The Future of Collective Bargaining between Labour and the Employer after the Case of *Public Servants Association v Minister of Public Service* [2021] 3 BLLR 255 (LAC)

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Abstract

This case note seeks to determine the future of collective bargaining after the Labour Appeal Court (LAC) judgment in *Public Servants Association v Minister of Public Service* [2021] 3 BLLR 255 (LAC). In arriving at a conclusion, context is provided. As part of the context it is shown that the right to engage in collective bargaining is not synonymous with the legal right to collective bargaining. This is based on the *Constitution of the Republic of South Africa,* 1996, case law and international law. Despite this, it is demonstrated that it can be argued that collective bargaining can be accepted as a recognised practice (a right) when one uses the test of what is a custom. It is further revealed that the main parties in public sector collective bargaining are the Public Service Coordinating Bargaining Council (PSCBC), the Department of Public Service and Administration, and trade unions. The last two ordinarily have competing interests and the PSCBC is the platform where they resolve their differences and enter into collective agreements. In 2018 a three-year wage agreement was reached for public servants, which the employer failed to implement in its last year. This led to the PSCBC intervening in the matter, but before it could reach fruition the matter was scheduled to be heard by the court. The last leg of the agreement was declared to be invalid and unenforceable on the basis that it was unaffordable and did not comply with the legal prescripts. This led to a period of uncertainty (2022-2023). This period saw government employees receiving 0% salary increases, failed wage negotiations, the unilateral imposition of a wage increase by the employer, a disruptive strike, and shorter wage agreements to address the shortcoming identified by the LAC in *PSA v DPSA*. The context provided yields the answer (the conclusion) that there is still room for collective bargaining, but that it will be filled with turbulence.

Keywords

Public service; collective bargaining; Public Service Coordinating Bargaining Council (PSCBC); Department of Public Service and Administration (DPSA); trade unions; resolution/agreement; National Treasury; strike; labour relations; *Labour Relations Act* (LRA); federation; tripartite alliance; wage.

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1 Introduction

Section 23 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*), titled "labour relations", entrenches a group of guaranteed labour rights in South Africa.[1] As one of these rights, the employer and employees (parties)[2] have a right "to form and join" entities that will represent and advance their rights and/or interests.[3] These rights or interests are normally advanced through collective bargaining.[4]

Collective bargaining can be described as "a process of negotiations between an [e]mployer and a group of employees (often represented by a [t]rade [u]nion) so as to determine the conditions of employment".[5] The

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1 Note that these rights must be understood in the context of other rights (or the *Constitution of the Republic of South Africa*, 1996 as a whole). This is termed "systematic interpretation"; see Botha *Statutory Interpretation* 209. Also see Finnemore, Koekemoer and Joubert *Labour Relations* 186*;* Garbers, Le Roux and Strydom *Labour Law* 455. They contend that these rights must be understood with the right to freedom of association in s 18 of the *Constitution.* These rights are further protected by ss 4-10 of the *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).

2 Finnemore, Koekemoer and Joubert *Labour Relations* 185 also include the state as a party in this relationship. It may be in the form of the entities mentioned in paras 3 and 5.

3 See ss 23(2)(a) and 23(3)(a) of the *Constitution*.

4 The term "collective bargaining" is used interchangeably with "bargaining" throughout the article. Also see Art 2 of *Convention (No 154) Concerning the Promotion of Collective Bargaining* (1981) (hereafter *Convention 154*).

5 The Public Service Coordinating Bargaining Council's (hereafter PSCBC) information brochure can be accessed at PSCBC 2017 https://pscbc.org.za/index.php/sample-page/pscbc-information-brochure. This description is materially similar to that contained in item 4(1) in GNR 1396 in GG 42121 of 19 December 2018. It describes collective bargaining as a "voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements with each other to

Code of Good Practice: Collective Bargaining defines collective bargaining as: "a voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements with each other to determine wages, terms and conditions of employment or other matters of mutual interest".[6]

The engagement in collective bargaining is recognised as one of the rights encompassed under the umbrella of the rights related to labour relations.[7] The usage of the words "engagement in" means that the actual bargaining is not a legal right.[8] Either the employer or trade union(s) may opt not to negotiate on a particular matter.[9] To a greater extent this may be used as an explanation of why an employer may prefer to act unilaterally in certain instances.

Collective bargaining is a tool for both parties that they can use to achieve any of the following objectives:

- resolve conflict or potential conflict on "matters of mutual interests". This will ultimately reduce "unnecessary disputes";

- set a standard through which issues are ventilated. This will ultimately ensure that there is a level of "conformity and predictability" in the manner in which labour and the employer address issues;

- optimise "employee participation" in the day-to-day running of an institution; and

determine wages, terms and conditions of employment or other matters of mutual interest". Also see Garbers, Le Roux and Strydom *Labour Law* 425.

6 GNR 1396 in GG 42121 of 19 December 2018.

7 McGregor *et al Labour Rules* 192-199.

8 Section 23(5) of the *Constitution*; Garbers, Le Roux and Strydom *Labour Law* 425. The Supreme Court of Appeal held that collective bargaining is not a right. It is rather a mechanism through which disputes can be resolved. See *SANDU v Minister of Defence; Minister of Defence v SANDU* 2007 4 BCLR 398 (SCA) para 10; *SANDU v Minister of Defence* 2007 8 BCLR 863 (CC) para 50; Garbers, Le Roux and Strydom *Labour Law* 425. This position has been reiterated by item 4(4) in GNR 1396 in GG 42121 of 19 December 2018. This is in line with Art 4 of *Convention 154*, which recognises collective bargaining as "voluntary negotiation[s]". Despite this position as outlined by the *Constitution*, case law, and statute, an argument can be made that collective bargaining in the public sector meets the requirements of a custom/practice (a recognised source of law). According to *Van Breda v Jacobs* 1921 AD 330 334, as reiterated by the Constitutional Court in *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) para 52, a custom is recognised if it is "certain, uniformly observed for a long period of time and reasonable".

9 This explains the voluntarist nature of the process of collective bargaining in South Africa. See Molusi 2010 *Obiter* 165-166.

- achieve "labour peace"[10] or industrial peace.[11]

Over and above the stated objectives, it needs to be emphasised that the aim of collective bargaining is to reach an "equitable settlement on matters of mutual interest" by negotiating such issues. In the public service bargaining is ordinarily sealed with a collective agreement/resolution.[12] The body mandated to facilitate the achievement of this result is the Public Service Coordinating Bargaining Council (PSCBC).

