A REVIEW OF THE COLLECTIVE BARGAINING SYSTEM IN THE PUBLIC SERVICE WITH SPECIFIC REFERENCE TO THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL (GPSSBC)

by

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DECLARATION

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

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CONTENTS PAGE

SUMMARY

Collective bargaining continues to play a prominent role in shaping employment relations in South Africa, without which the individual worker is powerless and in a weaker bargaining position against his employer. Collective bargaining can be described as an interactive process that resolves disputes between the employer and employee.

In South Africa the advent of democracy was accompanied by numerous interventions to level the historically uneven bargaining field. Therefore in examining the history of collective bargaining in South Africa it is necessary to reflect on the state of labour relations prior and post the 1994 democratic elections. The study provides an overview of the practices and processes of public service collective bargaining in the old and new public service.

The public sector accounts for a very significant proportion of employment in all countries around the globe, South Africa is no exception. Although the state as employer is in a stronger position than its private sector counterpart, the public employee is potentially also in a stronger position than its private sector counterpart. A defining characteristic of most government activity and services is that they are the ones available to the public. This means that industrial action which disrupts such services has a very significant impact on the public, serving as a substantial leverage in collective bargaining.

The bargaining councils in the public sector which ensure the effectiveness of collective bargaining are maintained, are examined to provide a comprehensive understanding of the workings of these institutions. Some of the gains and challenges are also explored to provide a holistic picture of state of collective bargaining in public service.

A comparison of countries seeks to analyse and compare globally the developments of collective bargaining in public administrations. The different political systems around the world have developed various labour relations processes in the public service, an examination of the approaches and mechanisms provides alternative ways of doing things.

Recommendations are made regarding the changes that need to be made, as well as matters, which need to be analysed and examined further.

CHAPTER 1
INTRODUCTION

1 INTRODUCTION

The term collective bargaining originated in the British labour movement and has evolved over time, collective bargaining is according to Grogan[1] "a process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation".

Historically the South African public service was not exposed to democratic values. Public service collective bargaining was undermined through legislation that did not recognised the then budding trade unionism within the public service. When the state restricted trade union activity within the public service a surge in industrial action was experienced within the public service. The increase in public service industrial action inevitably influenced the effective and efficient service delivery of the state.

Since 1994, primarily due to political, legislative and institutional changes with the advent of democracy labour relations has evolved significantly. Particularly for public servants who have been granted individual and collective rights, which were previously denied.

The institution of collective bargaining plays a critical role in promoting peaceful labour relations in South Africa and worldwide. Bendix describes it as:

> "a process, necessitated by a conflict of needs, interest, goals, values, perceptions and ideologies, but resting on a basic interdependency and commonality of interest, whereby employees/employee collectives and employers/employer collectives, by the conduct of continued negotiation and the application of pressure and counter pressure, attempt to achieve some balance between the fulfilment of the needs, goals and interest of management on the one hand and employees on the other - the extent to which either party achieves its objectives depending on the nature of the relationship itself, each party's source and use of power, the power balance between them, the organizational and strategic effectiveness of each party, as well as the type of bargaining structure and the prevalent economic, socio-political and other conditions".[2]

1 Grogan *Workplace Law* (2003) 304.

2 Bendix *Industrial Relations in South Africa* (2001) 232.

According to Bendix the bargaining relationship may be described as the extension, collectivisation and formalisation of the labour relationship. Prior to the establishment of the bargaining relationship, a formal relationship, regulated by the contract of employment or legislative provisions, does exist between the employer and individual employee. Also, negotiations might be conducted between the employer and individual employees, but there is no formal relationship between the employer and the employee collective, at least not one of the same types as the bargaining relationship. In the absence of a bargaining relationship there might be an informal collective relationship in that the employer may from time to time call his employees together, speak to them and canvass their opinions, or there might be another kind of formal relationship, embodied by workers committee' or workers' council. The first type of relationship puts no onus on the employer to consult with or heed the opinion of his employees, while the second may not allow employees to use their power to elicit concessions from the employer unless the workers' committee acts also in a bargaining capacity.[3]

In the establishment of the collective bargaining relationship, the parties agree, that each will not pursue his own interests to the exclusion of the other, but that they will interact within the framework of mutually agreed rules and procedures.[4]

Throughout the world, collective bargaining takes place in various forums and at a variety of levels. The term "forum" is used here to loosely describe any structural arrangement that may be established to accommodate the parties involved in collective bargaining. The different forums that have emerged are a reflection of historical development and choices of the parties, political and cultural influences as well as legislation. Globalisation is also increasingly playing a role in shaping collective bargaining forums.

The focus of this study is on collective bargaining and social dialogue in the public sector, specifically as practiced by the General Public Service Sector Bargaining Council (GPSSBC). In examining the history of collective bargaining in the public service the bargaining councils in the public sector will be analysed with specific interest in assessing the extent to which councils are fulfilling the role that was envisaged for them in the Labour Relations Act (LRA)[5] of 1995

3 Bendix *Industrial Relations in South Africa* 239.

4 Bendix *Industrial Relations in South Africa* 240.

5 Labour Relations Act 66 of 1995.

Chapter 2 of this treatise will contextualise the history of collective bargaining in the public service. The history is analysed to understand the development of collective bargaining and to provide a basis to understand the way in which the current system is fashioned, as well as the relative importance of bargaining councils as created by the LRA. The chapter will also explore the nature and extent of the right to engage in collective bargaining, more particularly, the controversies regarding the absence of the duty to bargain.

The South African public service is characterised by a high level of institutional regulation through labour legislation and acts. The Public Service Coordinating Bargaining Council (PSCBC)[6] is a product of the LRA, established to give effect to public service collective bargaining amongst its other responsibilities and to allow for the designation of 4 sectors, namely, education, safety and security, health and social development and the general public services.

In general people outside of the public service are unfamiliar with the functions of the PSCBC and a need exists to research and disseminate information about the functions of the PSCBC and the public service sector bargaining councils.

Chapter 3 will commence with an overview of the significant phases which has had an impact on the development of collective bargaining in South Africa. Focus will on the International Labour Organisation's (ILO)[7] influence in shaping labour relations and the application of international labour law in South Africa. The role of ILO labour standards in promoting sound labour relations in the public service cannot be overemphasized. In particular, the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No 98).

The Chapter will also outline the development of public service collective bargaining structures and provide insight to the processes and structures of the PSCBC. In this regard the Chapter will highlight the distinction of scope, admission and engagements within the context of the PSCBC. As the co-ordinating structure for collective bargaining in the Public Service it is important to understand the role and functioning of the PSCBC as it is the primary actor in this process.

6 Public Service Coordinating Bargaining Council (PSCBC).

7 International Labour Organisation (ILO).

Chapter 4 focuses on the General Public Service Sector Bargaining Council (GPSSBC)[8] and provides an in-depth analysis of the existence, functioning and processes of this Bargaining Council. Although in existence of for only fourteen years, the GPSSBC has made strides in collective bargaining for a diverse and often complicated sector.

The processes of collective bargaining at the level of the GPSSBC may not differ much from that of the PSCBC, however it is significant to analyse this Council with 41 national departments and 93 provincial departments residing under its scope the GPSSBC provides a good glimpse at the dynamics of public service collective bargaining.

Chapter 5 will attempt to explore the general state of collective bargaining internationally and provide a comparison on how collective bargaining in the South African Public Service compares to international counterparts. The comparative study will attempt to give an overview of recent trends and issues in public service labour relations in selected countries.

It seems that in the last two decades, public service labour relations have profoundly changed. Indications are that there is a downtrend in collective bargaining coverage, possibly as a consequence of public service/sector reforms aimed at more efficient provision of services. The chapter will also consider the impact of globalization and its effects on traditional labour relations.

Chapter 6 is the concluding chapter. The chapter provides an overview of the study and a summary of the research findings and recommendations. In assessing the future of collective bargaining an analysis of the Public Sector Summit Declaration on the future on collective bargaining in the public service will be provided as well as an overview on the Free Market Foundation constitutional challenge on the processes of collective bargaining.

The recommendations will focus on possible improvements to the approach and strengthening of collective bargaining in the public service.

Collective bargaining is central to the employment relationship. This study will analyse the process functions, role, history and influences of collective bargaining in the South African public service and provide a comparative analysis of international trends.

[8] General Public Service Sector Bargaining Council (GPSSBC).

CHAPTER 2
HISTORICAL OVERVIEW OF COLLECTIVE BARGAINING IN THE SOUTH AFRICAN PUBLIC SERVICE

2 1 COLLECTIVE BARGAINING – "THE OLD ORDER"

Collective bargaining has a long history. The term itself is said to have been coined in 1891 by the British Labour movement pioneer, Beatrice Webb.[9]

In the South African context collective bargaining in the public service has been characterised by conflict. In addition to the political reasons, the major source of conflict was that public sector employees had no formal collective bargaining rights.

The achievement of collective bargaining in the South African public service cannot be seen in isolation from the broader democratisation of the South African society. Prior to the 1995 LRA collective bargaining, as it is currently performed, in the South African public service was "an animal unheard of", according to Molahlehi.[10]

The period leading up to the 1994 democratic ballot vote was accompanied by multiple changes in the South African legislation. Some of the sweeping legislative transformation affected the public service as well.

In 1993 the Public Service Relations Act (PSRLA)[11] and the Education Labour Relations Act (ELRA)[12] was passed. This opened the doors to Public Service workers to enjoy certain basic rights. The South African Police Labour Relations Regulations in terms of the Police Act was promulgated. These regulations extended labour rights to members of the then police force. The regulations provided new procedures governing the discipline and dismissal of members of the police services.

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9 Godfrey, Maree, Du Toit and Theron *Collective Bargaining in South Africa Past Present and Future* (2010) 1.

10 Molahlehi "The Structure of Social Dialogue in the South African Public Service-PSCBC Conference" (2005) Celebrating a Decade of Social Dialogue in the Public Service unpublished paper.

11 The Public Service Labour Relations Act 105 of 1994.

12 The Education Labour Relations Act 128 of 1994.

The bargaining structures created by these three statutes performed similar functions. These were essentially to prevent disputes arising; to endeavour to settle disputes that have arisen or may arise; and take such steps deemed expedient to bring about the regulation of settlement of matters of mutual interest.

Through these statutes collective bargaining forums were established for collective bargaining in the public sector. The system of collective bargaining prior to the establishment of the PSCBC was confusing with various pieces of legalisation that attempted to cover as much of the public service as it could. The established bargaining forums included the Public Service Bargaining Council (PSBC),[13] Education Labour Relations Council (ELRC)[14] and the National Negotiating Forum and Provincial Negotiating Forums.

Prior to 1994 there was a perplexing system of collective bargaining. Not only was collective bargaining complex, various bargaining components were utilized to perform collective bargaining throughout the public service, these bargaining components did not speak to one another as they operated individually. The change in the political system, the demise of the apartheid government in 1994 and the birth of a new democratic era resulted in fundamental legislative changes.

2 2 CREATION AND ESTABLISHMENT OF THE NEW COLLECTIVE BARGAINING ORDER

The democratic South African government ratified a number of International Labour Organisation (ILO)[15] Conventions and Recommendations. South Africa affirmed its commitment to be bound by ILO Conventions and Recommendations.

In 1996 the interim constitution of South Africa was introduced. This led the way for the Public Service Act of 1994 to be introduced, thereby, repealing the 1993 PSRLA.

The Public Service Act of 1994 granted employees in the public service the freedom to join trade unions, the right to participate in collective bargaining and protection against unfair labour practices. In addition, employees employed by the state were granted the right to strike subject to adherence of the prescriptions in the 1995 LRA. For the first time in South African history these statutes made provision for labour relations to be extended to the public service employment relationship.

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13 Public Service Bargaining Council (PSBC).

14 Education Labour Relations Council (ELRC).

15 Internal Labour Organisation (ILO).

In introducing labour laws for the public sector the legislator had to introduce legislation which would accommodate the bureaucratic mode of management and production. Collective bargaining was regulated insuring that the collective bargaining processes and decision making structures were firmly connected the way in which the powers of management in the public sector were regulated. In order to ensure the continued adherence to the concept that the employer was one body and to ensure general accountability collective bargaining was centralised, with terms and conditions of employment being characterised by a high degree of uniformity.

