negotiations were conducted annually, and were often protracted, with the Council spending up to six months in negotiations. This deviated in 2001, when parties agreed to enter into multi-term agreements. Despite this, negotiations tend to drag on for months with the 2007 negotiations lasting nearly nine months. Parties need to explore the manner in which they are bargaining and how the process can be better managed in the future. In this regard, parties should be reflecting on previous negotiation processes and adopt best
practices suitable to the public service proven beneficial to other bargaining structures.

- **Essential services**

The negotiations around the LRA resulted in a substantial number of public servants, especially those in health, safety and security being prevented from participating in strikes as they are classified as essential services in terms of section 74.\(^{82}\) The LRA however provides for these sectors to negotiate minimum service agreements between management and workers. Such an agreement allows workers to strike, except those designated as minimum service. The PSCBC, through a collective agreement, has provided for negotiations over minimum service level agreements to take place within the relevant sector bargaining councils. There has been little or no attempt by the unions to push this which has probably suited the employer in the past.

The unions have also not sought to determine what services should or should not be classified as an essential service so as to limit the number of public servants affected by this prohibition which impacts on the effectiveness of strike action and worker solidarity. In terms of the 2007 wage settlement provision is made for a Joint Working Group to finalise such agreements in sector councils. At this moment the PSCBC is engaged on negotiations for the Minimum Service Level Framework Agreement.

- **Future of centralised bargaining**

Collective bargaining remains highly centralised, with sector and provincial bargaining structures having limited jurisdiction to negotiate substantial pay or conditions of service issues. The Constitution provides for a single public service. Although the 1997 amendments to the Public Service Act gave Ministers and MECs greater powers over work organisation and other aspects of human resource management, these have not affected the level at which bargaining takes place.

\(^{82}\) Labour Relations Act 66 of 1995.
The division of responsibilities between the PSCBC and sector councils is an area which might need to be reviewed and consideration given to exploring whether more issues should be referred to sector councils or not. A further issue is whether the scope of the councils needs to be reviewed with regard to whether they are truly “sector” instead of occupation–based.

- **Collective bargaining and budgetary process**

A key area of concern for labour regarding salary negotiations has been that bargaining takes place after government has determined the budget through its own budgetary processes. A principled agreement, arising from the Job Summit Framework Agreement, was reached to synchronise the collective bargaining process to government’s budgetary processes. Despite this agreement, parties have not pursued this to ensure implementation.

- **Governance of the Council**

There have been attempts by stakeholders to micro-manage the institution and limit the powers of the secretariat. This has not been limited to the Council but has occurred in numerous other tripartite labour market institutions such as the Sector Education and Training Authorities (Setas). Parties have recently agreed, as a strategic objective, to develop a delegation of authority between Council, the Executive Committee and the Secretariat. This is crucial if the institution is to ensure proper corporate governance.

Over the years, the trend has been that the negotiators who are party to the Council have been involving themselves in making governance or management decisions in the absence of the required skills or training. Instead these decisions should be vested in the hands of the Executive Committee comprising elected stakeholders who have the competency, seniority and skills to manage the governance of the institution.
• **A single public service**

The creation of a seamless public service delivery model will require the integration of local government and public entities into the provincial and national spheres of government. The alignment of the three spheres of government will raise a number of labour relations challenges such as possible restructuring of existing collective bargaining structures. It might also require yet another round of consolidation and integration of employment conditions as occurred post 1994 with the consolidation of the previous homeland structures.
CHAPTER 13  
POST-STRIKE REVIEW

The PSCBC experienced a tough round of wage negotiations during 2007 that culminated in the longest strike by public servants. A dispute was declared and public servants went on protracted strike which lasted 20 days. The PSCBC appointed independent mediators to resolve the impasse between the State as Employer and the Unions. Negotiations continued between parties through the assistance of the mediators and a settlement was later reached. The mediators then made a recommendation to the General Secretary of Council that parties should embark on a post strike/negotiations review process. The Executive Committee and Council endorsed this recommendation and appointed an independent facilitator, Mr John Brand.

The workshop was organized from 27 – 28 November 2007 at the Park Hotel in Limpopo province. The workshop sought amongst others to review the manner in which parties engaged with each other during the wage negotiation process, identify the obstacles that prevented the negotiators to achieve optimum results within a reasonable period of time and also to improve the method of negotiations.