In the year 2018 such an agreement was reached between the employer and employee representatives, namely PSCBC Resolution 1 of 2018 (hereafter the wage[13] agreement).[14] In principle, once the employer and trade unions (with sufficient voting power) have signed a proposed agreement, such an agreement is viewed as binding on all the parties concerned.[15]

The agreement was not fully honoured by the employer, which disproved the notion that once ratified, an agreement is binding on all. This led to two court challenges, both of which favoured the employer.[16] The conclusion of the wage agreement and its non-enforceability raises the question: What is

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10 This term is commonly understood to refer to a situation of avoiding labour unrest and/or labour disputes, such as strikes. See para 6.3, which shows that in the absence of collective bargaining, matters can get out of hand.

11 Finnemore, Koekemoer and Joubert *Labour Relations* 233-234. Also see Leppan, Govindjee and Cripps 2016 *Obiter* 475; Adams 2011 *Economic and Labour Relations Review* 153-164; Derber 1980 *Relations Industrielles/Industrial Relations* 187-192.

12 Finnemore, Koekemoer and Joubert *Labour Relations* 233; Garbers, Le Roux and Strydom *Labour Law* 426; Van Niekerk *et al Law@Work* 432. Also see PSCBC 2017 https://pscbc.org.za/index.php/sample-page/pscbc-information-brochure. Section 213 of the *LRA* defines a collective agreement as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-(a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations; 'council' includes a bargaining council and a statutory council".

13 Note that the term is loosely used. It should not be assigned its ordinary meaning.

14 Note that this resolution was applicable only to employees on salary level 1 to 12. It did not include members of the Senior Management Service who are on salary level 13 to 16.

15 Finnemore, Koekemoer and Joubert *Labour Relations* 233-234; Van Niekerk *et al Law@Work* 432-435. This can be understood as one of the "[c]ornerstone[s] of contract", expressed as *pacta sun servanda* (the sanctity of a contract). In explaining this term, Hutchison and Pretorius *Law of Contract* 21 describe the term as "an idea that contracts freely and seriously entered into must be honoured and, if necessary, enforced by the courts".

16 *Public Servants Association v Minister of Public Service and Administration* [2021] 3 BLLR 255 (LAC) (hereafter *PSA v DPSA*). Note that the matter ended up in the Constitutional Court; see *National Education Health and Allied Workers Union v Minister of Public Service and Administration* 2022 6 BCLR 673 (CC) (hereafter *NEHAWU v DPSA*).

the future of bargaining between labour (public servants on salary level 1 to 12) and the employer (the Department of Public Service and Administration, hereafter the DPSA)?[17]

To answer this question, the authors consider the following: the mandate of the PSCBC, actors in the PSCBC machinery, the collective agreement that caused the dispute (actions of the employer during the last leg of the agreement), the Labour Appeal Court (hereafter the LAC) judgment, eventualities of the LAC judgment, and what is likely to follow next.

In view of the LAC and Constitutional Court judgments, the primary aim of this case note is to inquire into the recent intricate challenges that have beset the system of collective bargaining in the public service in South Africa. The case note examines not only the constitutional and statutory context of collective bargaining but also the contours of collective bargaining as exemplified in seminal labour law cases of recent vintage.

2 The mandate of the Public Service Coordinating Bargaining Council (PSCBC)

As the PSBC is the entity which facilitated the wage agreement it is essential that its role be elaborated on. It is an independent institution created by the *LRA*.[18] It has bargaining councils which are sector-specific (see Figure 1).

17 This is in part motivated by the acknowledgement by the Labour Appeal Court (LAC) that if a decision (its decision) is made and it affects a multitude (all public servants), the adjudicator (LAC) is not well suited to predict the "repercussions" of his or her "interventions". See *PSA v DPSA* para 1.

18 See ss 35-37 of the *LRA*. Also see Finnemore, Koekemoer and Joubert *Labour Relations* 233 and Van Niekerk *et al Law@Work* 430-431; these authors contend that an institution such as the PSCBC can be formed by agreement or by legislation. They further note that such institutions can be permanent or interim (*ad hoc*).

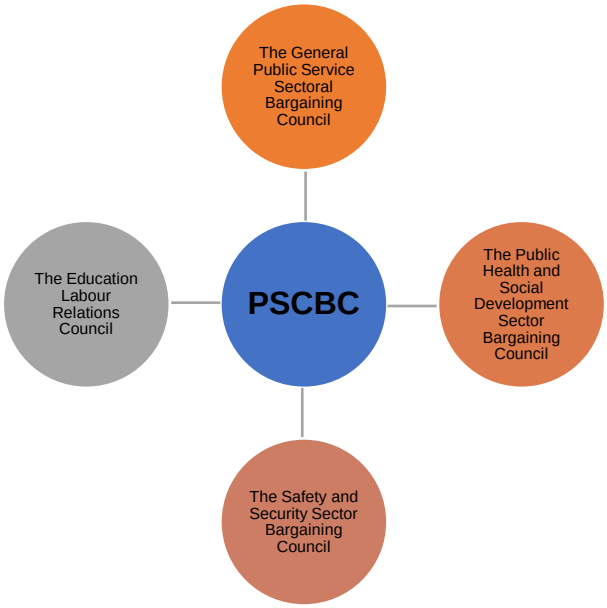

Figure 1: Composition of the PSCBC

The core of its existence is to "maintain good labour relations in the Public Service".[19] As a platform between labour and employers, the PSCBC performs the following functions:

- It serves as the machinery through which labour and employers in the public service reach resolutions on various matters. This may include conditions of employment, such as salaries and wages.
- It serves as either a mediator or an arbitrator in disputes between labour and employers in the public service.
- It facilitates the hearing of disputes between labour and employers in the public service.
- It seeks to "promote good governance, inclusive research and strategic partnerships".[20]

3 Actors in the PSCBC machinery

The main actors are labour and employers.[21] Neither of these actors can meet and discuss all matters at the same time. As a result, they are

19 Finnemore, Koekemoer and Joubert *Labour Relations* 198. Also see PSCBC 2017 https://pscbc.org.za/index.php/sample-page/pscbc-information-brochure.

20 See PSCBC 2017 https://pscbc.org.za/index.php/sample-page/pscbc-information-brochure.

21 The term "employers" is preferred in this submission. Other equivalent terms include government and/or the state. For an explanation of these two distinct terms, see

represented by others. The employer is represented by the DPSA. Labour is represented by recognised trade unions that have a membership or combined membership of 50 000 or more (see Table 1 for recognised unions that meet the threshold). Table 1 further shows how the parties that represent labour have voted on approved wage agreements between 2015 and 2023. It also shows how much voting power each of these actors has.

Among their labour-related rights, trade unions also have the option of joining a federation. Most of the parties in this machinery are affiliated with the Congress of South African Trade Unions (hereafter COSATU).[22] The rest are affiliated with the Federation of Unions of South Africa (hereafter FEDUSA).[23] The table also shows how this influences voting patterns.