2 3 LEGAL FRAME WORK

2 3 1 THE CONSTITUTION

The defining source of South African labour law lies in section 23 of the Constitution,[16] which guarantees a general right to "fair labour" practices as well as a right of all "workers" to "engage in collective bargaining" and to strike. The purpose of these rights as of all basic rights, is to "affirm the democratic human dignity, equality and freedom".[17] Section 23(5) of the Constitution confers the right "to engage in collective bargaining".

It is settled that the voluntary model of collective bargaining created by the LRA falls within the range of options permitted by the Constitution in realising these values.[18]

In terms of the Constitution a public service is established within public administration to execute the lawful policies of the government of the day. The Constitution states that "the terms and condition of employment of public service employees must be regulated national legislation".[19]

The structure of management in the public sector is determined by legislation, including the Public Service Act,[20] for those employed in the public service the Employment of Educators Act,[21] for educators and the South African Police Services Act,[22] for police personnel.

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16 Constitution of the Republic of South African 1996.

17 S 7(1) Constitution.

18 *Minister of Defence v National Defence Union* 2007 (1) SA 402 (SCA); (2006) 27 *ILJ* 2276 (SCA) par [25].

19 S 197(2) of the Constitution of the Republic of South Africa No 108 of 1996.

20 The Public Service Act, Proclamation No 103 of 1994.

21 The Employment of Educators Act 76 of 1998, Proclamation No 138 of 1994.

22 The South African Police Services Act 68 of 1995.

The Public Service Act covers those employees employed in the "traditional" public service.[23] The public service consists of the national departments and the provincial administrations, as set out in the Schedules to the Public Service Act.[24] The provincial administrations are established in the Constitution[25] as relatively autonomous political entities that have, not only administrative and executive powers but, to a limited degree can develop legislation in accordance with their own needs.[26] The provincial administrations, however, do not have legislative powers in relation to employment.[27]

2 3 1 1 THE RIGHT TO FAIR LABOUR PRACTICE

Section 9(1) of the Bill of Rights contained in the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9(2) provides that "Equality includes the full and equal enjoyment of all rights and freedoms".

Section 23(1) of the Constitution provides that "everyone has the right to fair labour practices".

When the LRA came into effect its stated purpose was primarily to give effect to the constitutional right to fair labour practices as enshrined in section 27 of the interim constitution which was in force at the time. Section 27 of the interim constitution was subsequently replaced by section 23 of the Constitution.

The most significant changes brought about by section 23 of the Constitution related to the bargaining regime. Firstly the right to collective bargaining was redrafted in its entirety. Secondly, the Constitution expanded the right to strike. Thirdly, the employer "right" to a lockout was deleted. Fourthly the Constitution included provisions dealing with union security arrangements.

According to Cheadle, the Constitution is unique in constitutionalising the "open ended" right to fair labour practices.[28] He states that this right is not to be found in constitutions of comparable states.

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23 S 8 of the Public Service Act, Proclamation No 103 of 1994.

24 Schedule 2 of the Public Service Act Proclamation No 103 1994.

25 The Constitution of the Republic of South Africa.

26 Chap 6 of the Constitution of the Republic of South Africa.

27 Schedule 4 and 5 of the Constitution of the Republic of South Africa.

28 Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 363.

2 3 1 2 THE RIGHT TO COLLECTIVE BARGAINING

The policy of the apartheid government was strongly opposed to extending labour rights including rights to collective bargaining to state employees. Section 2(2) of the 1956 LRA specifically excluded from the application of the 1956 LRA persons employed by the State and persons who taught, educated or trained other persons at any university, technikon, college, school or other educational institution maintained wholly or partly from public funds.

In February 1997 the Constitution replaced the Interim Constitution. The Constitution is the supreme law of the land.[29] Law or conduct inconsistent with the Constitution is invalid. The obligations imposed by the Constitution must be fulfilled.[30] The Constitution contains an extensive Bill of Rights.

The Bill of Rights applies to all law, and binds the legislative, executive, judiciary and all organs of state.[31] A provision in the Bill of Rights binds all natural or juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[32] In terms of section 7(2) of the Constitution, the state must respect, protect, promote and fulfill the rights in the Bill of Rights. Section 197(1) of the Constitution provides that "there is a Public Service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day". The Constitution also states that the terms and conditions of employment in the Public Service must be regulated by national legislation.[33]

Section 23(5) of the Constitution confers on every trade union, employers' organization and employer the right to engage in collective bargaining. Cheadle suggests that this right is a shorthand for a range of rights and freedoms associated with the institution of collective bargaining. He suggests that this right is divisible into three components: the freedom to bargain collectively; the right of one of those parties in the bargaining process to exercise economic power against the opposing party (by a strike or lockout); and thirdly possibility that the right imposes a positive duty to bargaining.[34]

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29 S 1(d) of the Constitution of the Republic of South Africa.
30 S 2 of the Constitution of the Republic of South Africa.
31 S 8(1) of the Constitution of the Republic of South Africa.
32 S 8(2) of the Constitution of the Republic of South Africa.
33 S 197(2) of the Constitution of the Republic of South Africa.
34 Cheadle *et al The South African Constitutional Law: The Bill of Rights* 363-390.

The Constitution does not impose a positive duty to bargain.[35] There is, however, a body of authority which suggests that the range of rights and freedoms contained in section 23 includes a positive duty to bargain. According to Cheadle, the Constitution did not intend to impose a positive duty to bargain. That much is re-enforced by the second and third sentences of section 23(5). He states that while the second sentence appears to state the obvious, its function is interpretive. It emphasizes the distinction between the right to engage in collective bargaining (the freedom to bargain) and the institutions and practices of collective bargaining.

It delineates the ambit of the right, by stating that the forms, institutions and practices of collective bargaining are not co-extensive with the right. Collective bargaining is constituted by a complex of rights and duties, processes and institutions. The object of the second sentence of section 23(5) is to provide a clear indication that the inclusion of the right to engage in collective bargaining is not an invitation to constitutionalise the content of collective labour law.

Cheadle states further that the inferences that the right in the first instance is restricted to a freedom, and that the forms, processes, institutions and the complex balance of power that forms part of any collective bargaining regime are the reserve of Parliament. This he argues is further re-informed by the formulation of the third sentence: the opening phrase, "to the extent that" suggests that the concept of collective bargaining is a wider concept than any of the collective bargaining rights incorporated in Chapter 2 of the Constitution.[36]

2 3 1 3 THE LABOUR RELATIONS ACT

On 11 November 1996, in line with the governments' policy of harmonisation of the country's labour laws, the Labour Relations Act,[37] (the LRA) came into effect. The LRA purported to repeal the Public Service Labour Relations Act, the Educators Labour Relations Act and the South African Police Services Labour Relations Regulations. However, in real terms it maintained the core provisions of these laws by retaining them in the transitional arrangements.[38] For the first time, a single law regulated labour relations in both the public and the private spheres.

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35 *Ibid.*

36 Cheadle *et al The South African Constitutional Law: the Bill of Rights* 392-394.

37 The Labour Relations Act 66 of 1995.

38 Schedule 7, the Transitional Provisions of Labour Relations Act 66 of 1995.

In section 1 of the LRA, it is stated that one of the purposes of the LRA is to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest. The LRA also seeks to promote collective bargaining at sectoral level. The LRA must be interpreted in order to give effect to the constitutional right to fair labour practices as well as to give effect to the international treaty obligations which are binding on South Africa.[39]

From its text the LRA does not impose a duty to bargain, but only promotes collective bargaining by providing a platform for bargaining at the level of the workplace and the structures for bargaining at industrial level. The reasoning underlying this policy choice is explained in the explanatory memorandum that accompanied the first draft of the LRA where it is stated: "While giving legislative expression where a system in which bargaining is not compelled by law, the draft bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organizational rights for unions and by fully protecting the right to strike."[40]

The LRA, in addition to its other features, created collective bargaining structures for the Public Sector. While the drafters of the LRA, canvassed the support and views of trade unions and business in the private sector, they did little to evaluate and analyse the structures of management in the public sector.[41] Consequently the collective bargaining structures are located where managerial authority is vested in the public sector. A central bargaining council was created, the Public Service Coordinating Bargaining Council (PSCBC)[42] as most issues are determined centrally. At the same time the collective bargaining structures that had been created for educators (ELRC), for police (the National Negotiating Forum (NNF)), the national departments and the provincial administrations continued to exist.[43]

In line with the principles set out in the LRA regarding sectors, the LRA makes provision for already existing sectors, for educators and police personnel and establishes a mechanism for the creation of other sectors in the public service.[44]

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39 S 3 of the LRA.

40 Explanatory Memorandum to the Labour Relations Bill.

41 The provisions of the LRA where negotiated in the National Economic Development and Labour Council, (NEDLAC) 1995 representatives of the three social partners, Labour, Business and Government made extensive input into the provisions of the LRA.

42 S 36 of the Labour Relations Act 66 of 1995.

43 Item 16 and 18 of Schedule 7 of the Labour Relations Act 66 of 1995.

44 S 37(1) of Labour Relations Act 66 of 1995.

The LRA also turned departmental and provincial chambers into bargaining councils, thereby creating another 33 bargaining councils. The result was that these councils negotiated collective agreements that duplicated and conflicted with agreements signed in other structures this problem was resolved by amending the LRA to grant the PSCBC the power to disestablish provincial departmental bargaining councils.[45]

In 2003 the PSCBC exercised this power, replacing these Councils with Chambers in the PSCBC and Sectoral Bargaining Councils. Although the chambers may negotiate collective agreements, such agreements have to be ratified by the over aching structure, thereby ensuring coordination with the rest of the system.[46]

2 3 2 PROVISIONS FOR COLLECTIVE BARGAINING

Cheadle identifies collective bargaining as one of the mechanisms intended to implement "fair labour practices", as mandated by the Constitution.[47]

The Labour Relations Act (LRA) of 1995 promotes centralised collective bargaining in three ways, namely collective agreements, bargaining councils and statutory Councils.

Collective agreements in terms of the LRA are established in terms of section 23 of the Act. Section 31 of the LRA deals with the "binding nature" of a collective agreement concluded in the bargaining council. This section gives legal effect to collective agreements. Once a collective agreement is reached, it becomes binding on the affected parties. Such a collective agreement binds the parties to the collective agreement.

2 3 2 1 PROVISIONS FOR THE ESTABLISHMENT AND GOVERNANCE OF BARGAINING COUNCILS

Statutory Councils in terms of the LRA is established in terms of section 39 of the LRA. This section describes a statutory council as a body consisting of a representative trade union/s and representative employers' organisation/s whose membership constitute at least 30 per cent of the employees respectively and are registered in terms of the requirements of the LRA.

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45 S 37(1)(a) and (b) of the Labour Relations Act 66 of 1995.

46 PSCBC Resolution 9/2003.

47 Cheadle *Regulated Flexibility Revisiting the LRA and the BCEA* (2006) 27.

The 1995 LRA states in section 35 states that:

> "There will be a bargaining council for-
>
> (a) the public service as a whole, to be known as the Public Service Co-ordinating Bargaining Council; and
> (b) any sector within the public service that may be designated in terms of section 37."

Section 36(2) of the LRA states:

> "The Public Service Co-ordinating Bargaining Council may perform all the functions of a bargaining council in respect of those matters that-
>
> (a) are regulated by uniform rules, norms and standards that apply across the public service; or
> (b) apply to terms and conditions of service that apply to two or more sectors; or
> (c) are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any sector."

Section 37 of the LRA provides for the establishment of bargaining in sectors of the public service. It gives PSCBC the power to, in terms of its constitution and by resolution to designate a sector of the public service for the establishment of a bargaining council. The PSCBC may also vary the designation of, amalgamate or disestablish bargaining councils so established.

