PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

07 March 2018

Chairperson of the Portfolio Committee on Labour

For attention: Mr Zolani Sakasa

Per email: zsakasa@parliament.gov.za

Dear Honourable Chairperson

WRITTEN SUBMISSION ON THE LABOUR RELATIONS AMENDMENT BILL

Comments deadline: 16 March 2018

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DATE: 06 / 03/ 2018

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1. INTRODUCTION

The Public Service Coordinating Bargaining Council (PSCBC) welcomes the opportunity to make a submission on the Draft Proposed Amendments to Labour Relations Amendment Act.

The PSCBC is a stature of law, designated or established in terms of section 36 the Labour Relations Act 66 of 1995, as amended.

Section 36 of the LRA defines the scope of the PSCBC to include on the one hand, all employees of the State as defined in the Public Service Act and on the other hand, the State as Employer. The Department for Public Service and Administration (DPSA) is the leading Department within the PSCBC.

The LRA further determines the functions of the PSCBC. Amongst those, is determining through collective bargaining the conditions of service applicable to public servants (as defined).

We hereby submit our comments to you in writing, but would also appreciate the opportunity to appear and make verbal submissions, at the appropriate time.

2. COMMENTS BY PSCBC ON CLAUSES OF THE DRAFT BILL

Amendment of section 127 of Act 66 of 1995, as amended by section 33 of Act 42 of 1996 and section 23 of Act 12 of 2002

According to the memorandum on the objects of the proposed amendments to the Labour Relations Act (the Act), the amendments to section 127 provides that a council or accredited agency may apply for the accreditation of its dispute resolution panel.

This amendment must also be read with the proposed amendment to section 128 that will now allow for a council accredited to perform dispute resolution functions to only appoint a person to resolve a dispute if that person is accredited by the governing body of the commission.

It is believed that such amendments may be contrary to the provisions of the power and functions of a bargaining council as listed in section 28 of the Act. A bargaining council must in relation to its registered scope amongst other ....*(c) ...prevent and resolve labour disputes, ...(d) ....perform the dispute resolution functions referred to in section 51 of the Act.*

By interpretation bargaining councils do not have to seek accreditation from the governing body as contemplated in section 127 for disputes of those parties as defined in section 51 of the Act. It is accepted that accreditation is only required for those disputes where one of the parties may not be a party to the bargaining council. Commonly referred to as non-party disputes.

In effecting the powers and functions of the council as per section 28, section 30 requires of a council to have a constitution that must at least, amongst other provide for .....*(i) the procedure to be followed if a dispute arises between the parties to the bargaining council.*

Bargaining councils therefore in terms of their constitutions, read with the provisions of the Act, allow for the appointment of a panel of conciliators and arbitrators to resolve disputes that may arise between parties to the council. The constitution provides for its own criteria, skills level and representivity of such a panel. It also provides for a code of conduct to which these panelist must adhere to.

The constitution of a bargaining council, the dispute resolution procedure, the rules governing dispute process and the panel of dispute resolvers are agreed to by parties in the council through a collective agreement. The application of section 23 of the Act, on the legal effect of collective agreements must also be read in relation to the proposed amendments.

The discretion and the right to appoint a panel of conciliators and arbitrators for council disputes and indirectly accrediting those persons to perform such functions, is solely that of the council. It cannot be by decision of the governing body.

The amendments proposed and section 127 as currently worded does not specifically address the issue of accreditation for the type of disputes, i.e. party to party disputes or non-party disputes. This lack of clarification clouds the interpretation of the proposed amendments.

The CCMA is also well aware that this specific issue around the accreditation of panelist is currently being discussed with them. It is disappointing that they did not disclose the intended amendments to the industry and consulted broadly on them.

These amendments have critical implications for bargaining councils that would want to comply with the concept of accreditation for purposes of good governance, not forgoing their right to perform dispute resolution functions to parties of council as provided for in the Act. It also has a direct implication on the State in relation to span and control of dispute resolution functions.

The alternative for councils is not to apply for accreditation to perform non-party disputes. This will result in those disputes being referred to the CCMA placing an undue burden on the already overloaded case load of the CCMA. It will also have an impact on the resources of the State as to manage dispute resolution in two different forums.

To prevent ambiguity in the interpretation of the Act it is suggested that the proposed amendment of subsection 1 be worded as follows;

"Any council or private agency may apply to the governing body in the prescribed from for accreditation [and] or for accreditation of its dispute resolution panel to perform any of the following functions-"

Furthermore that section 128, subsection 3 be worded as follows;

"(3)(a)(i) An accredited council may confer on any person who is accredited by the governing body and appointed by the council to resolve a non-party dispute or to resolve a dispute not provided for in the constitution of that council, the powers of a commissioner in terms of section 142, read with the changes required by the context."

Amendment of section 135 of act 66 of 1995, as amended by section 36 of the act 42 of 1996, section 8 of act 127 of 1998 and section 26 of act 12 of 2002

This amendment at its best is confusing.

It is not clear if the amendment intends to prevent prolonged postponement of matters at conciliation

or does it provide for a mechanism where the director believes, where reasonable prospect exist, a further postponement of the conciliation, for not more than 5 days, will result in the matter being resolved, he/she may then arbitrarily decide to postpone the matter?

It is also not understood why a matter will be postponed by the director if a party refuse to agree to such extension, being unreasonable or not, as the party will still return after 5 days with no settlement.