As already indicated in paragraph 2, the PSCBC engages in matters between labour and the employer. It provides the space for labour and employees to meet and serves as a mediator or arbitrator in a matter referred to it by either labour or the DPSA.[24]

Table 1: Unions recognised by the PSCBC

Trade union	**2015 agreement**	**2018 agreement**	**2021 agreement**	**2023 agreement**	**Allocated voting power[25]**	**Affiliated Federation**
Democratic Nursing Organisation of South Africa (DENOSA)		X	X		6.72%	COSATU
Health and Other Service Personnel Trade Union of			X	X	7.71%	FEDUSA

Heywood *Politics* 55 and 110. These other two terms are not preferred since in study fields such as Politics and International Law they have a different and far bigger meaning than being the employer. The preferred word is also based on the fact that each government department (organ of state) is viewed as an independent entity, with its own accounting officer. As such it is an independent bearer of rights and obligations. As such in its own rights it is an employer.

22 Congress of South African Trade Unions date unknown http://mediadon.co.za/unions-contact/.

23 Federation of Unions of South Africa 2021 http://www.fedusa.org.za/unions-2/.

24 This is in line with Art 3 of *Convention 154*.

25 This is based on the PSCBC's "National Vote Weight as at 31 December 2021"; see PSCBC 2021b https://pscbc.co.za/index.php/collective-bargaining/vote-weights.

Trade union	**2015 agreement**	**2018 agreement**	**2021 agreement**	**2023 agreement**	**Allocated voting power[25]**	**Affiliated Federation**
South Africa (HOSPERSA)						
National Professional Teachers' Association of South Africa (NAPTOSA)	X	X	X	X	5.97%	FEDUSA
National Education, Health and Allied Workers' Union (NEHAWU)	X	X			16.02%	COSATU
Police and Prisons Civil Rights Union (POPCRU)	X	X			11.86%	COSATU
Public Servants Association (PSA)	X		X	X	18.93%	FEDUSA
South African Democratic Teachers Union (SADTU)	X	X	X	X	21.29%	COSATU
South African Police Union (SAPU)	X		X		11.50%	Unknown[26]

[26] The indication prior to SAPU's conference in December 2022 was that it was affiliated with the South African Federation of Trade Unions (hereafter SAFTU). Its congress decided to withdraw from SAFTU. As to whether this has been actioned or not remains to be announced to the general public. Note that SAFTU still lists SAPU as one of its affiliates; see SAFTU 2023 https://saftu.org.za/affiliates/. See Sithole 2022 https://www.iol.co.za/the-star/news/police-union-withdraws-its-saftu-affiliation-24705195-4afd-4615-9930-7ffc9def82e4.

4 The collective agreement that caused the dispute (actions of the employer during the last leg of the agreement)

On 8 June 2018 most of the trade unions[27] subscribed to a three-year salary agreement, and PSCBC Resolution 1 of 2018 was reached.[28] Table 2 outlines the essence of the agreement. Table 1 shows which parties ratified the agreement. The employer gave effect to the agreement during the first two financial years. In the last year of the agreement a dispute was lodged by the employer. The employer stated that it was unable to give effect to the last leg of the resolution, citing affordability challenges.[29]

The dispute was set for conciliation, which failed to yield any positive outcome. As a result, the dispute was eventually set for arbitration. Prior to the arbitration being finalised, the PSA set an application for the enforcement of the resolution at the Labour Court.[30]

Table 2: The essence of PSCBC Resolution 1 of 2018

Salary level	Increase Year 1 (18/19)	Increase Year 2 (19/20)	Increase Year 3 (20/21)
1-7	7%	CPI[31] + 1% = 5.65%	CPI[32] + 1% = 5.19%
8-10	6.5%	CPI + 0.5% = 5.15%	CPI + 0.5% = 4.69%
11-12	6%	CPI = 4.65%	CPI = 4.19%

27 It can be assumed that all trade unions that signed the agreement did so in good faith, with the understanding that once it reached the required majority, it would be honoured by all parties concerned (including unions that did not ratify it). Note that the Constitutional Court found that the employer also acted in good faith when she requested that the negotiation for the last leg of the 2018 agreement be reopened; see *NEHAWU v DPSA* para 106. When one considers that in 2022 the employer unilaterally increased the salaries of public sector employees and that had it wanted to (unilaterally) increase public servants' salaries in 2020 it would have done so, one wonders if indeed the employer acted in good faith as stated by the court.

28 *PSA v DPSA* paras 2-3; PSCBC 2018 https://pscbc.co.za/index.php/collective-bargaining/psbc-resolutions-docman/2018-1.

29 *PSA v DPSA* para 9.

30 See *NEHAWU v DPSA* paras 22-23.

31 The Consumer Price Index (hereafter CPI) is an index of average consumer prices. It indicates the average increase in price of certain items (generally consumed by a household) over a period of time. The duration that was used was 1 April 2018 to 31 March 2019 (one financial year). According to the DPSA 2019b https://www.dpsa.gov.za/dpsa2g/documents/cos/2019/17_3_p_05_08_2019.pdf, the CPI for the duration stood at 4.65%.

32 According to the DPSA 2020 https://www.dpsa.gov.za/dpsa2g/documents/cos/2020/17_3_p_24_7_2020.pdf, the CPI for the duration stood at 4.19%.

5 The Labour Appeal Court (LAC) judgment

As previously indicated, prior to the arbitration of the dispute between labour and the employer, the PSA took the employer to the Labour Court.[33] The employer also brought about a counter-application, namely a declaratory order to set aside the resolution.[34] As opposed to hearing the applications separately, both were heard simultaneously by the LAC.[35]

The matter was decided in favour of the employer.[36] The LAC pronounced itself as follows:

> It is declared that the enforcement of clause 3.3 of Resolution 1 of 2018 (the Resolution) is unlawful for contravention of ss 213 and 215 of the Constitution of the Republic of South Africa, 1996 and Regulations 78 and 79 of the Public Service Regulations, 2016.[37]

6 Eventualities of the LAC judgment

In arriving at a determination, the LAC understood that its decision might have unintended consequences.[38] One of these consequences was that public servants did not receive a salary increase for the 2020/2021 financial year. The eventualities of the judgment can be documented up to April 2023.

6.1 The 2021 wage agreement and the appeal of the LAC judgment

In July 2021 a new wage agreement was reached, namely PSCBC Resolution 1 of 2021. The argument can be made that the agreement was made in the hope that the Constitutional Court would rule in favour of labour and that, as such, this resolution was a transitional measure while a bigger outcome was awaited.[39]

As opposed to many other previous agreements it was distinguished by the following:

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33 See *PSA v DPSA* para 10.