2 4 ESTABLISHMENT OF THE PSCBC

In South Africa the state as employer and its organised trade unions needs to speak to one another. Historically and by nature the bond between these parties are adversarial because of the different interest the parties bring to the relationship. A third party needs to intervene to facilitate the conditions for building a healthy bond between the two social partners. In the South African public service legislation such as the 1995 Labour Relations Act, a third party was created. It is known as the Public Service Co-ordinating Bargaining Council (PSCBC).

Section 35 of the LRA establishes the Public Service Co-ordinating Bargaining Council ("the PSCBC") as a Bargaining Council for the Public Service as a whole. The PSCBC may perform all the functions of a Bargaining Council in respect of those matters that are:

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

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

(c) assigned to the State as employer in respect of the Public Service that are not assigned to the State as employer in any sector.[48]

The term "public service" is defined in section 213 of the Act to mean national departments, provincial administrations, provincial departments and organisational components contemplated in section 7(2) of the Public Service Act, 1994. The South African National Defence Force, the national Intelligence Agency and the South African Secret Service are excluded from the definition of public service.

Once properly established,[49] the PSCBC had the power exercised in terms of its constitution and by resolution to designate a sector in the Public Service for the establishment of a bargaining council[50] which must then be established in terms of its constitution.[51] After the establishment of the PSCBC, the Public Service Bargaining Council and its Central Chamber established under the PSLRA of 1994 ceased to exist. However, the Chambers for each department and provincial administration were constituted as juristic persons and were deemed to be the Bargaining Councils that have been established under section 37 of the LRA for the department or provincial administration concerned.

In 2003 the PSCBC exercised powers as provided by the LRA to replace these Councils with Chambers in the PSCBC and the other Sector Bargaining Councils.

The PSCBC has four sector bargaining councils, namely the Safety and Security Sector Bargaining Council (SSSBC), the Public Health and Social Development Sector Bargaining Council (PHSDSBC), the Education Labour Relations Council (ELRC), and the General Public Service Sector Bargaining Council (GPSSBC). The PSCBC has objectives and the sector councils facilitate the attainment of the PSCBC objectives. However, the PSCBC remains the overarching "mother body" for collective bargaining in the South African public service.

48 S 36(2) of the LRA.
49 Schedule 1 of the LRA.
50 S 37(1) of the LRA.
51 S 37(2) of the LRA.

2 5 ESTABLISHMENT OF THE GPSSBC

In terms of section 37(5) of the LRA the sector bargaining councils have exclusive jurisdiction in respect of matters that are specific to the sector for which the council was established and has the authority to conclude collective agreements and resolve labour disputes in that sector.

The PSCBC has designated 4 sectors, that being GPSSBC, SSSBC, PHSDSBC and ELRC.

The scopes of these councils are as follows:

GPSSBC

The GPSSBC covers all Public Service employees who do not fall within the scope of the above Sector Councils (PHSDSBC, SSSBC or the ELRC) excluding uniform members in the following institutions:

- Members of the National Defense Force;
- Members of the National Intelligence Agency
- Members of the South African Secret Service; and
- Members of the South African National Academy of Intelligence.[52]

SSSBC

The scope of the SSSBC encompasses the State as employer, as well as its employees who are employed in the South African Police Service in terms of:

- The South African Police Service Act 68, 1995;
- The Public Service Act 103, 1994;
- Employees that do not fall within the scope of the SSSBC;
- Trainee Students / Student Constables;
- Security Guards/Officers;
- Metro Police / Traffic officers;
- SANDF Employees;
- Department of Correctional Services employees;
- Part-time /Temporary / Contract employees employed by SAPS;
- Tea Clubs / Sports Clubs Employees; and

[52] GPSSBC Constitution Clause 3.

- Cleaners who are cleaning SAPS buildings but contracted to the Service Provider.[53]

PHSDSBC

The PHSDSBC encompasses the State as Employer, and its employees who are in the Health and Social Development Sector; i.e. Employees who are employed by the Departments of Health and Social Development at national and provincial levels. Schedule 1 of the Constitution of the PHSDSBC also lists health professionals employed in all other national and provincial departments who fall within their scope.[54]

ELRC

The scope of the ELRC covers the following employees:

- Educators employed in terms of Employment of Educators Act No 76 of 1998; and

- Educators or Lecturers in the 50 Public FET Colleges employed in terms of Further Education and Training Colleges Act

The ELRC lacks jurisdiction on the following employees:

- Educators employed by the School Governing Body (SGB); and

- Support staff in the Department of Education and FET Colleges e.g. (Clerks, Secretaries etc).

The GPSSBC therefore covers all national and provincial departments which are not covered by the scopes of other three sector councils.

The GPSSBC has been established as a result of the PSCBC having designated a "general" sector in the public service in terms of section 37 of the LRA, and PSCBC Resolution 10 of 1998, that is, a sector other than education, safety and security and health and social development. The jurisdiction of the GPSSBC is determined by its scope of registration and can be summarized as all those departments (and employees) that are not covered by the other three sectors.

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53 SSSBC Constitution Clause 3.

54 PHSDSBC Constitution Clause 3.

The GPSSBC was registered and inaugurated with the Department of Labour on 7 September 1999.

CHAPTER 3
COLLECTIVE BARGAINING

3 1 INTERNATIONAL LABOUR ORGANISATION

One of the International Labour Organisation's (ILO) core mandates is to promote collective bargaining worldwide. This mandate was set out in 1944 in the Declaration of Philadelphia, which forms part of the ILO Constitution and recognizes "the solemn obligation of the International Labour Organization to further among the nations of the world programmes that will achieve the effective recognition of the right of Collective Bargaining".[55]

The Right to Organise and Collective Bargaining Convention, 1949, No 98 provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Labour Relations (Public Service) Convention, 1978 (No 151) promotes collective bargaining for public employees, as well as other methods allowing public employees' representatives to participate in the determination of their conditions of employment. It also provides that disputes shall be settled through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration.

The Collective Bargaining Convention, 1981 (No 154) defines collective bargaining and calls for its promotion in all branches of economic activity, including public service. The convention acknowledges that collective bargaining in the public service may need to be addressed differently from other branches of economic activity. This is because its conditions of service are usually designed to achieve uniformity.

The Convention acknowledges that these conditions are usually approved by parliaments and often contain exhaustive regulations covering rights, duties and conditions of service that leave little room for negotiation.

[55] Record of Proceedings, International Labour Conference, 26th Session, Philadelphia, 1944.

It is therefore recognised that negotiations for public servants are often centralized due to the unique situation of the public service and it's financing. Wages and other employment conditions of public servants have financial implications that must be reflected in public budgets. The budgets are approved by bodies such as parliaments, not always the direct employers of public servants. Negotiations with financial implications regarding the public service are, therefore, frequently centralized and subject to directives or the control of external bodies, such as the finance ministries or inter-ministerial committees.

These aspects are compounded by other issues such as the determination of the subjects that can be negotiated, the jurisdiction of the various state structures, as well as the determination of negotiating parties at different levels.

Based on these issues, Article 1(3) of the Convention allows for special modalities of application that might be fixed by national laws or regulations, or by national practice for the public service.

Special modalities could include:

- parliament or the competent budgetary authority setting upper or lower limits for wage negotiations, or establishing an overall budgetary package within which parties may negotiate monetary or standard-setting clauses;

- legislative provisions giving the financial authorities the right to participate in collective bargaining alongside the direct employer;

- harmonization of an agreed bargaining system with a statutory framework, as is found in many countries; and

- the initial determination by the legislative authority of directives regarding the subjects that can be negotiated, at what levels collective bargaining should take place or who the negotiating parties may be. The determination of directives should be preceded by consultations with the organizations of public servants.

Collective bargaining globally in public services have been under strain in recent years due largely to the global economic crisis. The International Labour Organisation has in the 102nd International Labour Conference discussed a report on "Collective bargaining in the public service: a way forward". The report provided an analysis of the advantages of collective

bargaining in the public sector and recalled that the public service must be effective and efficient to ensure the exercise of rights and improve citizens quality of life.[56]

The report also noted that a change is underway in the traditional status of public servants and justifies the need to strengthen collective bargaining and freedom of association in the public sector.[57]

3 2 COLLECTIVE BARGAINING STRUCTURES

In order to ensure that organisational conflict is effectively managed, the LRA introduces collective bargaining structures at central and workplace level.

The LRA provides that a bargaining may be established by one or more registered employer party and one or more registered employee party who voluntarily come together and agree to bargain with each other.

Below are a few of the powers and functions of bargaining councils as outlined under section 28 of the LRA:

- to conclude collective agreements
- to enforce these collective agreements
- to prevent and resolve labour disputes
- to perform the dispute resolution functions
- to establish and administer a fund to be used for resolving disputes
- to promote and establish training and education schemes
- to establish and administer, pension, medical aid, sick pay, holiday, unemployment and training schemes or funds for the benefit of the parties to the bargaining council or their members

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56 Report Collective Bargaining in the Public Service, Part II 80.

57 Report Collective Bargaining in the Public Service, Part II 83.

- to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area

- to determine, by collective agreement, the matter which may not be an issue in dispute for the purpose of a strike or lockout at the workplace, and

- confer on workplace forums additional matters for consultation

3 3 BARGAINING AGENDA

There is no closed list of issues that may form the subject matter of collective bargaining, Grogan[58] argues that the current LRA adopts a *laissez-faire* approach when it comes to the identification of appropriate issues for collective bargaining. It intentionally does not prescribe the agenda for collective bargaining and leaves it to the participants in line with its preferred principle of voluntarism.

The LRA in section 64 (2) instructs disputing parties over "a refusal to bargain" to refer their dispute to advisory arbitration before resorting to industrial action, although it is devoid of specifics of what should be bargained on.

Consequentially, employers tend to perceive the collective bargaining agenda in a narrow fashion in order to protect and retain their managerial prerogative to decide on organisational issues and processes. Trade unions on the other hand, tend to demand consultation on all matters of "mutual interest" between an employer and employee before any managerial action is taken unilaterally.

In essence the core of the collective bargaining agenda remains salaries and conditions of service.

3 4 ORGANISATIONAL RIGHTS

Sections 11 to 22 of the LRA comprise organisational rights that are afforded to registered trade unions to enable them to participate in the process of collective bargaining and dispute

58 Grogan *Collective Labour Law* (2007) 101.

resolution. The Act allocates these rights according to the degree of representativeness of a trade union at the workplace.

3 5 THE RIGHTS OF SUFFICIENTLY REPRESENTATIVE TRADE UNIONS

These are registered trade unions acting alone or in collaboration with others that are sufficiently representative of the employees at a particular workplace. The Act itself is devoid of any specific percentages that indicate sufficient representation. A generally accepted percentage however is between 30% and 33%.

The rights accorded to sufficiently represented trade unions can be summarised as follows:

- the right to enter the employer's premises in order to recruit, communicate and or serve members' interest;

- the right to hold meetings with employees outside of their working hours at the employers' premises;

- the members of such a trade union(s) are entitled to participate in any ballot conducted by the trade union at the employer's premises; and

- the employer has to effect stop deductions for the payment of trade union dues instructed to do so by the members.

The rights are granted subject to conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

3 6 RIGHTS OF MAJORITY TRADE UNIONS

These are registered trade unions acting alone or jointly that represent majority of employees at a particular workplace. The usual majoritarian threshold is recommended at 50% + 1 employee representation.[59] These trade unions enjoy all the rights conferred on sufficiently representative trade unions plus additional rights that they enjoy due to their higher degree of representativeness.

[59] Grogan *Collective Labour Law* (2010) 114.

Below are these additional rights:

- the right to elect shop stewards;
- may set up, together with employer party, thresholds for representivity;
- the right to information (with certain limitations); and
- the right to obtain leave for office bearers.

3 7 COLLECTIVE AGREEMENTS

A collective agreement is defined in the LRA and Basic Conditions of Employment Act as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered trade unions, on the one hand, and on the other hand, one or more registered employers' organisations, or a combination of employers' organisations.[60]

Traditionally collective agreements fall into the following three categories:

- Recognition agreements – agreements in terms of which the bargaining relationship between the union and the employer is acknowledged and regulated.