Subsection 2(A), is also not clear what happens if the parties diaries does not allow them to convene within or on the 5th day? It also does not consider the already published case roll of the CCMA or a bargaining council for the 5th day or any other day before then.

As the Act currently reads in section 135 (2) parties have the right to agree to extend the 30 day period. That should remain the right, as they will know best and unreasonable interference by administrative action should be refuted.

It is suggested that the proposed insertion of section 2(A) be deleted in its entirety.

It's noted that section 2(C) allows for the exclusion of the application where the State is the employer.

This is welcomed.

However the note in the memorandum that states that "no extensions is however permitted where the state is the employer", cannot be correct as a blanket provision. Extensions is provided for in terms of the dispute resolution procedures and rules of those bargaining councils where the state is the employer.

Insertion of sections 150A, 150B, 150C and 150D in Act 66 of 1995

The principle of introducing advisory arbitration is one that is supported. Parties need to have an alternative mechanism to "unlock" deadlocks. However this cannot be done at the cost of the ideologies of our labour legislation.

Section 150A (1) (a) reads as follows; *".....on the directors own accord or on application of one of the parties to the dispute;"* – Our labour legislation is built on the principle of majoritism. The request

for advisory arbitration must therefore also be based on the principle of the majority party. The majority of parties cannot be bound by the "request" of the minority. The principle should also be read and understood in the wording of subsection 3 (b).

It is recommended that the clause be amended to reflect the following;

Section 150A (1) (a) to read as follows; ".....on the directors own accord or on application of one of the parties to the dispute, in the case of a labour party requesting the facilitation, such request must have the agreement of the majority of labour parties to the dispute;" The wording in clause 3(b) to be amended within the same context.

Section 150A (1) (a) reads as follows; *".....on the directors own accord or on application of one of the parties to the dispute;"*- A legal understanding that might be challenging in the interpretation of law is created by allowing for the Director on his own accord to appoint a panel to conduct the advisory process in subsection 1, while in subsection 3 the right for the panel to facilitate a resolution of the dispute excludes the principle of by "own accord" of the director.

It is recommended that the clause be amended to reflect the following;

Section 150A (1) (a) to read as follows; ".....[on the directors own accord or] on application of one of the parties to the dispute, in the case of a labour party requesting the facilitation, such request must have the agreement of the majority of labour parties to the dispute;"

Subsection (2) read as follows; *"the panel contemplated in subsection (1) must facilitate a resolution of the dispute at any time after a commissioner has issued a certificate of unresolved dispute under section 135(5)(a) or a notice of the commencement of the strike or lockout contemplated in section 64(1)(b),(c) and (d), whichever is the earlier."* By a layman's reading this implies that before employees has gone out on strike the panel "must" facilitate the resolution of the dispute as long as one of the activators in subsection 1 is present and whichever occurs at the earliest date. This does also not read well with sub clause 4 (a) that requires the strike or lockout to be no longer functional.

Subsection (3) reads as follows; "(3) Subject to subsection (3), the panel may only....." – The referencing to subsection (3) should be "subsection (4)". Furthermore clause (c) in subjection 3, makes reference to subsection (4) that should read subsection (5).

Subsection (4) allows for the director to appoint a panel in terms of subsection 3 (a) and (b) if the director has reasonable grounds to believe that one or more of the listed circumstances exist. Does this by implication mean that even if "directed to do so by the Minister" the Director still has the discretion to disregard the "direction" of the Minister. If so clause 3 (a) should rather be amended to read; "if [directed] requested to do so by the Minister" Alternatively the right "to believe" should be limited to only clause 3(b).

Subsection (5) the reference to subsection (2) (c) should be corrected. The section has no subsection (2) (c).

Section 150B subsection 6 refers to section 150A (2) (a) to (c). Subsection 150A has no subsection 2.

Section 150C (3) refers to the publication of the award in terms of subsection (6), it should read in terms of subsection (7).

Section 150D 1(b) refers to subsection 3 or 5(b), the reference to 5(b) is not understood.

It is also not clear how the insertion of sections 150A-D will be applicable to the State. The Act in section 150D refers to the binding effect of an advisory award if one of the parties is an employer's organization? The state is not an employers' organization and/or the State should be specifically referred to or excluded.

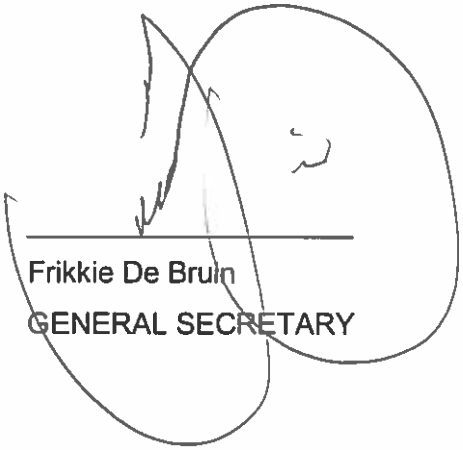
There should be a broader consideration of the implication of the process of an advisory award, read with the provisions of the Labour Relations Act specifically referring disputes within essential services (within the State) to parliament for endorsement. Consideration should also be given to the powers and functions of the Minister for Public Service and Administration in determining conditions of service for the public service and how an advisory award published may impact on the same.

3. CONCLUSION

Due to the extensive consultation processes of the PSCBC, Council may want to forward further inputs at a date time to the appropriate forum.;

Should you have any questions, please do not hesitate to contact us. Please also keep us informed of future developments and invite us to any future discussions in relation to this issue.

Yours faithfully,



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GENERAL SECRETARY