34 See *PSA v DPSA* para 11.

35 See *PSA v DPSA* para 11. This was because an application was brought by the parties in terms of s 175 of the *LRA*. Also see *NEHAWU v DPSA* para 24.

36 See *PSA v DPSA* paras 49-51.

37 *PSA v DPSA* para 51. Essentially, all of the provisions mentioned required the DPSA to obtain a mandate from National Treasury. The DPSA did not have the express consent to bind the employer to the last year of the resolution. Note that this conclusion was subsequently confirmed by the Constitutional Court in *NEHAWU v DPSA*. This conclusion can also be understood using one of the "[c]ornerstone[s] of contract", which is expressed as privity of contract. In explaining this term, Hutchison and Pretorius *Law of Contract* 22 describe the term as "the idea that a contract creates rights and duties only for the parties to the agreement, and not for third persons". The 2018 resolution sought to bind National Treasury (a third party) without its express consent.

38 See *PSA v DPSA* para 1.

39 The agreement had reached resolution status by 26 July 2022. The Constitutional Court heard an appeal from the LAC judgment on 24 August 2021 and delivered its unanimous judgement on 28 February 2022.

- It was a single-year agreement (2021/2022).
- It introduced a non-pensionable allowance (a cash gratuity) with amounts ranging from R1 220 to R1 695.[40] This allowance was set for a year or until a new resolution was reached.
- It made provision for a pensionable 1.5% increase (commonly associated with performance assessment, which saw persons not eligible to receive it due to being on probation or having top notches on any of the 12 salary levels of public servants being accommodated in the agreement).
- It included a compliance clause, which addressed the shortcoming identified by the LAC in the 2018 resolution.[41]
- The agreement was reached speedily and there were only two parties that did not ratify the agreement (see Table 1).
- The CPI was not used as a measure of determining salary increments.
- The signatory of the employer was the Director General of the DPSA, as opposed to a delegated person.[42]

In August 2021 the Constitutional Court finally heard the appeal against the LAC judgment and the judgment was handed down at the end of February 2022. As previously stated, it did not go as labour had anticipated. The following things stand out about this matter at the Constitutional Court:

- Though having the nature of an appeal, the matter was not treated as an appeal in its entirety. Parties such as NEHAWU, SADTU and POCRU were initially cited as respondents in the appealed judgement. In the current case they were cited as applicants. They moved from taking a passive role in the matter to being the main role players, with the party who would ordinarily be cited as the appellant.
- The court also stood by the LAC decision that the wage agreement violated sections 213 and 215 of the *Constitution* and Regulations 78 and

40 Note that the allowance from a benefit perspective of the employees was not in their best interest. It increased their tax liability, as it was taxed a lot higher than a standard salary. Furthermore, the employees' pension benefits remained stagnant for the duration till a new agreement was reached, as both the employer and employees were not contributing any further money outside the salary notches of the employees to the Government Employees Pension Fund (hereafter GEPF).

41 This satisfied what was lacking in the 2018 wage agreement, namely privity of contract.

42 PSCBC 2021a https://pscbc.co.za/index.php/collective-bargaining/psbc-resolutions-docman/2021.

79 of the Public Service Regulations. It went further and declared that these clauses were peremptory and required exact compliance.[43]

- In addition to the above they included section 39 of the *Public Finance Management Act* 1 of 1999 (hereinafter the *PFMA*). The provision deals with budgetary controls. It places a duty on accounting officers to ascertain that there are budgetary controls. The court went on to explain that these mechanisms of the gaining approval of National Treasury were aimed at preventing over spending, protecting members of the public at large, ascertaining that there is transparency in the spending of public funds, and expenditure control as envisaged in section 39 of the *PFMA*.[44]

- It was argued that in this particular instance the court should use the principle of *estoppel* against the DPSA. The court found that the principle could not be used to achieve an outcome that was not permissible in law.[45] The court went on to confirm the LAC's judgement.[46]

6.2 The proposed 2022 wage agreement

With this short-term solution (see paragraph 6.1) having been reached, and the Constitutional Court having ruled against labour, the parties went back to the drawing board. They failed to reach an agreement and the offer that was tabled by the employer failed to be ratified by the majority of unions within 21 days. As such, it collapsed.[47]

By November 2022 the following had occurred:

- The employer had unilaterally[48] granted employees a 3%[49] salary increase.[50]

43 *NEHAWU v DPSA* para 78.
44 *NEHAWU v DPSA* para 77.
45 *NEHAWU v DPSA* para 92.
46 *NEHAWU v DPSA* para 114.
47 South African Government 2022 https://www.gov.za/speeches/update-202223-public-service-wage-negotiations-9-nov-2022-0000.
48 There are two dominant "labour relations perspectives": unitarist employers and the promotion of pluralism. In terms of the former, the state and labour have a limited role in what happens in the world of work. The latter acknowledges that trade unions and labour have a role to play. The South African public sector has been largely characterised as pluralistic. The action of the employer went against this view. See further Finnemore, Koekemoer and Joubert *Labour Relations* 7-8 and 185-186.
49 According to the DPSA 2022a https://www.dpsa.gov.za/dpsa2g/documents/cos/2022/17_3_p_4_10_2022.pdf, the CPI for the previous financial year was 5.22%. As a result, the offer was less than half of what the CPI was.
50 Note that since the birth of the democratic South Africa (27 April 1994), this is the second time the employer has taken such a route. This occurred in 1999 and led to the biggest public sector industrial action (strike) to date. The employer also has a remedy of a lockout.

- The employer had announced that the non-pensionable allowance (cash gratuity) would continue being paid until the end of the 2022/2023 financial year.

- The PSA declared a dispute regarding the proposed wage agreement. The Commissioner of the PSCBC subsequently issued the PSA with a non-resolution certificate. A subsequent meeting was set between the PSA and the employer, during which picketing rules were agreed upon. Numerous pickets were conducted by PSA members over the month of November. On 10 November, PSA members embarked on a strike supported by other unions affiliated with FEDUSA.[51]

- NEHAWU followed the same route as the PSA. It was joined by POPCRU, DENOSA, and HOSPERSA. However, they did not go on strike instantly. They opted to embark "on several pickets; marches; handing in of memorandum of demands to government; and mass protests throughout the country" to implement their action in the same year (month). It was delayed to the following year; as discussed in paragraph 6.3.[52]

- There have been numerous claims that there was a public sector strike over the unilateral decision by the employer.[53]

These actions set the tone for what was to occur next: NEHAWU became the game-changer.