- Substantive agreements – agreements in terms of which wages and conditions of employment are laid down for a particular period.

- Procedural agreements – agreements which regulate procedures for disciplinary action, the resolution of grievances and such matters as retrenchment procedures.[61]

In section 23 of the LRA the powers of collective bargaining agreements are clarified. These agreements, when they are concluded with a majority trade union(s), bind not only the parties to the agreement and their members but also extend to non-parties if:

- the employees are identified in the agreement; and
- the agreement expressly binds the said employees.

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60 S 213 of the LRA and s 1 of the BCEA.

61 Grogan *Collective Labour Law* (2010) 130.

Under the LRA the extension of bargaining council agreements to non-parties is possible under certain specified conditions. The effect of extension of a bargaining council agreement to non-parties is to render the non-party to whom it is extended, for all intents and purposes, a party to the agreement.[62]

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.

3 8 DISPUTES OF INTEREST AND DISPUTES OF RIGHT

Grogan[63] holds that the distinction between disputes of right and disputes of interest forms a cornerstone of the LRA. It is explained that disputes of right are those arising from breaches of rights or failure to discharge obligations conferred or imposed by the Act or other statutes, by collective agreements, or by individual contracts of service. Such disputes are all justiciable or arbitratable under the LRA. All other disputes are disputes of interest which must be resolved by negotiation or, in the absence of agreement, industrial action.[64]

The LRA does not resolutely distinguish between disputes of interest and disputes of right. Section 134 of the LRA refers to "matter of mutual" interest, a phrase which is widely misunderstood to be synonymous with disputes of interest. However read in context it actually refers to any dispute between an employer and employees including both disputes of interest and disputes of right, in which employees and employers share a mutual interest.[65]

3 9 COLLECTIVE BARGAINING IN THE PSCBC

The PSCBC was established with the aim of creating a culture of engagement and dialogue between public service unions and the State. Unlike the private sector bargaining councils, which are formed through a voluntary process, the LRA, section 35 establishes the Public

62 Grogan *Collective Labour Law* (2010) 130.
63 Grogan *Collective Labour Law* (2010) 103.
64 Grogan *Collective Labour Law* (2010) 103.
65 *Ibid*.

Service Co-ordinating Bargaining Council (PSCBC) as a mandatory bargaining council for the public service.

3 9 1 OBJECTIVES OF THE PSCBC

Once established, the PSCBC set itself objectives in managing the relationship between the state and its recognised trade unions.

The constitution of the PSCBC set the following objectives, for the Council to:

- generally enhance labour peace in the *public service*;
- promote a sound relationship between the *employer* and its *employees*;
- in terms of *the Act* and this constitution, negotiate and bargain collectively to reach agreement on matters of *mutual interest* to the *employer* and *employees* represented by admitted *trade unions* in the *Council*;
- provide mechanisms for the prevention and resolution of disputes between—
    - the employer and trade unions admitted to the Council;
    - the employer and trade unions not admitted to the Council; and
    - the employer and employees,
        - where the employer has the requisite authority to resolve such disputes;
- conclude, supervise and enforce collective agreements;
- comply with its powers and duties in terms of the Act and this constitution;
- consider and deal with such other matters as may affect the interests of the parties to the Council; and
- promote effective communication and co-ordination between the Council and sectors.[66]

[66] PSCBC Constitution 2003 clause 3.

The underlining theme running throughout the above objectives is to enhance constructive social dialogue between the parties involved in the PSCBC.

3 9 2 BARGAINING PROCESS - PSCBC

A point often raised with regards to challenges in collective bargaining in South Africa, is that the realm of collective bargaining is still characterised by some as adversarial. This view is especially perpetuated in the public service due to the frequency of industrial action.

The Constitution of the PSCBC provides that any party to the Council may submit a written proposal regarding a matter of mutual interest to the Secretary for consideration by the Council. If it is decided that the *Council* will deal with a proposal, it must meet within 21 working days after receipt of a proposal. At the meeting 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 negotiating 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.

The Constitution also provides that in the event parties do not conclude a Resolution of Council during the negotiating period any party may refer the matter for conciliation in terms of the dispute resolution procedures. If the matter is not resolved during the conciliation process, parties to the Council may exercise their rights in terms of the LRA.

3 9 3 PARTIES TO THE PSCBC

3 9 3 1 THE EMPLOYER

The PSCBC consists of equal representation of the employer and employee organisations. The employer represents 50 percent of the votes in the Council and labour holds the other 50 percent. An agreement must have the support from the employer plus at least 51 percent of labour's support.

The State as employer is represented by the Chief Negotiator from the Department of Public Service and Administration (DPSA). The employer's negotiating team also consists of chief negotiators from sector bargaining councils, representatives from national departments and representatives of provincial administrations in the public service. The Chief Negotiator convenes an employer caucus, called the Labour Relations Forum, on a monthly basis to prepare for the collective bargaining processes. The total delegation of the employer representation in Council is thirty five.

The Employer Mandating processes

The Minister of Public Service and Administration convenes and chairs a Mandating Committee, consisting of the key public service ministers namely Ministers of Education, Health, Safety and Security, Justice and Constitutional Development, Defence and Finance. The Mandating committee which reports to cabinet provides mandates to the Chief Negotiator on bargaining issues. Cabinet maintains control over the bargaining process and mediates between the interests of the different ministers. Parliament has no direct influence on the collective bargaining process.

3 9 3 2 THE TRADE UNIONS

Over 90 percent of public service employees belong to trade unions admitted to the PSCBC.[67]

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[67] Shamira Huluman *The Practice of Social Dialogue in the South African Public Service, Public Service Co-ordinating Bargaining Council, South Africa* (2006) Mauritius.

The Constitution of the PSCBC requires any single trade union party to apply for admission to the Council if it meets the threshold requirement of 50 000 members, and is admitted to a Sectoral Council.[68]

The threshold constitutes 5 percent of the public service. This is a relatively low representatively requirement, as compared to the private sector where representivity is set at around 20 percent.

Currently there are 8 trade unions admitted to the PSCBC.

Trade Unions admitted to the PSCBC as at June 2013 (membership figures as at 31 December 2012):

Union	Vote Weight	Membership
DENOSA acting together with SAMA	5.855%	57 950
HOSPERSA/NUPSAW/ NATU acting together	10.551%	104 426
APEK, ITUSA, NUE, OFSATA, PEU, SAOU, SAUVSE, USAPE, acting together as NAPTOSA	8.606%	85 177
NEHAWU acting together with PAWUSA	16.491%	163 217
POPCRU acting together with SASAWU and SADNU	10.797%	106 864
PSA acting together with UNIPSA and NPSWU	18.022%	178 367
SADTU acting together with CTPA	23.137%	228 986
SAPU	6.540%	64 727
Total Union Membership		989 714

The high rate of organised workers can be attributed to the agency shop agreement entered into by the parties to the PSCBC.

[68] PSCBC Constitution 2003 clause 7.1.

Agency Shop Agreement

An agency shop agreement does not oblige employees to become union members, but it may provide that non-members who are eligible for union membership are obliged to pay a subscription that does not exceed the amount payable in dues by union members.

The agency shop seeks to overcome the problem of "free riders" and it avoids infringing the employee's right to freedom of association.

The LRA section 25 provides that:

> "A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring 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."

In line with the above provisions the PSCBC entered into PSCBC Resolution 1 of 2005, Agency Fee Agreement. This agreement has also been amended through PSCBC Resolution 2 of 2010 and Resolution 1of 2011.

The PSCBC in its annual report of 2012/2013 reported that within the public service there are 180 291 agency fee payers.[69]

3 10 REFUSAL TO BARGAIN

By formulating the residual unfair labour practice concept in narrow terms, the drafters of the Act attempted to shield the collective bargaining process from intrusion by the courts. Yet it provides for arbitral intervention (of an advisory nature) where a dispute concerns a "refusal to bargain", and for compulsory, binding arbitration of all disputes involving the "interpretation or application" of collective agreements.[70]

While the phrase "refusal to bargain" is defined in section 64(2), the meaning of the phrase "interpretation or application" of collective agreements is left undefined. Non-compliance with a collective agreement seems to fall within the ambit of the phrase, but termination or suspension of the agreement arguably does not. This is because specific provision is made

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69 PSCBC Annual Report 2012/2013.

70 Jordaan *Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom of Contract* (2009).

in section 64(2)(b) of the LRA for advisory arbitration if the dispute concerned the "withdrawal" of recognition of a bargaining agent.

As the withdrawal of recognition inevitably involves the termination of the recognition agreement, any dispute involving the latter is therefore subject to advisory - as opposed to binding - arbitration. Otherwise, however, the phrase "interpretation or application" of a collective agreement would seem to cover every conceivable dispute arising from or in connection with a collective agreement.[71]

[71] *Ibid.*

CHAPTER 4
THE GPSSBC

4 1 INTRODUCTION

The GPSSBC derives its powers and functions from the Constitution of Council.[72] The powers and functions are defined as follows:

- conclusion of collective agreements;
- enforcement of collective agreements
- prevention and resolution of labour disputes;
- performance of the dispute resolution functions referred to section 51 of the *Act*;
- establishment and administration of a fund to be used for resolution of disputes;
- promotion and establishment of training and education schemes;
- raising, borrowing, lending, levying and investing funds;
- development of policy proposals that may affect the sector;
- determining, by collective agreement, matters that may not be an issue in dispute for the purposes of a strike or a lock–out at a workplace;
- exercising any other power to perform any other function that may be necessary or desirable to achieve the objectives of Council.
- creation of an environment conducive to the provisioning of operational services by the PSCBC to the Council if it contributes to efficiency or administrative convenience and is appropriate for the sharing of skills, expertise or resources.[73]

72 GPSSBC Constitution 2003.

The objectives of the Council are contained in the GPSSBC Constitution. They are listed to be:

- promote labour peace in the General Public Service Sector;

- promote and maintain sound relationships between the employer and its employees;

- in terms of the Act and this constitution, negotiate and bargain collectively to reach agreement on matters of mutual interest to the employer and employees represented by admitted trade unions in the Council;

- provide mechanisms for the prevention and effective and expeditious resolution of disputes between-

  (i) the employer and trade unions admitted to the Council;
  (ii) the employer and trade unions not admitted to the Council; and
  (iii) the employer and employees,

  where the employer has the requisite authority to resolve such disputes;

  - conclude, supervise and enforce collective agreements;

  - comply with its powers and duties in terms of the Act and this constitution;

  - consider and deal with such other matters as may affect the interests of the parties to the Council; and

  - promote the effective delivery of services to the community;

  - promote effective communication between the employer, its employees and the trade unions in the General Public Service Sector.[74]

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[73] Clause 5.
[74] Clause 4.

The GPSSBC is governed by duly elected members to Council, acting as parties to the Council, representing the employer and all trade unions admitted to the GPSSBC. Subject to the direction and control of the Council, the Executive Committee may exercise and perform the powers, functions and duties of the Council relating to the supervision and control of the day-to-day management and administration of the Council.[75]

The composition of the Executive Committee is as follows:

(a) Chairperson and two Vice-Chairpersons;
(b) Three (3) representatives appointed/elected by the employer; and
(c) Three (3) representatives appointed/elected by the admitted trade unions.[76]

4 2 MEMBERSHIP TO THE GPSSBC

As established the parties to the Council are the State as employer and all trade unions admitted to the Council. Unions who meet the following criteria or threshold requirements may apply for admission to the *Council*:

(a) A registered *trade union* which meets the threshold requirement of 30 000 members; or

(b) two or more registered *trade unions* acting together as a single party, (referred to as a combined trade union party), provided their combined membership meets the threshold requirement of 30 000 members**.**

The trade unions meeting these requirements in the GPSSBC are; Police and Prison Civil Rights Union (POPCRU); National Education, Health and Allied Workers Union (NEHAWU) Public Servants Association (PSA).[77]

[75] Clause 14.4.
[76] Clause 14.1.
[77] GPSSBC Annual Report 2013/14.