Results and outcomes of post strike review workshop is reflected as Annexure A.
CHAPTER 14
CONCLUSION

As stated at the outset, the 2007 strike has been a wake-up call for both parties. The employer can no longer hide behind the notion that the strike, or previous strikes was purely “political” but has been forced to realise the extent of dissatisfaction which exists amongst its employees. This should be a worrying thought especially if the potential exists for public servants to become “radicalized”. This will however, largely depend on how and/or whether this energy will be harnessed and channeled appropriately.83

For unions, the strike revealed weaknesses in its structures, an inevitable consequence of a strike of such duration. More importantly, the strike revealed the extent to which members asserted themselves against a leadership, despite members initially resisting, in some instances, going out on strike, which has yet to fully embrace some fundamental principles of union democracy.

Whilst, the strike might have revealed a “reconfiguration of power between the state and unions” as argued by Hassen, the key question here is whether the unions are in a position to take forward the gains made and have taken on board the lessons learnt from last year's strike so as to influence their approach in preparing for the next round of negotiations which could, in theory, start towards the end of 2008. The same is of course true for employers and whether they remained sufficiently focused in the face of the 2009 elections.

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83 Renee Grawitzky is a freelance researcher and journalist
PARTIES WERE DIVIDED INTO GROUPS AND THE FOLLOWING QUESTIONS WERE POSED TO ALL GROUPS FOR DISCUSSION;

- What goes on well in negotiations?
- What hinders negotiations or mediation?

THE FOLLOWING ARE THE RESPONSES BY THE DIFFERENT GROUPS;

GROUP 1

WHAT GOES WELL ON OUR NEGOTIATIONS?

- The negotiations brought parties to know each other.
- Spirit of reconciliation.
- Parties were able to sign an agreement notwithstanding what was happening in the boardroom.
- Willingness of the parties to engage in bilaterals.
- Both parties displayed a sense of responsibility particularly in holding negotiation meetings deep into the night.
- Strong sense of unity amongst labour parties during negotiations.

WHAT HINDERS NEGOTIATION OR MEDIATION?

- Rigidity of mandates of parties.
- Budget announcement before negotiations.
- Lack of involvement of all parties in the budgetary process.
- Propaganda media statements during negotiations.
- Fluctuating levels of trust between the parties throughout the negotiations process.
- Political interventions
- Negative media influence on public opinion.
- Arrogance and power play (posturing on the part of the negotiating process)
Absence of decision makers in the negotiating teams.
Lack of continuity among negotiators from both parties.
Negotiations vs. Collective bargaining, i.e. Labour demands incongruent with Employer offer.
High expectations from the members placed pressure on negotiators.

Group 2

What goes well in negotiations or mediations?

Commitment of parties to the negotiation process
Parties has positions
Labour had duty
Respect for each other
Joint decision on appointment of facilitator which showed commitment to finding resolution
Signing of collective agreement.
Rapport during and outside the bargaining process
The idea of a package of matter dealt with during the mediation process is positive.
Good resources and admin support during the negotiations.
Members support to union negotiators
Commitment of individuals in the negotiation process
Media played an important role

What hindered negotiation or mediation?

No serious negotiations prior to the strike
Management / Planning
Clarity on proposal on OSD
Lack of clear mandates
No flexibility of mandates
State budgets are pre-determined
Role of media
Poor communication from the Employer
Division amongst labour by sector
Political intervention / interference
Lack of trust
Mandates of unions are politically influenced

Group 3

What goes well in negotiations or mediations?

Continuous dialogue
Structural strength
Unity amongst unions
Agreement by consensus
Mutual respect
Compromise
Ownership and commitment to process
Enhances mandating process

What hindered negotiations or mediation?

Threatening behaviour
Lack of respect / arrogance
Misinformation
Unclear mandates
Lack of trust
Poor communication between principals / negotiators
Political and inadequate differences
Lack of time table negotiation
Lack of capacity / training
Rigid mandates
Proper analysis of context and socio political economic environment
Poor preparations
Group 4

What goes well in our negotiations of mediations?

- Signing of collective agreement
- Good will and respect, humor
- Constant good communication- formal, informal
- Mutual recognition of scope to improve
- Unity of labour

What hindered Negotiations and mediations?

- Poor & lack of preparations
- Lack of detail: offer & demand
- Inflexible/rigid mandates
- Multi layered negotiations
- Contradiction to caucus position
- Time management
- Challenges of different mandating processes
- Media sensationalism
- Partial intervention by 3rd parties

Budgets

- Political negotiations
- Late coming taking meetings back
- Distortion of information

Group 5

What goes well in negotiations or mediations?