6.3 National Education, Health and Allied Workers' Union (NEHAWU) as the game-changer

After the unilateral decision was taken to increase public servants' salaries by 3%, attempts were made to conclude a new wage agreement for the financial years 2023/2024, 2024/2025, and 2025/2026 (a three-year deal). For the

This is unlikely to happen in the public sector as this would inconvenience the many who are in dire need of public services and goods. See Finnemore, Koekemoer and Joubert *Labour Relations* 141; Garbers, Le Roux and Strydom *Labour Law* 426; Staff Reporter 1999 https://mg.co.za/article/1999-08-17-nehawu-rejects-implementation/.

51 PSA 2022 https://www.psa.co.za/docs/default-source/psa-documents/media-statements/psa-fedusa-public-service-strike-to-continue-on-10-november-2022.pdf?sfvrsn=59996bfc_4.

52 *Minister for the Public Service and Administration v National Education, Health and Allied Workers Union* [2023] JOL 58172 (LC) (hereafter *DPSA v NEHAWU*) para 3.

53 South African Government 2022 https://www.gov.za/speeches/update-202223-public-service-wage-negotiations-9-nov-2022-0000; PSCBC 2022 https://pscbc.co.za/index.php/docman/media-statements/2231-pscbc-media-release-update-on-wage-negotiations-081122/file; DPSA 2022b https://www.dpsa.gov.za/dpsa2g/documents/rp/2022/18_1_p_26_10_2022A.pdf.

financial year 2023/2024, the employer proposed a 4.7%[54] increase, and for the last two legs it proposed an increase equivalent to the CPI (capped at 6.5%).[55] Labour tabled a counter-offer. It proposed a single-term (financial year) agreement that made provision for a 10% increase across all salary levels.

The fact that the government failed to react positively to various union actions, as elaborated on in paragraph 6.2, the 3% unilateral wage increase, and the government's unwillingness to negotiate openly (as opposed to making a take-it-or-leave-it offer) persuaded NEHAWU to embark on a strike. On 23 February 2023, a day after the budget speech by the Minister of Finance, NEHAWU notified the DPSA of its intention to go on strike ("strike action, picket, or any other form of industrial action") on 6 March 2023.[56]

The DPSA went to court to interdict the action. In arguing for the interdict, the DPSA contended that there was a prolonged delay between the granting of a certificate by the Commissioner of the PSCBC and the actual strike (November to February).[57] Furthermore, it contended that the notice issued by NEHAWU was defective in that it referred to "a public service wide strike", which included employees outside the scope of the non-resolution certificate issued by the PSCBC (this included those employed by the South African Social Security Agency (hereafter SASSA), the Special Investigation Unit (hereafter SIU), and the South African National Biodiversity Institute (hereafter SANBI)) and furthermore failed to explicitly exclude employees offering essential services[58] from the scope of public sector employees.[59]

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54 An explanation given by the employer is that the current cash gratuity on average amounts to 4.2%, and, as such, the employer was merely adding an increase of 0.5%. This increase was supposed to be pensionable. As a result, this was not going to translate into more money in the pockets of employees. It was only going to benefit them upon retirement, as both the employer and employee were going to be forced to contribute to the GEPF.

55 PSA 2023 https://www.psa.co.za/docs/default-source/psa-documents/newsletters/2023-to-be-used-from-3-january-2023/pscbc-17022023.pdf?sfvrsn=5dab0434_4.

56 At the heart of the of the bone of contention by NEHAWU were the following three issues: the employer's refusal to agree to a 10% salary increase; the demand of a housing allowance of R2 500 (per month) and for dismissed employees to be paid out their contribution to the Government Employees Housing Scheme; and for pay progression (1.5% salary increase linked to performance assessment) to be payable to people on the top notch of each salary level. Note that the 2021 wage agreement made provision for such an increase. Further note that the current housing allowance is R1 500.07 and it is increased annually on the basis of the average CPI announced by Statistics South Africa for a financial year; see DPSA 2022a https://www.dpsa.gov.za/dpsa2g/documents/cos/2022/17_3_p_4_10_2022.pdf.

57 *DPSA v NEHAWU* para 5.

58 Section 213 of the *LRA* defines essential service as:

"(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
(b) the Parliamentary service;
(c) the South African Police Service".

Also see Pillay 2001 *Southern African Business Review* 57.

59 *DPSA v NEHAWU* paras 18-19.

NEHAWU opposed the DPSA's application. It relied on the following three issues: non-joinder, alleged non-compliance with the provisions of section 68(2) of the *LRA*,[60] and a lack of urgency or self-created urgency.[61] The DPSA had failed to join other parties with sufficient interest.[62] In furthering this point NEHAWU contended that what the DPSA was supposed to dispute was not the notice to strike but the non-resolution certificate issued by the PSCBC. As such, the DPSA ought to have included the Commissioner who issued the non-resolution certificate in the proceedings.[63] This view was not upheld by the court, who noted that the test of a joinder plea is well established in law and NEHAWU was not in a position to show prejudice to other parties (POPCRU, HOSPERSA and DENOSA) it sought to be joined on the current matter before the court, interdict of a notice to strike (actual strike).[64]

In relation to the alleged non-compliance with the provisions of section 68(2) of the *LRA*, NEHAWU contended that the DPSA had failed to give it 48 hours' notice. The court took into account that the DPSA had failed to comply with the requirement by only three hours. The court interpreted the clause purposively and took into consideration that NEHAWU had not suffered any notable prejudice because of the substantial compliance of the DPSA with section 68(2) of the *LRA*. It further noted that the matter had been set down for 3 March 2023 but was only heard on 4 March 2023 (by agreement between the parties). This gave sufficient opportunity to NEHAWU to supplement its replying affidavit. As such, the substantial compliance by the DPSA was held to be sufficient.[65]

The last ground for opposing the application was a lack of urgency.[66] This was premised to a great extent on the non-compliance with the provisions of section 68(2) of the *LRA.* The court had already addressed this matter. The alternative argument presented by NEHAWU was that the urgency was self-created. In

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60 Section 68(2) of the *LRA* provides: "The Labour Court may not grant any order in terms of subsection (1)(a) unless 48 hours' notice of the application has been given on the respondent: However, the Court may permit a shorter period of notice if-
(a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
(b) the respondent has been given a reasonable opportunity to be heard before a decision concerning the application is taken; and
(c) the applicant has shown good cause why a period shorter than 48 hours should be permitted".

61 *DPSA v NEHAWU* paras 5-25.

62 This was with reference to the parties who applied for the non-resolution certificate from NEHAWU. As such, POPCRU, HOSPERSA, and DENOSA should have joined in the application; see *DPSA v NEHAWU* para 5.

63 *DPSA v NEHAWU* para 6. Note that this issue was disposed of in para 10 of the judgment. It was noted that the PSCBC was joined in the matter in analogy by the Commissioner, who issued the non-resolution certificate. Despite this, the PSCBC no longer had any interests as it has discharged its obligations as contemplated in s 135(1) of the *LRA*.