Membership figures as at 31 December 2012:[78]

Trade Union	Membership
NEHAWU	87 930
POPCRU	33 963
PSA	119 869
TOTAL	133 922
Total Membership	272 354

Government Departments falling under the Scope of GPSSBC:

1.	Dept. of Agriculture, Forestry and Fisheries
2.	Dept. of Arts and Culture
3.	Dept. of Basic Education
4.	Dept. of Communications
5.	Dept. of Correctional Services
6.	Dept. of Cooperative Governance
7.	Dept. of Defence and Military Veterans
8.	Dept. of Economic Development
9.	Dept. of Energy
10.	Dept. of Environmental Affairs
11.	Further Education and Training Colleges
12.	Dept. of Government Communications Information System
13.	Dept. of Government Printing Works
14.	Government Pension Administration Agency
15.	Dept. of Higher Education and Training
16.	Dept. of Home Affairs
17.	Dept. of Human Settlements
18.	Dept. of International Relations and Cooperation
19.	Independent Police Investigation Directorate
20.	Dept. of Justice and Constitutional Development
21.	Dept. of Labour
22.	Dept. of Mineral Resources
23.	National Treasury
24.	Office of the Public Service Commission

78 *Ibid.*

25.	Dept. of Performance, Monitoring and Evaluation
26.	Dept. of Public Enterprise
27.	Public Administration Leadership And Management Agency
28.	Dept. of Public Service and Administration
29.	Dept. of Public Works
30.	Dept. of Rural Development and Land Reform
31.	Dept. of Science and Technology
32.	Dept. of Sport and Recreation
33.	Statistics South Africa
34.	Dept. of Tourism
35.	Dept. of Trade and Industry
36.	Dept. of Traditional Affairs
37.	Dept. of Transport
38.	The Presidency
39.	Dept. of Water Affairs
40.	Dept. of Women, Children, People with Disabilities

North West Province

1.	Office of the Premier
2.	Dept. of Agriculture and Rural Development
3.	Dept. of Education
4.	Dept. of Economic Development, Environment, Conservation and Tourism
5.	Dept. of Finance
6.	Dept. of Human Settlement, Public Safety and Liaison
7.	Dept. of Local Governments and Traditional Affairs
8.	Dept. of Public Works; Roads and Transport
9.	Dept. of Sport, Arts and Culture

Mpumalanga Province

1.	Office of the Premier
2.	Dept. of Agriculture, Rural Development and Land Administration
3.	Dept. of Community Safety, Security and Liaison
4.	Dept. of Cooperative Government and Traditional Affairs
5.	Dept. of Culture; Sport and Recreation
6.	Dept. of Economic Development, Environment and Tourism

7.	Dept. of Education
8.	Dept. of Finance
9.	Dept. Human Settlements
10.	Dept. of Public Works, Roads and Transport
	Gauteng Province
1.	Office of the Premier
2.	Dept. of Agriculture and Rural Development
3.	Dept. of Community Safety
4.	Dept. of Economic Development
5.	Dept. of Education
6.	Dept. of Finance
7.	Gauteng Treasury
8.	Dept. of Human Settlement
9.	Dept. of Infrastructural Development
10.	Dept. of Roads and Transport
11.	Dept. of Sport, Arts, Culture and Recreation

Eastern Cape Province

1.	Office of the Premier
2.	Dept. of Economic Development, Environmental Affairs and Tourism
3.	Dept. of Education
4.	Dept. of Human Settlements
5.	Dept. of Local Govt. and Traditional Affairs
6.	Dept. of Provincial Planning and Treasury
7.	Dept. of Roads and Public Works
8.	Dept. of Rural Development and Agrarian Reform
9.	Dept. of Safety and Liaison
10.	Dept. of Sport; Recreation; Arts and Culture
11.	Dept. of Transport

Western Cape Province

1.	Dept. of the Premier
2.	Dept. of Agriculture
3.	Dept. of Community Safety
4.	Dept. of Cultural Affairs and Sport

5.	Dept. of Economic Development and Tourism
6.	Dept. of Education
7.	Dept. of Environmental Affairs and Dev. Planning
8.	Dept. of Human Settlements
9.	Dept. of Local Government
10.	Dept. of Transport and Public Works
11.	Provincial Treasury

Northern Cape Province

1.	Office of the Premier
2.	Dept. of Agriculture and Land Reform
3.	Dept. of Cooperative Governance, Human Settlement and Traditional Affairs
4.	Dept. of Education
5.	Dept. of Environment and Nature Conservation
6.	Dept. of Finance, Economic Affairs and Tourism
7.	Dept. of Roads and Public Works
8.	Dept. of Sport, Arts and Culture
9.	Dept. of Provincial Treasury
10.	Dept. of Transport, Safety and Liaison

Free State Province

1.	Dept. of the Premier
2.	Dept. of Agriculture and Rural Development
3.	Dept. of Cooperative Governance and Traditional Affairs
4.	Dept. of Economic Development, Tourism and Environmental Affairs
5.	Dept. of Education
6.	Dept. of Human Settlements
7.	Dept. of Public Works
8.	Dept. of Sports, Arts, Culture and Recreation
9.	Provincial Treasury

Limpopo Province

1.	Office of the Premier
2.	Dept. of Agriculture
3.	Dept. of Economic Development and Tourism

4.	Dept. of Education
5.	Dept. of Cooperative Governance, Human Settlement and Traditional Affairs
6.	Dept. of Public Works
7.	Dept. of Roads and Transport
8.	Dept. of Safety; Security and Liaison
9.	Dept. of Sports; Arts and Culture
10.	Dept. of Provincial Treasury

KwaZulu-Natal Province

1.	Office of the Premier
2.	Dept. of Agriculture and Environmental Affairs
3.	Dept. of Arts and Culture
4.	Dept. of Community Safety and Liaison
5.	Dept. of Cooperative Government and Traditional Affairs
6.	Dept. of Economic Development and Tourism
7.	Dept. of Education
8.	Dept. of Human Settlement
9.	Dept. of Public Works
10.	Dept. of Sport and Recreation
12.	Dept. of Transport
13.	Dept. of Provincial Treasury
14.	Dept. of Royal Household

4 3 NEGOTIATIONS AND CONSULTATIVE PROCESSES

The GPSSBC constitution provides the framework for negotiations in the bargaining council and also provides for mechanisms to deal with matters of mutual interest and is in most respects identical to those of the PSCBC.

Parties to the council can choose one of three options to process mutual interest issues in the council:

- a negotiation route via formal council meetings and then, if a deadlock is reached, referral to conciliation and, if a dispute is not settled, embarking on a protected strike or lockout (referred to as “the first option”);

- immediate conciliation and then protected industrial action (referred to as “the second option”);

- referral of a matter to a chamber of the GPSSBC (referred to as “the third option” or “the chamber option”).

4 4 GPSSBC CHAMBERS

4 4 1 OVERVIEW OF CHAMBERS

In 2004 the GPSSBC established chambers for all 9 provincial administrations and national departments which fall under the scope of the GPSSBC. Chambers have not been established in departments falling outside the GPSSBC scope or falling wholly within the scope of another council.

The purpose of Chambers is to provide for an environment conducive to expedite processes of negotiation/ consultation/ information sharing and deliberations.[79]

A chamber’s jurisdiction is limited to issues upon which:[80]

- in the case of a Provincial Chamber, the Premier or the relevant Executing Authority and/or the Head of the Department at Provincial level may make a decision that binds the employer, and

- in the case of a National Departmental Chamber, the Executing Authority or Head of the Department may make a decision that binds the employer.

The primary objectives of the Chambers are to promote labour peace, promote and maintain sound relationships between the employer and its employees and, to negotiate, consult, share information, and bargain collectively to reach agreement on matters of mutual interest between the Parties to the Chamber.[81]

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79 GPSSBC Resolution 1/2012.

80 *Ibid*.

81 *Ibid*.

4 4 2 ADMISSION TO THE CHAMBER

The admission to the Chamber is limited to the Employer in the designated Provincial Government or National Department and only trade union parties admitted to the GPSSBC at Sectoral Level.[82]

Chambers do not establish a threshold as admission is based on sectoral admission.

4 4 3 JURISDICTION OF CHAMBERS

A Chamber must function in the Provincial Government or National Department, for which it has been established.

The jurisdiction of a Chamber is:

- limited to issues upon which in the cases of a Provincial Chamber, the Premier or the relevant executive Authority and /or the Head of the Department at Provincial level may make a decision that binds the employer, and

- in the case of a National Departmental Chamber, the Executive Authority or Head of the Department may make a decision that binds the employer.[83]

4 4 4 DECISIONS AND RESOLUTIONS OF CHAMBERS

A chamber's jurisdiction is limited to "matters which fall exclusively under its jurisdiction" (as set out above). A decision of the Chamber requires the vote of the employer together with a majority of votes of the trade unions admitted to Chamber.[84]

Policy Decisions and/or collective agreements of the Chamber must however be referred to Council and do not take effect for a period of 30 days from the date it was sent to Council.[85]

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82 *Ibid*.
83 *Ibid.*
84 GPSSBC Resolution 1/2012 Clause 11.
85 GPSSBC Resolution 1/2012.

4 4 5 RATIFICATION OF CHAMBER COLLECTIVE AGREEMENTS

Once Council has received the decision / collective agreement, it must satisfy itself that the decision and/or collective agreement of the Chamber-

- falls within the jurisdiction of the Chamber;
- meets the requirements for Collective Agreements as set out in the Labour Relations Act 66/1995 (as amended) and clause 14 of this manual;
- is not in conflict with any legislation and or regulations governing the Public Service;
- is not in conflict with any decision or collective agreement of the Council; and
- is not in conflict with any decision or collective agreement of the Public Service Coordinating Bargaining Council (PSCBC).

If Council finds that a decision and/or collective agreement of the Chamber meets the criteria set out above, the Council will ratify such decision or collective agreement. If it is however found that a decision and/or collective agreement of the Chamber does not meet the criteria, the Council will set aside or vary such decision or collective agreement.

Collective agreements ratified by Council or varied for purposes of ratification become an agreement of Council for the purposes of review and dispute resolution.

If there is a dispute over a matter of mutual interest arising in a chamber, it may be referred to the council. The council must consider the dispute and attempt to resolve it. If unsuccessful, any party may refer the dispute to the council for conciliation. If the matter is not settled at conciliation, the parties may exercise their rights in terms of the LRA, as explained above.

4 4 6 DISPUTE PREVENTION

The GPSSBC also utilise the Chambers for dispute prevention. The procedure is provided for in the Governance Rules for Chamber, GPSSBC Resolution 1/2012.[86]

[86] Clause 17.

The process allows for the administrator of the Chamber to submit a report in writing within 1 day of the dispute/deadlock arising in the Chamber to the General Secretary of Council who on receipt of such must convene a facilitation between Parties with the view to resolve/settle the matter.

Should the deadlock / dispute remain unresolved the General Secretary to Council must refer the matter to the Executive Committee of Council for mediation.

Should these interventions as contemplated above fail, the matter is dealt with in terms of dispute resolution procedure of the Council.

4 5 COLLECTIVE AGREEMENTS

Since inception of the Council in 1999 there have been numerous collective agreements reached. The number of resolutions of the Council have also increased with the advent of Chambers in 2004.

The list below sourced from the GPSSBC website contains all collective agreements concluded in the Council over the past 14 years.