- Agreement signed
- Strong admin resources
Good relationship amongst negotiators with the admin
Tolerance between parties
Commitment of the negotiation process (e.g. bilateral) by parties and leadership
Respect for the Constitution of Council

What hindered Negotiations and mediations?

Rigid mandates
Negotiating in bad faith
Lack of consolidated positions
Unavailability of the Chairperson
Shifting of the goal position
Pre-budgeted positions
External influences e.g. parliamentary pronouncement & private sector negotiations
Political issues
Negotiation process too long
Media
Lack of sufficient exchanges of information
Unprofessional conduct by parties
Undermining integrity of parties
Dysfunctional task teams
Undermining integrity of parties
Matters too long on the agenda
Punctuality of parties

Group 6

What has generally gone well in the negotiations or mediators?

Willingness to negotiate
Build relations and trust
Good communication between parties
Signing of resolutions
Mutual respect between parties
Parties willing to compromise

What hindered Negotiations and mediations?

Lack of trust amongst parties
Lack of transparency
Lack of urgency during negotiations
Lack of flexible mandates
Betrayal
Failure to implement existing resolutions
Bad communications
Lack of skilled and open negotiations
Discipline
Lack of proper planning
Tendency of parties to talk past each other (perceived or real)
Self interest
Arrogance (Bulling tactics)
Dictating policy

Emanating from group discussions the following were the common points raised, particularly those that hindered negotiations:

Unrealistic expectations,
few concessions,
inflexibility,
lack of trust,
poor selection of negotiation team,
changing of negotiators,

Parties were introduced to different techniques of negotiating for optimum results. The facilitator used various scenarios to demonstrate the types of results that could be achieved when parties negotiate with:
- Pre-determined mandates
- Use of power
- Mistrust
- Negative perceptions

In addition to the above, parties were introduced to the stages and tactics of positional bargaining, negotiating with the assistance of a facilitator, problem solving processes, expanding the pie instead of looking at the positional demand and to focus on mutual gain. Furthermore, parties were shown the difference between Positional and Interest-based bargaining. Positional bargaining is determined by power and rights whereas in the Interest-based bargaining, issues are put across whereby both parties have interest in reaching a settlement.

**COSTS AND BENEFITS OF VARIOUS TECHNIQUES FOR NEGOTIATIONS WERE HIGHLIGHTED.**

**Costs and benefits of positional based negotiation**

<table>
<thead>
<tr>
<th>COSTS</th>
<th>BENEFITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compromise outcome could damage relationships</td>
<td>It maintains power positions</td>
</tr>
<tr>
<td>Reduced trust between parties</td>
<td>Limited disclosure of information</td>
</tr>
<tr>
<td>Positions often based on false assumptions</td>
<td>Maintains the status quo</td>
</tr>
<tr>
<td>Creates the perception of disregard for needs</td>
<td>Help parties retain a competition</td>
</tr>
</tbody>
</table>

**Costs and benefits of a needs-based negotiation**

<table>
<thead>
<tr>
<th>COSTS</th>
<th>BENEFITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Move away from adversarialism perceived as weak</td>
<td>Win-win outcome</td>
</tr>
<tr>
<td>Requires disclosure of information</td>
<td>Builds relationship</td>
</tr>
<tr>
<td>May expose divergent interest resulting in more conflict</td>
<td>Tends to deal with causes</td>
</tr>
<tr>
<td>Time consuming (in the short-term)</td>
<td>Foster participation</td>
</tr>
<tr>
<td>Possible loss of power</td>
<td>Foster greater commitment to agreements</td>
</tr>
<tr>
<td>Higher level of skill required</td>
<td>Develops trust, better solutions, non adversarial</td>
</tr>
<tr>
<td></td>
<td>Non-confrontational</td>
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<tr>
<td></td>
<td>Shared investments in the conflict resolution process</td>
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</tbody>
</table>
Parties were also introduced to “alternatives to negotiation and consequences of not reaching an agreement”. The following two alternatives to negotiating were introduced to the parties:

1. **Best Alternative to a Negotiated Agreement (BATNA)**

This method is the best alternative to achieve an agreement in negotiation. It involves a careful exploration of each party’s power and rights based alternatives to reaching agreement. It is also the starting point to all negotiation.

This means that, a realistic understanding of your own and the other parties, BATNA is vital to determining the negotiation power in any negotiation.

The facilitator also highlighted the most common mistakes that negotiators make in BATNA and are as follows:

- Some negotiators walk into a negotiation without knowing what they will do if they can’t reach an agreement. This makes them insecure and unsure of when they should keep negotiating and when they should head for the door. Without knowing what your BATNA is, the whole negotiation process may collapse.
- The other common mistake is the assumption of knowing your BATNA without first thinking more creatively about other ways to satisfy your interest.
- For instance, other negotiators may regard the strike as their BATNA without considering other alternatives which are more effective and less costly.