64 *DPSA v NEHAWU* paras 5-8. The court relied on *Absa Bank Ltd v Naude* 2016 6 SA 540 (SCA) para 10 and *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) para 12.

65 *DPSA v NEHAWU* paras 5-25.

66 *DPSA v NEHAWU* paras 12-17.

replying to this the court detailed the timeline since the issuing of the notice to strike and the various pieces of correspondence between the parties. It showed that NEHAWU had the opportunity to fix the noted defect and chose not to. As such, the DPSA only had access to court as its last resort. The court held that in the absence of its hearing the matter, the DPSA was likely to suffer prejudice or material harm.[67]

On 4 March 2023 an interdict was issued by the Labour Court, and the reasons for its being granted were issued on 6 March 2023.[68] On the same day the Labour Court issued an order for the judgement to be executed.[69] The execution order was appealed, and the appeal was heard on 10 March 2023. The LAC made an interim order that replaced the enforcement order. It ordered that the following should be done until any ensuing appeal was heard:

- All essential services employees who are covered by the PSCBC were "restrained and prevented" from participating in any action relating to the notice served by NEHAWU to the DPSA on 23 February 2023.

- Employees represented by NEHAWU in SASSA, the SIU, and SANBI were also barred from participating in any activity relating to the NEHAWU notice of 23 February 2023.

- NEHAWU was ordered to use all available platforms to bring to attention the content of the order to its members and officials. It was emphasised that the order needed to be brought to the specific attention of NEHAWU-affiliated employees in hospitals and clinics in South Africa. This was so because this was the most disrupted sector.[70]

After the court battles the NEHAWU strike was eventually called off. This was as a result of a settlement between labour and the employer. This created hope that there was still room for collective bargaining and preventing the employer from

67 *DPSA v NEHAWU* paras 18-23.

68 *DPSA v NEHAWU* para 1.

69 *NEHAWU v Minister for the Public Service and Administration* 2023 6 BLLR 487 (LAC) (hereafter *NEHAWU v DPSA* 2023) para 1. This order was sought and made in terms of s 18 of the *Superior Courts Act* 10 of 2013.

70 *NEHAWU v DPSA* 2023 para 57. What the court did in this regard is similar to corrective interpretation as outlined in Botha *Statutory Interpretation* 212-214. In particular, they used reading down, severance and reading in to keep the NEHAWU notice strike constitutional. Note that reading down is a method of statutory or constitutional interpretation used by the courts to make legislation (action) that seems unconstitutional to be in line with the *Constitution*. Reading in means that a court reads in words and severance means a court cuts out words, with the same intention of keeping a provision/act within constitutional parameters. In a way one can argue that this is what the court *a quo* should have done. This balances the employees' right to strike (as a means to compel the employer to bargain) and the employers' rights to have certain services uninterrupted by employee actions.

acting unilaterally.[71] The parties furthermore agreed that the 2023/2024 agreement (as outlined in paragraph 6.4) would take into consideration the disputes outlined in paragraph 6.2.[72]

6.4 The 2023 wage agreement

A two-year wage agreement was reached on the eve of the 2023/2024 financial year, namely PSCBC Resolution 2 of 2023. In a way, the conclusion of this agreement can be attributed to the efforts of NEHAWU, even though it did not ratify it.

The positives that can be taken from this agreement include the fact that the employer moved away from its initial salary increase offer of 0.5% and desisted from taking further unilateral actions on matters that had traditionally been resolved through collective bargaining. Further conclusions from this agreement include the following:

- The legalisation (ratification) of the payment of the non-pensionable cash allowance for the financial year 2022/2023. It may be argued that this had already been covered by the 2021 wage agreement. However, if one factors in the unilateral increase for the financial year 2022/2023, one can argue that the allowance should have ceased to exist when the 3% increase was paid and, as such, the employer was within its rights to seek to recoup the allowances (monies) paid in the 2022/2023 financial year. This clause prevents such an action from being undertaken by the employer.

- The agreement of a two-year deal shows that there is progress in attempting to bridge the trust deficit between the parties (see paragraph 7).

- The employer has agreed on clauses that address inflation (see Table 3).

- There were attempts to agree on other issues such as the Government Employees Housing Scheme.

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71 One can argue that the strike did serve its purpose, compelling the employer to bargain and move from its original position.

72 NEHAWU 2023 https://www.nehawu.org.za/NEHAWU%20Statement%20On%20The%20Public%20Service%20Strike%2015%20March%202023.html. See also PSCBC 2023a https://pscbc.co.za/index.php/docman/media-statements/2250-pscbc-media-release-140323-oo-bn-002/file. This can be stated to make the appeal of the *DPSA v NEHAWU* moot, and, as such, no longer worth the time of the court. See DPSA 2023 https://www.dpsa.gov.za/dpsa2g/documents/rp/2023/18_1_p_06_04_2023.pdf.

- Like the 2021 resolution, there is a compliance clause. The DPSA can no longer run to court and state that it does not have a financial mandate from National Treasury.[73]

- The time when the agreement was reached (the last day of the financial year) gives hope that if both parties commit to collective bargaining and neither bargains from a take-it-or-leave-it position, we may have an agreement that may be sealed before the annual budget speech in February.

- Like the agreement before it, the signatory of the employer was the Director General of the DPSA, as opposed to a delegated person

Table 3: The essence of PSCBC Resolution 2 of 2023

Salary level	Increase Year 1 (23/24)	Increase Year 2 (24/25)
1-12	An average increase of 7.5%, which includes: • "Translation of the current non-pensionable cash allowance into a pensionable salary, estimated at an average of 4.2%"; and • "An additional 3.3% pensionable salary increase".[74]	Projected CPI capped as follows: • If the CPI is below 4.5%, employees will receive a salary increase of 4.5%; and • If the CPI is above 6.5%, employees will receive a salary increase of 6.5%.

7 What is likely to follow next?

The partial non-fulfilment of the 2018 resolution broke the trust between labour and the employer (trust deficit). On the issue of trust deficit, Grawitzky poignantly remarked that:

> Lack of capacity, basic negotiating skills, trust between partners, the power of negotiators to influence and educate their own constituencies, turnover of the [t]he bargaining environment has begun to look more adversarial not only because of the

73 PSCBC 2023b https://pscbc.co.za/index.php/collective-bargaining/psbc-resolutions-docman/2023.

74 Note that the DPSA has provided guidelines as to how this agreement will be operationalised. Employees will be granted a 3.3% salary increase on their salary notches (as they were on 31 March 2023). After this calculation, the value of the non-pensionable allowance (the cash gratuity) that an employee was receiving will be multiplied by 12 and added to the notch after the salary increase.