Resolution	Collective Agreement Name
Resolution 3 of 2013	Addendum Organisational Rights Agreement
Resolution 2 of 2013	Establishment Parity between Conditions of Service of College Appointed Support Staff in the Public Further Education and Training with those Employed in the Public Service
Resolution 1 of 2013	GPSSBC Organisational Rights
Resolution 1 of 2012	Amendment of GPSSBC Resolution 2 of 2005: Governance Rules for Chambers
Resolution 4 of 2011	Collection of the Levy Fund FETC
Resolution 3 of 2011	Establishment of special leave for the Department of Environmental Affairs
Resolution 2 of 2011	Amendment of the FETC Res 1 of 2011
Resolution 1 of 2011	Ratification on the establishment of parity in salaries of support staff employed in the Public further Education and Training College(FETC)
Resolution 4 of 2010	Disestablishment and establishment of National Departmental Chambers

	in compliance with the reconfiguration of Government
Resolution 3 of 2010	Special leave for the Department of the Premier provincial Chamber (Free State Chamber)
Resolution 2 of 2010	Agreement on special leave in DCS amendment of DBC resolution of 1 of 2002
Resolution 1 of 2010	Agreement on the Levy fund: GPSSBC
Resolution 19 of 2009	Agreement on night shift allowance and night work hours for Security personnel in the Chamber of the Department of Rural Development and Land Reform
Resolution 18 of 2009	Permanent appointment/absorption of temporary support staff the Department of Education for the chamber of the Provincial Government of the Limpopo Province
Resolution 17 of 2009	Turnaround agreement for the chamber of the Department of Home affairs
Resolution 16 of 2009	Migration of Employees from the old structure of information and communication technology to a new one for the chamber of the Department of International Relations and Co-operation
Resolution 15 of 2009	Resignation period in the Department of Correctional Services for the Chamber of the DCS
Resolution 14 of 2009	Adoption of a shift system for traffic officials in the Department of Roads and Transport
Resolution 13 of 2009	Implementation of the policy on the working conditions of Security officials in the Chamber for the National Treasury
Resolution 12 of 2009	Agreement on organizational rights in the chamber for the Public Service Commission
Resolution 11 of 2009	Establishment, Ratification of the Governance rules and confirmation of the Dispute Resolution procedure applicable for the FETC
Resolution 10 of 2009	Appointment of Panel of Conciliators and Arbitrators
f 2009	OSD for Engineers
Resolution 8 of 2009	OSD Environmental and Biodiversity Officers
Resolution 7 of 2009	Establishment of the task Team on the Identity of the other Occupational Classes to be considered for OSD
Resolution 6 of 2009	OSD Engineers, Technicians, Architects Technicians, GIS Technician and QS
Resolution 5 of 2009	OSD Engineers Technicians, Architects Technicians, Draughts Person, GISs Technicians and Science Technicians

Resolution 4 of 2009	OSD Artisans
Resolution 3 of 2009	Quality Surveyor, , Architects, Planners, GISC Profs, Scientists
Resolution 2 of 2009	OSD DCS
Resolution 1 of 2009	DEAT- Introduction of a Sea-going Allowance for employees at the Marine and Coastal Management MCM Branch
Resolution 1 of 2008	Agreement on the implementation of an occupation specific Dispensation(OSD) for Legally qualified categories of employees
Resolution 1 of 2007	Transfer of employees from the Department of Education to Individual FETC
Resolution 3 of 2006	Procedure Manual regulating Relations between DCS and Unions admitted to the Departmental Bargaining Chamber
Resolution 2 of 2006	DCS Disciplinary Code and Procedure
Resolution 1 of 2006	DCS Disciplinary Code and Procedure amendment
Resolution 3 of 2005	Amendments of the Res 2 of 2005
Resolution 2 of 2005	Governance Rules of the GPSSBC
Resolution 1 of 2005	Transitional agreement towards the implementation of the 7 days establishment
Resolution 4 of 2004	Adoption of rules for the conduct of proceeding before the GPSSBC
Resolution 3 of 2004	Establishment of the National and Provincial departmental chamber
Resolution 2 of 2004	Dispute procedure for the Dispute emanating from PSCBC Resolution 7/2002
Resolution 1 of 2004	Amendment of the Fulltime shop steward agreement of the Resolution 3/2001 of GPSSBC
Resolution 3 of 2003	Levy agreement
Resolution 2 of 2003	GPSSBC Constitution
Resolution 1 of 2003	Giving effect to the decision on the meeting held 7 March 2003
Resolution 1 of 2002	Payment of an Acting Allowance
Resolution 5 of 2001	Amendment of the GPSSBC Constitution on Dispute Resolution procedure
Resolution 4 of 2001	Amendment of the Constitution GPSSBC Domicilium clause
Resolution 3 of 2001	Appointment of full time shop steward
Resolution 2 of 2001	Appointment of Panel of Conciliators and Arbitrators
Resolution 1 of 2001	Amendment of Resolution 2/2000
Resolution 9 of 2000	Amendment to the Constitution : Clause 18.11 Submission of Auditors report to the Registry

Resolution 8 of 2000	Adoption of code of conduct of Panellist
Resolution 7 of 2000	Amendment of the Constitution
Resolution 6 of 2000	Amendment of the Constitution
Resolution 5 of 2000	Appointment of Panel of Conciliator and Arbitrators
Resolution 4 of 2000	Amendment to the Fee policy
Resolution 3 of 2000	Amendment to the Dispute Resolution procedure
Resolution 2 of 2000	Implementation of the Dispute Resolution
Resolution 1 of 2000	Application of the transfer and the utilisation of the R10 million allocated to the GPSSBC

CHAPTER 5
COMPARATIVE ANALYSIS – GERMANY / UNITED KINGDOM / GHANA

5 1 INTRODUCTION

This comparative study examines the evolution of labour relations in the public service in Germany, the United Kingdom and Ghana. It looks at recent trends in public service labour relations in these selected countries, with particular emphasis on the impact of reforms on this sector.

In many countries, the Constitution, complemented by national legislation, gives public employees the right to collective bargaining. Although the regulatory framework governing labour relations vary from country to country, the principle of bargaining in the public service is very similar across geographic regions. In general, labour relations in the public service are governed by separate laws.

In almost all countries focus is on efficient performance and delivery of public service. However, the processes of reforming the public service are different and such processes have had significant impact on the conduct of labour relations.

In view of the fact that the public service is “owned” by the governments, it has a two-fold function: as employer and as national administrator. This dual function makes labour relations in this sector unique. Legislatively, government and workers’ representatives are the main actors in public service labour relations. While the government is usually represented by ministries or departments the workers are typically represented by unions of public employees.

The majority of public service collective bargaining is centralized. There is however a growing debate on decentralising public service collective bargaining to the enterprise level.

For the purposes of this analysis the comparative study conducted by the International Labour Organisation Social Dialogue, Labour Law and Labour Administration Branch in 2008 will be used.

5 2 GERMANY

5 2 1 OVERVIEW OF THE STRUCTURE OF THE STATE AND PUBLIC ADMINISTRATION IN GERMANY

In the Federal Republic of Germany, the state is governed by the Constitution, the Basic Law of 23 May 1949. The state is rooted in the principle of the rule of law, which governs the relationship between the state and its citizens.

Three principles enshrined in the Basic Law are of particular significance for the structure of the state and the administration, namely:

- separation of powers,
- federal system of government,
- self-government for local authorities.

The separation of powers is at the core of the rule of law. Germany was constituted as a Federal Republic on the basis of the Basic Law. The Federal Republic is made up of states (Länder) within a Federation (Bund). As constituents of the Federation, the *Länder* are states with sovereign rights and responsibilities which are not devolved from the Federation but are granted to them by the Basic Law.

State power is divided between the Federation and the *Länder* according to tasks and functions. As a basic rule, the Basic Law stipulates that exercise of state powers is a matter for the *Länder*. The Federation has administrative and legislative power only in those areas laid down by the Basic Law. For example, the Federation may adopt laws in areas which in the public interest require uniform regulation at national level. In practice, the legislative function falls mainly within the responsibility of the Federation, whereas the *Länder* focus on administration. As a rule, the public administration of the *Länder* carries out federal law.

Administration in Germany is organized in three independent levels:

- the administration of the Federal Government,
- the administration of the *Länder*,
- the administration of the local authorities.[87]

[87] Fedral Ministry of the Interior Broucher http://www.bmi.bund.de/ ; accessed 4 October 2013.

5 2 2 THE LEGAL FRAMEWORK

The Constitution of Germany and the Collective Agreement Act of 9 April 1949 are the main statutes which govern the system of labour relations in Germany. They guarantee the right of both workers' and employers' organizations to freely form associations and bargain collectively. The Collective Agreement Act is one of the major acts regulating the labour relations activities of social partners.

The public service in Germany comprises mainly the administration at federal and state level, municipal administrations and entities of public or private law mostly at the municipal or local level which are under the full control of the municipality and which provide services of common interest to communal residents.

There are two distinct categories of workers within Germany's public service. The first are civil servants of the federal Union of the states and at communal level, who are nominated and whose status is governed by statutes and laws and is not determined by a labour contract.

The second category comprises employees of the federal Union, the state or at communal level, whose employment relationship is determined by a labour contract. The federal Union, in consultation with civil servants' organizations, determines status related rights and duties for all civil servants whereas the states have the sole legislative power to enact conditions of career, pension schemes and remuneration relating to their civil servants.

Only employees without civil servant status within the administration at different levels have the right to bargain collectively, by virtue of the Collective Agreement Act of 1949.[88]

5 2 3 PARTIES TO PUBLIC SERVICE COLLECTIVE BARGAINING

Six trade unions are identified as representing public service employees in Germany. These included the Public Services, Transport and Traffic Union (OTV), the Educational and Academic Union (GEW), the Police Union (GdP), the Horticultural, Agricultural and Forestry Union (GGLE), the German Post Office Union (DPG) and the German Railways Union (GdB). Since 2001, some of these public sector unions have merged with other unions and affiliated with the German Federation of Trade Unions (DGB). Two other trade unions

[88] Casale and Tenkorang *Public Service Labour Relations: A Comparative Overview* ILO Paper 17 (August 2008).

represent employees in the public sector: the German Union for Employees (DAG) and the German Civil Servants Association (DBB).

Employers' associations

Three employers' associations represent the public sector. The federal Union as an employer is represented by the Ministry of Federal Interior Affairs. The state governments, with the exception of the states of Berlin and Hessen, are represented by the Collective Bargaining Association for the German Lander. The municipalities and the state enterprises and institutions at the local level are represented by the Association of Local Government Employers. These three employers' associations are independent of all the various levels of governments.[89]

5 2 4 STRUCTURE AND LEVELS OF COLLECTIVE BARGAINING

Collective bargaining in the public service takes place at the central level. Thus, all the three levels of government centrally undertake collective bargaining negotiations, coordinating their bargaining in order to ensure uniform agreements for employees within a given sector.

Collective agreements are negotiated at the central level and are thus often applied at the enterprise level. However, there is a strong agitation for decentralizing collective bargaining in the public service. [90]

5 3 UNITED KINGDOM

5 3 1 OVERVIEW OF THE STRUCTURE OF THE STATE AND PUBLIC ADMINISTRATION IN THE UNITED KINGDOM

There are two distinct categories of public sector employees in the United Kingdom, civil service and public service employees. Civil servants are often referred to as employees of the central government, and public servants as employees of local administrations, public enterprises and public institutions. For instance, employees of health care, electricity, gas, and water industries have the status of public servants. Public service reforms focusing on privatizing public enterprises have had a severe impact on the labour relations system in the United Kingdom.

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89 *Ibid*.

90 *Ibid.*

5 3 2 THE LEGAL FRAMEWORK

Collective bargaining can be described as the foundation of labour relations in both the public and the private sectors in the United Kingdom. Although England does not have a written Constitution as most of the countries - and therefore nothing is provided at such a level, surprisingly there is no substantive statutory regulation governing collective bargaining either. Instead, as mentioned above, the parties concerned undertake collective bargaining purely voluntarily. However, the Employment Relations Act of 1999, provides clear definition for recognizing and establishing bargaining units.

Traditionally there is no record of legislative intervention in the labour relations system in the United Kingdom. Only trade unions are allowed to negotiate and conclude collective agreements. Works Councils and other employee representatives are not required to conclude collective agreements. The major actors involved in public sector collective bargaining are union representatives and government representatives.[91]

5 3 3 PARTIES TO PUBLIC SERVICE COLLECTIVE BARGAINING

Workers' organizations

The majority of public service employees are unionized. There also are several unions in the civil service, notably the Professional, Technical and Commerce Union (PTC), the Inland Revenue Staff Federation (IRSF), and the First Division Association (FDA).