2. **Worst Alternative to a Negotiated Agreement (WATNA)**

This refers to the worst that could happen if an agreement is not reached.

**CONCLUSION**

The post strike review workshop was a success in that, it gave parties the opportunity to come together and reflect on the factors that hindered the wage negotiations process and developing an action plan on how to improve future
negotiations. It also assisted to restore the trust relationship between the parties. Further parties, learned new techniques and other alternatives to negotiations.

<table>
<thead>
<tr>
<th>Objectives</th>
<th>How</th>
<th>Who</th>
<th>When</th>
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<tbody>
<tr>
<td>1. Capacity Building for Negotiators</td>
<td>Workshops and proper training, succession planning, teambuilding</td>
<td>All parties to Council &amp; PSCBC Secretariat</td>
<td>Ongoing</td>
</tr>
<tr>
<td>2. Effective Time Management</td>
<td>Issuance of notices, minutes and documents on time. Caucus in time</td>
<td>PSCBC Secretariat</td>
<td>Per meeting As stipulated in the constitution Next financial year</td>
</tr>
<tr>
<td>3. Develop and understanding of other parties’ needs</td>
<td>Pre-negotiations meetings Share information Consolidated needs Listen Have flexible mandates Explore possibilities / Alternatives Batna</td>
<td>All parties</td>
<td>4-6 weeks prior to commencement of negotiations to minimize disputes</td>
</tr>
<tr>
<td>4. Minimize agenda issues</td>
<td>Multi-term agreement</td>
<td>All parties</td>
<td>Ongoing</td>
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<tr>
<td>5. De-link salary issues from condition of service for negotiations</td>
<td>Council should revisit position s on package negotiations Commitment</td>
<td>All parties</td>
<td>Ongoing</td>
</tr>
<tr>
<td>6. Ensure Organisational effectiveness</td>
<td>Adhere to policies / terms of references</td>
<td>All parties PSCBC</td>
<td>Ongoing</td>
</tr>
<tr>
<td>7. Instilling Openness and transparency</td>
<td>Improve Listening skills Information sharing to enhance understanding of positions Workshops</td>
<td>All parties</td>
<td>Ongoing</td>
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<tr>
<td>8. Building Relations, trust &amp; respect between parties</td>
<td>Council to explore ways to build trust and respect</td>
<td>PSCBC</td>
<td>Ongoing Yearly team and relationship building interventions</td>
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<tr>
<td>9. Proper planning – pre – negotiation meetings</td>
<td>Council will endeavour to develop the timetable that’s inclusive pre-negotiations meetings and provide resources.</td>
<td>All parties</td>
<td>Ongoing</td>
</tr>
<tr>
<td>10. Improve Mandate gathering</td>
<td>Improve internal processes to acquire mandates</td>
<td>All parties</td>
<td>Ongoing</td>
</tr>
<tr>
<td>11. Identify workable alternatives to prevent disputes/strikes</td>
<td>Bilateral meetings or constant engagement between parties Commitment to engage</td>
<td>All parties</td>
<td>Ongoing</td>
</tr>
<tr>
<td>12. Improved Media and Communication Strategy</td>
<td>PSCBC to manage the communication via media to the public on an ongoing basis not limited to wage negotiations Council to have communication committee</td>
<td>PSCBC Secretariat Communication Committee</td>
<td>By June 2008</td>
</tr>
<tr>
<td>14. Reflection on previous negotiation process (pre-negotiation phase) To ensure that there is reflection on the previous process prior to the next round of negotiations</td>
<td>Hold pre and post review workshops</td>
<td>All parties and Secretariat</td>
<td>28 November 2007 / ongoing</td>
</tr>
<tr>
<td>15. To alignment between of meetings PSCBC and other Sectors during the negotiations</td>
<td>Ensure synchronization of year planner / calendar of PSCBC/Sector Councils during negotiations</td>
<td>Secretariat</td>
<td>1-2 weeks prior negotiations commencement.</td>
</tr>
<tr>
<td>16. Parties to formulate a mutual framework for negotiations</td>
<td>To conduct a pre-negotiation workshop facilitate by an independent facilitator to agree of framework, timeframes, issues etc</td>
<td>All parties PSCBC Task Team</td>
<td>1-2 weeks prior to negotiations</td>
</tr>
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