> quality of bargaining, across both private and public sector, but the lack of trust which exists between the parties with no real dialogue happening on the shopfloor between line management and employees on how to influence business outcomes.[75]

This trajectory is likely to be a major obstacle in the future negotiation pattern. As already seen, labour is unwilling to enter into any long-term agreement with the employer; they ratified only a single and a two-year agreement with numbers that do not inspire confidence or bring about a sense of labour peace.[76]

Since 2018 there have been only two wage agreements which were not in line with the standard three-year agreement. Both these agreements focused merely on the take-home wages and salaries of the public servants. These resolutions included a clause to address the shortcoming identified in *PSA v DPSA* (lack of financial approval from National Treasury) and were signed for the employer by the Director General of DPSA. This clause will most likely feature in all future wage agreements to ensure that the employer is never again in a position to claim that there was no financial approval and that as a result the sealed agreements are null and void. Furthermore, the usage of the Director General of DPSA as a signatory is likely to continue in an effort to repair the trust deficit.

As a result of this deficit in trust the PSCBC is now reduced to an entity that yields only short-term results (one- or two-year agreements).[77] This speaks in a way to the acceptability of the PSCBC as a mechanism to settle disputes between labour and the employer. As seen in *PSA v DPSA*, *NEHAWU v DPSA, DPSA v NEHAWU*, and *NEHAWU v DPSA* 2023, the main actors are now inclined to use the courts to resolve their disputes. This further strengthens the notion that the PSCBC is no longer the preferred arena in which to settle disputes between parties.

This state of affairs has shown that labour is dynamic and, as such, it presents fertile enough grounds for intra-labour rivalry.[78] The unions with the majority vote (55.89%) (see Table 1) in the PSCBC are members of COSATU. They can be viewed as the key drivers in determining what will be ratified and what will be allowed to 'die a slow death' (such as the draft resolution of 2022).[79] Their vote is

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75 Grawitzky 2011 https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_175009.pdf.

76 Note that both agreements were ratified by the same parties (see Table 2). They enjoy a 53.9% majority. The glue in the agreement is the ratification between SADTU and the PSA; or, put differently, the relationship between SADTU- and FEDUSA-affiliated unions (see Table 1 for a distribution of their power). Should either party not sign in the near future and most COSATU affiliates continue not being interested in agreements that are perceived as anti-labour, there will be no agreement and the prospects of a strike will increase.

77 See Finnemore, Koekemoer and Joubert *Labour Relations* 233, who contend that the success of any bargaining institution depends on its acceptability by the clients. After the breakdown of the 2018 resolution, the usage of the courts to settle the enforceability of the resolution, and the absence of a long-term agreement, one can infer that the acceptability of the PSCBC as an entity to resolve bargaining issues has degraded.

78 Gyesie *Exploring the Impact of Collective Bargaining* 44.

79 As a collective (COSATU affiliates), this statement can be said to be cast in stone. However, if SADTU continues ratifying all proposed wage increases, it leaves other

dependent to some extent on the following two aspects: the current state of the "tripartite alliance"[80] and the current living (working) conditions of the employees they represent.[81]

It has always been known that the African National Congress (ANC) is the lead member in the tripartite alliance. The other two parties can therefore merely lobby and be given certain positions in the government.[82] Over time, this has not worked well for the South African Communist Party (SACP) and COSATU, or quite arguably for labour. This is linked to a certain extent to the working (living) conditions of their members.[83] Faced with an economy that is not growing fast enough, the higher demands of life (rising food and fuel costs, rising interest rates, increasing electricity tariffs, *et cetera*), and the employer's inability to give effect to their demands (giving effect to the last leg of the 2018 resolution and demands for salary increases above the CPI), the tripartite alliance is unlikely to hold as well as in the early years of South African democracy.[84] The weaker it is (or is perceived to be), the more difficult things will be for labour.

This makes it possible that a salary increase below CPI may still be reached in the near future (beyond the 2024/2025 financial year).[85] The opposite may be true; if COSATU takes a resolution on the negotiations, then SADTU will be bound by it.[86] Such a resolution will decrease the probability of having a salary wage agreement that is below the CPI. Regardless of which side history absolves, trade unions will still demand an increase above the CPI. This is not only in their interest, but also in the interest of labour.

In response to the demand for wage increments above the CPI, the employer is most likely to stick to its plan of reducing the cost of compensating employees (hereafter COE). The non-fulfilment of the 2018 resolution was one of the measures it took. In addition, it also reduced the COE in relation to performance

affiliates in the shadows. It was the reason why the 2018 agreement came to life. See Duma 2022 https://ewn.co.za/2022/10/06/sadtu-takes-govt-s-3-salary-hike-offer-says-wage-strike-won-t-benefit-members. It should be noted that despite SADTU's participation in the negotiation process, the DPSA had no mandate to alter the conditions of service (employment) of educators. This will be operationalised by the Minister of Education. This is similar for the police and members of the correctional services (appointed in terms of the relevant statutes).

80 This denotes a relationship between the ruling party (ANC), the SACP and COSATU.

81 Amoako 2012 *Labour, Capital and Society* 85-86.

82 There are others who are of the view that when such people occupy such positions it is labour that suffers the most, since office bearers' loyalty will shift from those they represent to either the self or the ruling party (or sometimes both).

83 Amoako 2012 *Labour, Capital and Society* 86.

84 See Amoako 2012 *Labour, Capital and Society* 86, who argues that the inability of the government to accede to worker demands and implement neoliberal policies such as the Redistribution and Development Programme and the Growth, Employment and Redistribution Strategy has a strong potential to ignite strikes in the public sector.

85 In line with the recent wage agreement this is already a possibility. See Table 3.

86 This view of members or affiliates acting as one is referred to as "rank and file" by Amoako 2012 *Labour, Capital and Society* 86.

bonuses.[87] Other avenues that it may consider include the non-filling of vacancies due to turnover[88] and the stopping of various allowances (acting, standby, cell phone, and travel allowances). In instances where labour does not want to reduce certain items in an agreement, the employer might continue to act unilaterally.

Mahmood and Banerjee acknowledge that "the status of collective bargaining has been debated, if not doubted, in recent times, with the weakening of the bargaining power of labour *vis-a-vis* employers, enfeebled workplace solidarity and increasing decentralization of bargaining".[89] Similarly, Botha maintains that the "collective bargaining process ensures that the interests of employees can be enforced by themselves or their trade union representatives, and also that an economic exchange between the collective workforce and the employer takes place".[90] Therefore, it becomes clear that collective bargaining is not only about salaries; it includes what one may term "ancillary matters".