Employers' organizations

There are two employers' associations in the public service: the Association of Metropolitan Authorities (AMA) and the Association of County Councils (ACC), both with jurisdiction in determining wages and salaries. In the civil service, the National Whitley Council and the Joint Consultative Committee are the principal negotiating committees which conclude collective bargaining. The civil service and the public service have different sets of collective agreements.[92]

91 *Ibid.*

92 *Ibid.*

5 3 4 STRUCTURE AND LEVELS OF COLLECTIVE BARGAINING

Negotiated agreements at the national level often focus on traditional issues contained in collective agreements such as wages and conditions of employment. In some public sector enterprises, bargaining takes place at the enterprise level.

Collective bargaining in the United Kingdom is relatively decentralized. Various government administrations have consistently opposed national-level bargaining in the public sector. As a result, national-level bargaining no longer takes place in the majority of public sector enterprises. Enterprise-level bargaining is more predominant than the other levels of bargaining. Even though tripartite consultation on the minimum wage exists, there is no bargaining on the national minimum wage. The average duration of collective bargaining agreements in the public service is one year.[93]

5 4 GHANA

5 4 1 OVERVIEW OF THE STRUCTURE OF THE STATE AND PUBLIC ADMINISTRATION IN GHANA

Labour relations in the public service in Ghana has undergone numerous changes in the past three decades, due to a succession of military regimes and finally a return to constitutional democracy. The joint economic and public sector reforms resulting from the structural adjustment programme in the 1980s severely reduced public sector employment, changing the dynamics of labour relations in the country. The privatization of state enterprises compelled labour unions to negotiate deals against their wishes. Cost sharing and outsourcing were also introduced in the public service.

In Ghana the public sector consists of the national government, the various regional and district administrations, public enterprises, public institutions, and health care institutions. Quasi-governmental institutions as well as government-sponsored programmes also fall under the umbrella of the public sector. The military, police, and fire service are not covered by the labour laws in the country; employees of these institutions have no right to form a union, to strike or bargain collectively.

93 *Ibid.*

5 4 2 THE LEGAL FRAMEWORK

The Labour Act of 2003 (Act 651) sets out the regulatory framework for labour relations in Ghana. The Act consolidates all previous legislations relating to the labour market in Ghana. The law is commonly regarded as a negotiated law which made conscious attempt to move away from the common law position which regards the employment relationship as a master-servant relationship and frequently criminalises labour relations. The new labour law seeks to protect the interest of not only workers but equally importantly the interest of employers. The law establishes the premise for minimum standards of working conditions (e.g. wages and conditions).

The Act is divided into twenty parts with 179 sections. Part III of the law deals with protection of employment and spells out the rights and duties of both employers and workers. Part XI is devoted to Trade Union and Employers Associations. Section 79 of Part XI guarantees the rights of workers to form or join trade unions of their choice for the protection of their economic and social interests. Section 80 permits two or more workers in the same undertaking to form a trade union. The section also allows two or more employers in the same industry or trade with fifteen or more workers to form or join employers association of their choice. The section outlines the procedures for the formation and registration of trade unions and employers associations.

However, subsection (2) of section 79 of the labour law precludes some categories of workers from forming or joining trade. These include workers in policy/decision-making and managerial positions or performing highly confidential duties. In addition, the Securities Act also forbids the security agencies including the military, police, fire service and the immigration service from forming or joining a trade union.

Part XII of the law deals with the legislative framework for collective bargaining in Ghana. Sections 96 to 111 provides the general legislative framework for collective bargaining.[94]

The Labour Act of 2003 made substantial changes in the area of trade union formation. Unlike the previous Act 299 which required a minimum of five workers for trade union formation, the new law states, “two or more workers employed in the same undertaking may form a trade union”. This change had a major impact on workers in the informal sector. The new labour law likewise validated compulsory collective bargaining, and firmly established

[94] Nyarko, Clara, Boateng and Asafu-Adjaye *Analysis of Outcomes of Collective Bargaining in Ghana* (2009).

the Government as an employer in matters involving labour relations, particularly on issues relating to labour disputes and collective bargaining.[95]

5 4 3 PARTIES TO PUBLIC SERVICE COLLECTIVE BARGAINING

The social partners involved in the public service labour relations systems in Ghana include the Government and the various public sector workers' organizations. The management of public enterprises and institutions are the principal representatives of public sector employers. Public service bargaining is typically between employers' and workers' organizations. Prior to negotiations, the parties often embark on consultations as well as informal meetings to establish the general framework of bargaining.

Workers' organizations

The public sector workers' organizations include the Public Service Workers' Union, the Civil Servants Association (CSA), the Ghana National Teachers Associations (GNAT), the Ghana Registered Nurses Association (GRNA), and the Judicial Services Association of Ghana. The Public Service Workers' Union is affiliated with the Trade Union Congress (TUC), the first and major trade union federation in Ghana. The Civil Servants Association is an umbrella organization that represents all civil servants; this workers' association is not affiliated with the TUC, but it collaborates with the TUC in many areas involving labour relations. The GNAT and the GRNA have in the past always joined the TUC to negotiate the national daily minimum wage. The advent of the new trade union (GFL) has further strengthened their collective bargaining position. In Ghana, trade unions are the only workers' organizations that have traditionally held collective bargaining rights.

Employers' associations

The Ministry of Manpower Development, Youth and Employment is the government agency responsible for labour relations issues. It draws on the expertise of other government agencies such as the Ministry of Finance and Economic Planning, the Statistical Service, and the Prices and Income Board, in negotiating the national daily minimum wage. The national daily minimum wage is applicable to all employees regardless of sector.[96]

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95 Casale and Tenkorang *Public Service Labour Relations: A Comparative Overview* ILO Paper 17.

96 *Ibid*.

5 4 4 STRUCTURE AND LEVELS OF COLLECTIVE BARGAINING

Ghana's collective bargaining in the public service is bipartite in nature, usually involving representatives of the union and the employer. However, in many cases, to ensure transparency, other social groups and independent government agencies are also represented. The structure of bargaining in the public service is formal, involving high-profile government representatives and union officials. The duration of public service collective agreements vary between two and three years. Many collective agreements tend to have wage re-opener clause that allows the parties to review wages and salaries in order to account for real wage loss due to inflation. Some collective agreements also permit wage indexation that allows automatic adjustment of wages to reflect inflationary trends.

In the public service, collective bargaining takes place at all levels. Generally, collective bargaining can fairly be described as decentralized. However, the national minimum wage is centralized at the national level. The national minimum wage provides the base or benchmark for determining other wages and salaries across all sectors in the country. It is noted that wage negotiations are typically centralized.[97]

5 5 COMPARISONS

The factors causing the changes in labour relations systems in the Public Services are both external and internal. Labour relations actors have little or no control of these factors.

In Germany the majority of public service collective bargaining is centralized, there is however a growing debate on decentralising public service collective bargaining to the enterprise level, as is the case in the United Kingdom where since the early 1990's there has been a significant decentralization of collective bargaining, leading to the phasing out of national-level bargaining in the Public Service.

When comparing two of the main economies of Europe, Britain and Germany, it is evident that in both countries, a decentralisation of collective bargaining has taken place, however the degree and timing of these processes have varied considerably. In Germany, only certain aspects of collective bargaining are delegated to the company level, while the practice of concluding overarching framework agreements at sectoral level continues, giving

97 *Ibid*.

social partners a degree of control over collective bargaining at company level. The British collective bargaining system, on the other hand, has always been traditionally decentralised.

In the case of South Africa, the abolishment of apartheid and the institution of democracy were pivotal in bringing massive change in all areas, including labour relations. A new labour law was enacted that provides labour rights for public service employees. Similarly, in Ghana, the establishment of constitutional democracies became a condition for continuing aid, grants, and loans from donor countries and international financial and multilateral institutions. Thus, the transformation of the political environment has been the major agent of change in Ghana and South Africa's labour relations systems.

The changing trends in these African countries labour relations systems have ensured changes in labour laws which have enabled many public service employees to enjoy labour rights such as freedom of association and collective bargaining for the first time. In addition, workers in general, especially public service employees are represented on public policy decision-making processes more than ever before.

Despite the political and economic challenges facing public service labour relations in these countries, some remarkable achievements have been made. Labour rights have been extended to many more public service employees. Labour relations institutions have been established and existing ones have been to strengthen to promote labour relations.

It can be argued that social dialogue in the public service in African countries have become more vigorous and remained relatively centralized whilst in Europe there is a trend of collective bargaining slowing down as global challenges shrink public services. According to the findings of published international research carried out by the Economic and Social Affairs Department of the United Nations on the role of public enterprises, it is acknowledged that:

> "in recent times, globalization, liberalization and ongoing structural transformations of national economies contributed to an expansion of the private sector, on the one hand, and downsizing of the public sector including dismantling or divestment of public enterprises, on the other".[98]

Although the selection for comparison is limited it can be noted that the effects of the global financial crisis and globalisation will continue to shape the labour relations environment for

[98] United Nations Economic and Social Affairs Department *Public Enterprises: Unresolved Challenges and New Opportunities* (New York) (2008).

much of the near future. In the countries analyzed it is evident that collective bargaining remains an important aspect of public service labour relations. The way we experience collective bargaining may change but the foundations established in the Constitutions (except for the United Kingdom), legislation and collective agreements remain.

CHAPTER 6
CONCLUSION

6 1 PUBLIC SERVICE SUMMIT DECLARATION

The Public Service Summit arises from PSCBC Resolution 1 of 2007 where parties to the PSCBC agreed to host a summit to discuss the following areas:

- Resourcing the public service
- Outsourcing and agentisation
- Performance and productivity in the public service
- Work Environment
- Minimum wage

Subsequent to reaching this agreement, the parties to the council further agreed to –

- extend the terms of the summit to include remuneration policy, strengthening collective bargaining, and focusing on health, education and the criminal justice cluster, and amend “sector” to “service” in clause 15 of Resolution 1 of 2007.

The Public Service Summit, consisting of parties to the PSCBC, recommitted itself to the transformation of the public service, focusing discussions and resolutions in the following areas –

- Providing quality service delivery through labour intensive resourcing;

- outsourcing and Agentisation in the Public Service;

- building effective and responsive frontline service offices in education, health and criminal justice cluster;

- introducing measures to utilise the public service to combat youth unemployment;

- creating a productive and performance orientated public service;

- supporting measures to strengthen anti-corruption legislation and initiatives';

- remuneration policy; and

- reaffirming a commitment to strengthen public service collective bargaining.

Further the parties to the summit aimed to promote a public service capable of meeting the aims and objectives of a democratic developmental state, which include –

- Being people-centred and people-driven;

- Creating a national vision, and mobilising society behind this vision;

- Striving for a new and sustainable development growth path;

- Restructuring the economy and striving for socio-economic inclusion;

- Striving to achieve universal access to quality public services, decent jobs, food security and decent housing;

- Strengthening of participatory democracy; and

- A strong state that decisively intervenes in the economy to redistribute resources.

The summit culminated in the signing of PSCBC Resolution 6 / 2010, which encompasses the declaration. Although the summit and the declaration ultimately sought to address labour relations in the public service the most significant impact of declaration on collective bargaining can be directed to the following clauses in the declaration:

> "re-affirming a commitment to strengthen public service collective bargaining".
>
> "centralised bargaining remains a key feature and need to be strengthened by aligning constitutions of the sector councils to that of the PSCBC".

The summit did not direct what initiatives could be taken to strengthen collective bargaining, this has been left to the PSCBC to determine and implement. The summit did however cement the principle of centralized bargaining in the Public Service.

It is therefore evident that the future of Public Service Collective Bargaining will remain routed in centralized bargaining with the PSCBC leading the initiatives to strengthen collective bargaining.

6 2 FREE MARKET FOUNDATION - CHALLENGE ON COLLECTIVE BARGAINING IN SOUTH AFRICA

The Free Market Foundation (FMF), an independent, non-profit civic body, launched a constitutional challenge in the High Court in Pretoria, to section 32 of the Labour Relations Act. This clause allows collective agreements on wages and employment conditions to be extended to employers not party to the negotiations.

The FMF believed this section was a significant factor in preventing job creation, especially among small and medium enterprises.

A total of 50 respondents were cited, including the ministers of Labour and Justice and Constitutional Development, and the 48 bargaining councils in South Africa, including all five Public Service Bargaining Councils.

The principle of section 32 is that conditions of service or any other matter, in which an agreement is reached, should be extended to non-parties of a bargaining council as to ensure uniformity and equity within a specified working environment or within the scope of that specific bargaining council. Membership by employers to a bargaining council in the private sector is voluntary. Therefore to achieve the principle of uniformity and equity the act must provide for a function to make it possible to extend these collective agreements. This is further supported in the act with the principle of appointment of agents in the bargaining councils to monitor and enforce these extensions. The Act also allows for remedial action against those employers that would refuse to implement collective agreements extended under section 32.

The Labour Relations Act in section 23 also defines what constitutes a collective agreement and it defines who will be bound by a collective agreement and the legal effect of such. It is

specific in providing that a collective agreement will bind the members of every trade union party to the agreement (sub section 1(b)) and employees who are not members of registered trade unions party to the agreement but who have amongst other specifically being identified in the agreement (sub section 1(d)(i)). In the Public Service all agreements bind all employees of the State, such being members of trade unions party to the agreement or not.

Sections 35-37 of the Labour Relations Act establishes the PSCBC and allows for a process to establish Sector Bargaining Councils. The Act recognises that the employer within the PSCBC will be a single employer, being the "State as Employer". It further in section 213 continues to support this principle in defining the "Public Service". It also defines the scope of the PSCBC being the "Public Service as a whole". If logic prevails that in a Country there will be only one "State as Employer" then it must be accepted that there will be no other "non- employer parties" to the PSCBC.

Therefore even if there should be an argument that employees not belonging to trade unions admitted to the PSCBC could constitute "non-parties" the Labour Relations Act refutes such argument. Therefore again there could be no "non-employee parties" to a PSCBC agreement.

The FMF challenge is expected to reach the Constitutional Court within the next few years, whether the Public Service Bargaining Councils are still included in the challenge and what the impact the application will have to collective bargaining remains to be seen. The potential bearing of the matter however, on the landscape of collective bargaining cannot be ignored when considering the future of collective bargaining in the Public Service.

6 3 AMENDMENT TO THE LABOUR RELATIONS ACT – ORGANISATION RIGHTS

The Labour Relations Amendment Bill (LRAB) was adopted by the National Assembly in Parliament on 20 August 2013. It is expected that this Bill will have a significant impact on Labour Relations in South Africa.

One of the most significant amendments can be attributed to section 21 of the LRA, the proposed amendment will give arbitrators discretion to award organisational rights under section 21, section 13 and/or section 15 in instances where a union does not meet the threshold established by a collective agreement in terms of section 18. The threshold in the

agreement may be disregarded if applying it would unfairly affect a trade union that represents a “significant interest” or “substantial number” of employees. The commissioner will be required to draw a balance between the majority trade union and the trade union seeking to enforce rights.

The amendments are aimed at promoting the inclusion of non-standard employees in the collective bargaining framework and expanding the application of organisational rights. These amendments will effectively expand the employee pool in a workplace for purposes of procuring organisational rights and have the effect of creating a more inclusive collective bargaining arena in the workplace.

In terms of the proposed amendments, a commissioner determining a dispute about organisational rights will also have to consider the general composition of the workforce. This will include considering the extent to which employees are employed are employed in non-standard forms of employment, such as through a temporary employment service provider or on a fixed-term contract.

It is expected that these amendments will lessen the need felt by smaller unions to use industrial action as the only route to obtain organisational rights previously reserved for more representative unions only.

6 4 RECOMMENDATIONS

6 4 1 INTRODUCTION

This study aspired to discuss three aspects. Firstly, to provide insight into the history of collective bargaining in the South African public service. Secondly, to provide a review of the collective bargaining system and processes in the South African public service, and lastly, to assess the process of collective bargaining in other public services by conducting a comparative analysis. In providing recommendations out of the study it was necessary to consider the future of collective bargaining in the South African Public Service and contemplate what could affect such.

In assessing the history of public service collective bargaining it is noted that South Africa is widely recognised as a positive benchmark in collective bargaining and social dialogue. It is evident that South Africa, as a developing country has gone through a political change from

an apartheid state to a democratic state in 1994. The political changes have had a huge impact on labour legislation in the country. The Constitution of the country and all subsequent legislation have been products of tripartite dialogue.

The South African Constitution, has enshrined the rights and values contained in the United Nations Universal Declaration of Human Rights, African Charter and International Labour Organisation Conventions. The cornerstone of the Constitution is embodied in the Bill of Rights which contains specific rights on labour relations, and confers rights to trade unions and workers. These rights are given detailed effect through the enactment of specialised labour legislation such as the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Skills Development Act, 1998 and others.

The review of collective bargaining system in the South African public service reveals that the system remains highly centralised however, the comparative analysis conducted did reveal a developing trend towards decentralised collective bargaining in the public service internationally.

Although there are many pressures on the labour legislative framework, it is unlikely that there is going to a major overhaul of the current system in the near future. This however largely depends on political, social and economic dynamics. The recommendations below therefore seek to augment the gains made by the actors in the public service collective bargaining environment since 1994.

The general view on the proposed amendments is that they are well placed and give trade unions the opportunity to also organise in a-typical employment environments, which is becoming more prevalent in the modern workplace. There may however be problems with the application of the amendments in workplaces with multiple “strong” trade unions, and especially where such unions are more or less equally matched.

6 4 2 STRENGTHENING OF CENTRALISED COLLECTIVE BARGAINING

The Public Service Summit Declaration, cemented the view of the Employer and Unions that centralised bargaining is here to stay. The PSCBC was tasked to ensure that sector councils are aligned to the constitution of the PSCBC and the principle of collective bargaining is strengthened.

In this study the review of the GPSSBC revealed that the Council has to a degree decentralised collective bargaining in allowing its Chambers to bargain collectively on matters of mutual interest with a view to reach collective agreements, although the Council has retained the power of ratification of such agreements it has not pronounced on what the status of the agreement would be should it not be ratified. It must be noted that the agreement is a result of negotiations between an Employer and Trade Unions specifically on matters of mutual interest.

It is the writer's opinion that it was never the intention of the GPSSBC to delegate collective bargaining on matters of mutual interest to the Chambers, but merely to allow for a structured environment for consultation, information sharing and deliberation.

The questions that need to be addressed are twofold, namely:

- should the way in which collective bargaining is managed be determined by the different laws that establish management authority in the public sector, this being to decentralise collective bargaining to the executing authorities in national and provincial departments; and/or

- should collective bargaining be determined in accordance with those principles set out in the LRA generally, namely the organisation of labour relations in accordance with the establishment of sectors which are organised along industrial lines?

The GPSSBC constitution upholds the principles of centralised bargaining and attempts to promote such. To this extent there may exist a mis-alignment of the GPSSBC Constitution and Resolution 1 of 2012 (Governance Rules for Chambers). It is therefore recommended that the GPSSBC amends its Governance Rules for Chambers (Resolution 1/2012) to the Constitution of the Council.

6 4 3 STRENGTHENING OF COLLECTIVE BARGAINING

The Public Service Summit Declaration emphasised the need to strengthen collective bargaining and committed parties to the PSCBC to identify and implement relevant processes.

Collective Bargaining has played an important role in mitigating the effects of, the huge inequalities which exist within the South African society, however these inequalities have

also strained the employment relations. Furthermore, the capacity and resources among social partners are limited weak, which hamper the quality of agreements reached. Capacity issues include, among others, a lack of negotiating skills, turnover of negotiators and lack of access to information and resources so as to prepare properly for negotiations.

The challenge for the social partners in moving forward is how to improve productivity and ensure workers share in productivity gains. Deep inequalities in the society coupled with the lack of trust between the negotiation partners as well as the inherent weaknesses among the bargaining partners have made for a rather adversarial bargaining environment, as reflected in the rise in the number of working days lost due to strikes.

The hierarchy of public service collective bargaining require the Sector Councils to implement or give effect to decisions and agreements reached at the level of the PSCBC. The situation is particularly challenging when timeframes are attached to these tasks and Sector Councils are not able to meet such.

This non-compliance is not dealt with adequately in the primary resolution or agreement, the drafters of such agreements need to take cognisance of what the implications would be should a Sector Council fail to implement or execute a decision or agreement of the PSCBC. In addressing this gap and strengthening the accountability between the PSCBC and its Sector Councils, the outcomes of collective bargaining will most definitely be strengthened.

Aside from the outcomes of bargaining, the study found that collective bargaining and industrial relations institutions – set up during political transition – remain relatively strong. However, the capacity and resource constraints among social partners are impacting their ability to be responsive enough to sufficiently mitigate the effects of the equalities.

Nevertheless, the study shows that collective bargaining can play a role in achieving labour peace. Therefore any investment in capacity building of negotiators and actors is well placed and recommended.

6 4 4 CHANGING THE APPROACH TO COLLECTIVE BARGAINING IN THE PUBLIC SERVICE

Public service labour relations in many regions of the world are in a state of flux, and the changes bring new patterns in the conduct of labour relations. It can be argued though that

in South Africa our approach has been somewhat static and begs the question that perhaps it is time to change our approach to conventional collective bargaining.

It is now generally accepted that Interest Based Bargaining is a viable approach to mutual interest negotiations and collective bargaining, achieving optimal results and reducing strike incidents. It is however still a relatively new concept, when considering that the traditional adversarial model of Position-Based Bargaining has been in place for centuries. Position based bargaining has been the extensively utilised in the South African Public Service.

These two approaches are in conflict, not only in method, but also in terms of their foundational values and belief-systems. If parties still cling to traditionally held perceptions of mistrust and the need to assert themselves, even at the risk of disrespecting and escalating conflict, it may not be possible to adopt a true interest based approach, but with acceptance and acknowledgement that change is necessary may bring about a new era of collective bargaining in the public service.

Interest based bargaining goes by many names and different definitions. The Cambridge Business English Dictionary defines it as follows:

> "Interest-based bargaining
>
> noun [U] (abbreviation IBB, also interest-based negotiation, integrative bargaining, win-win bargaining):
>
> A method for helping two sides to reach agreement by trying to find ways in which both sides can get what they want:
>
> Interest-based bargaining can be contrasted to traditional negotiation, where at the end there is a winner and a loser."

In brief, interest based bargaining focuses on finding mutually beneficial solutions, rather than parties fighting to maintain a particular position through a show of force. In a sense the parties choose to assess the situation and their competing interests from the same side of the table, by seeking to understand the opposing party's interests and concerns and then finding solutions together – while remaining open to alternative and creative solutions, rather than just holding onto positions and a sense of entitlement that could polarise the parties in the absence of mutual understanding.

Interest based bargaining is a process that enables traditional negotiators to become joint problem-solvers. It assumes that mutual gain is possible, that solutions which satisfy mutual interests are more durable, that the parties should help each other achieve a positive result.

Some Key Differences between Interest Based Bargaining and Position Based Bargaining:

POSITION BASED BARGAINING	INTEREST BASED BARGAINING
Parties are adversaries	Parties are joint-problem solvers
Goal is Victory	Goal is Wise Decision
Demanding Concessions	Working together to Determine who gets what (how to expand and slice the pie)
Dig into position	Focus on Interests, not positions
Misleading and use of tricks	Open About Interests, Principles of Fairness
Insist on your position	Insist on objective criteria; consider multiple answers
Apply Pressure	Use reason; yield to Principle, not pressure
Look for a win for you alone	Look for win-win opportunities

The South African public collective bargaining system has traditionally been steeped in position based bargaining, in changing the approach interest based bargaining may been the most viable option, with the most benefits.

It is recommended that more research be conducted to determine whether training and development in interest based bargaining would be a viable option in changing the public service approach to collective bargaining.

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