In the public sector this may include the following: medical subsidies, housing subsidies, leave, danger allowances, *et cetera.* With the 2018 wage agreement having come to an abrupt end, all ancillary matters are most likely to continue being stagnant. This view excludes issues that have their own standing agreement (resolutions). It is submitted that there are ‘low- hanging fruit/[issues]’ that ought to be addressed in order to improve collective agreement relating to wages in the public service. For example, matters relating to medical subsidies, cost of living, housing subsidy must be integral part of salary negotiations. Furthermore, engaging labour on these matters has the potential of resuscitating the smooth resolution of disputes in the public service. In this context Recommendation No. 163 provide practical guidance for promoting collective bargaining. For example, Recommendation No.163 encourages, among others, that both parties have access to the information required for meaningful negotiations; parties must agree on procedures for the settlement of labour disputes and find a solution to the dispute themselves.[91]

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87 In the financial year 2018/2019, state departments were told to budget only 1.5% for the COE budget; in the financial year 2019/2020, this was reduced to 0.75%; in the financial year 2020/2021, it was reduced to 0.5%; in the financial year 2021/2022, it was reduced to 0%; and in the financial year 2022/2023 and beyond, it was stated that it will be "determined based on the Comprehensive Review of ALL PMDSs [Performance Management and Development Systems] for ALL categories of Employees". See DPSA 2019a https://www.dpsa.gov.za/dpsa2g/documents/rp/2019/18_1_p_30_01_2019.pdf.

88 This may be as a result of employees having found alternative employment, death, ill-health, or voluntary exit mechanisms/programmes. This is also evident from the statement issued by National Treasury 2023 https://www.treasury.gov.za/comm_media/press/2023/2023033101%20Media%20statement%20-%202023%20Public%20sector%20coordinated%20bargaining%20council%20outcome.pdf.

89 Mahmood and Banerjee 2023 *Economic and Industrial Democracy* 965-966.

90 Botha 2015 *De Jure* 331.

91 Collective Bargaining Recommendation No. 163 of 1981.

One of the mechanisms used to deal with a dispute arising from collective bargaining is a strike or lockout. NEHAWU has proved that this is a possible action in the absence of an agreement. It has shown that the employer is most likely to be coerced into an agreement if employees embark on an industrial action that affects services such as health.

A strike by workers in the current conditions seems unlikely, but when one considers what occurred in 1999, one cannot completely rule it out. If trade unions (especially COSATU-affiliated unions) could reach an agreement on it, it might be a reality. It was largely they who carried out the 1999 strike.[92]

Figure 2: What is likely to follow the eventualities of the LAC judgement?

8 Conclusion

This case note has sought to determine the future of collective bargaining after the LAC's *PSA v DPSA* judgment. In considering this dilemma the authors have looked at the following: the legal status of collective bargaining, the arena of collective bargaining in the public sector, the primary players in this mechanism, the collective agreement that caused the dispute (the actions of the employer during the last leg of the agreement), the LAC judgment, eventualities of the LAC judgment, and what is likely to follow next.

Major emphasis was placed on collective bargaining. Collective bargaining is an important instrument in the employee-employer relationship. Although not identified as a right by section 23 of the *Constitution*, case law, or regulation, it has been shown that it can be argued that the engagement in collective bargaining by public servants (through their trade unions) and the employer

92 See Amoako 2012 *Labour, Capital and Society* 85-86. Note that the strike was associated with the unilateral salary increase by the DPSA in 1999; see Staff Reporter 1999 https://mg.co.za/article/1999-08-17-nehawu-rejects-implementation/.

(through the DPSA) constitutes a legally recognised practice (a custom). It has further been shown that it is in the best interest of both parties to engage in it.

The arena of public sector bargaining was introduced in terms of the PSCBC. It was noted that the PSCBC is divided into sector-specific bargaining councils (see Figure 2). The actors in this arena were also introduced. It was shown that the PSCBC is a player (an adjudicator) between the DPSA and the trade unions. In relation to the trade unions, it was shown which unions have a right to represent employees' rights and interests at the PSCBC and which federations they belong to (see Table 2).

A collective agreement (PSCBC Resolution 1 of 2018) was facilitated by the PSCBC (see Table 2, which covers the essence of the agreement). The employer failed to give effect to the last leg of the agreement. When the PSCBC was about to arbitrate the matter, the PSA made an application to the Labour Court. The employer counteracted this application with its own declaratory application (seeking to declare the agreement null and void). As opposed to hearing the matters separately, the LAC heard both cases simultaneously. The LAC decided in favour of the employer and declared clause 3.3 of the agreement to be invalid as there had been no approval by National Treasury and the government did not have the financial means to meet the demands of labour.

The LAC judgment created (what some may view as) unintended consequences. The following are key findings in terms of the eventualities of the LAC judgment: as opposed to getting an increase in 2021, public servants received a non-pensionable allowance (cash gratuity) for two financial years; in 2022 the government unilaterally implemented a 3% salary increase; at the beginning of 2023 a strike led by NEHAWU changed the views of the government on collective bargaining (movement from unilateralism to pluralism, which advocates collective bargaining), meaning parties were able to negotiate and this led the government to improve its offering for the 2023/2024 financial year.

With the above context established, one is in a better position to answer the question posed at the beginning of the case note: What is the future of bargaining between labour (public servants on salary level 1 to 12) and the employer (the DPSA)? There is a hope that collective bargaining will continue between labour and employers. One will need to account for the trust deficit between the parties, inter and intra-union rivalry (in labour and the tripartite alliance), the demands of labour for salary increases above the CPI, non-attendance to other matters associated with bargaining, unilateral decision-making by the employer, and little prospect of fully blown industrial action (strikes). As such, when bargaining occurs it will do so under these constraints, and it is most likely to be dominated by the issue of salary increases while ancillary matters take a back seat.

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List of Abbreviations

ANC	African National Congress
COE	Compensations of employees
COSATU	Congress of South African Trade Unions
CPI	Consumer Price Index
DENOSA	Democratic Nursing Organisation of South Africa
DPSA	Department of Public Service and Administration
FEDUSA	Federation of Unions of South Africa
GEPF	Government Employees Pension Fund
HOSPERSA	Health and Other Service Personnel Trade Union of South Africa
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
NAPTOSA	National Professional Teachers' Association of South Africa

NEHAWU	National Education, Health and Allied Workers' Union
POPCRU	Police and Prisons Civil Rights Union
PFMA	Public Finance Management Act 1 of 1999
PSA	Public Servants Association
PSCBC	Public Service Coordinating Bargaining Council
SACP	South African Communist Party
SADTU	South African Democratic Teachers Union
SAFTU	South African Federation of Trade Unions
SANBI	South African National Biodiversity Institute
SANDU	South African National Defence Union
SAPU	South African Police Union
SASSA	South African Social Security Agency
SIU	Special Investigation Unit