Bargaining in Bad Faith in the Botswana Public Service – A Review of the BOFEPUSU and BLLAHWU Judgments.

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ABSTRACT

The BOFEPUSU and BLLAHWU judgments dealt with unilateral action on the part of the government as employer, during the course of collective bargaining. In both judgments, the Courts found the said unilateral action to amount to bad faith bargaining with respect to unionized employees. The Courts however found that the said unilateral action did not amount to bad faith bargaining with respect to non-unionized employees.In this case note, it will be argued that both decisions are wrong to the extent that they hold that the government can unilaterally award non-unionized employees an increment when a forum for bargaining in the public service exists.

1. INTRODUCTION

In 2014 the government as employer took a unilateral decision to award public officers a four percent (4%) salary increment. In 2015, the High Court declared that decision a violation of the government's duty to bargain in good faith ('The BOFEPUSU judgment'). In finding that the decision violated the government's duty to bargain in good faith, the High Court held that there was no violation in respect of non-unionized employees. Less than a year later and in 2016, the government yet again took a unilateral decision to award all public officers a three percent (3%) salary increment. This decision has been interdicted pending the finalization of proceedings to determine the legality or otherwise of the unilateral increase ('The BLLAHWU judgment'). In granting the interdict however, the court limited its application to unionized employees belonging to the Applicant trade unions. In limiting the application of the interdict to unionized employees, the court reasoned that the non-unionized employees and

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unionized employees whose unions were not in the Public Service Bargaining Council ('PSBC') were not members of the PSBC and therefore not parties to the bargaining process. Since they were not parties to the bargaining process, extending them the increment was not a breach by government of the duty to bargain in good faith.

This case note provides a critique of the said judgments. It will argue that the judgments are wrong to the extent that they hold that extending an increment to non-unionized employees and employees belonging to a trade union not party to the bargaining council, does not amount to bargaining in bad faith. The first part will deal with the BOFEPUSU case. This part will also critique the judgment and set out its shortcoming as regards its finding concerning non-unionized employees. The second part will examine the BLLAHWU case. This part will also critique the judgment and set out its shortcoming as regards its finding concerning non-unionized employees. The third part is the conclusion.

2. BAD FAITH BARGAINING – THE BOFEPUSU AND BLLAHWU JUDGMENTS

2.1 The BOFEPUSU Judgment[1]

2.1.1 The Facts

On the 26th March 2014, the President at a kgotla meeting at a village called Kachikau, announced unilaterally that there will be a salary increase of 4% for all public officers. This statement came at a time when the PSBC had already set in motion the bargaining process for the 2014/15 wage negotiations. The President indicated that notwithstanding the ongoing salary negotiations with the applicant unions, the government will implement a 4% salary increase for all public servants effective April 2014. It was further pointed out that the government could not afford to wait for the PSBC negotiations because the PSBC takes too long to conclude negotiations and that while the PSBC was at liberty to undertake negotiations on salary increment, the government was constrained to offer anything more than the 4% increment.

1 *Botswana Federation of Public Sector Trade Unions and Others v The President of the Republic of Botswana and Others* UAHGB-000061-14 (High Court) (Unreported).

The Government as employer had granted recognition to all of the five applicant unions and had also entered into a bargaining relationship with them at the PSBC. At the Public Service Bargaining Council, the parties had concluded Procedures for Meetings and Negotiations in August 2013 in terms of which the parties had bound themselves to bargain with one another in good faith. The said Procedures also outlined the following conduct as amounting to bad faith bargaining – either party bypassing the negotiation process; engaging in unilateral action such as the unilateral alteration of terms and conditions or industrial action before negotiations have been exhausted; and prohibition of negotiating through the media and preempting the outcomes of the bargaining process through the media.

The applicants' case was that the government was bargaining in bad faith and in violation of the rules of conduct governing negotiations in the following ways:

1. The President had resorted to publicly making known what the Government's final position is in respect of the 2014/15 negotiations before the bargaining process could commence in earnest. He had indicated in public that the Government will offer only 4% and not more;
2. The DPSM had issued out public communications in terms whereof the DPSM amongst other things communicates the government's proposal regarding the conditions of service for public servants which had been tabled for and had as yet to be negotiated by the PSBC.

In seeking to justify the conduct complained of, the respondents pointed out that the applicants had misinterpreted the statements by the President and that the said statements did not undermine the PSBC nor does it stop the negotiation process from going on. Further, that the applicants had failed to appreciate that the President does not only represent the union members but equally stands to represent the interest of all personnel employed by the government, most of which have been listed in the directives in question. To that end therefore, the President had the responsibility to protect the interests of those personnel in as much as he is charged with the responsibility of protecting the entire government work force. That the applicants had once again failed to appreciate

this responsibility and have unwittingly and selfishly viewed it only in light of the union members at the exclusion of other employees of the government.

2.1.2 The Issues

The following issues arose for the court's determination:

1. Whether or not the conduct of government in unilaterally awarding salary increments was a breach of government's duty to bargain in good faith with the applicants?
2. Whether or not the conduct of government in implementing the unilateral 4% salary increment to non-unionized employees of the government undermines and violates the legislative role of the PSBC and constitutes a breach of the duty to bargain in good faith?
3. In attempting to justify the unilateral increase, the respondents had argued that since the increase was effected by the President as the Head of the Executive, the said decision could not be impugned. The court therefore dealt with the issue as regards the powers of the President on the collective bargaining process and the manner of exercise of such powers.

2.1.3 The Findings of the Court as Regards Bad Faith Bargaining

As regards the first issue, the Court found that the conduct of government was a breach of the government's duty to bargain in good faith with the applicants. In so finding, the Court as a preliminary observation noted that the parties had agreed in clear terms in their Procedures for Negotiations that they would bargain in good faith and had equally agreed in clear terms what amounted to bad faith bargaining.[2] The Court further noted that the government as party to an agreement cannot override and disregard the obligations it assumed under the said agreements.[3] The court found that unilateral action when taken during negotiations or upon subjects on which the union wishes to bargain on, weakens the unions by showing the employees that it is useless trying to negotiate. An

2 Paragraph 41 of the transcript of the Judgment.

3 *Ibid*, Paragraph 59. The court found that the said agreement came about through the provisions of the Public Service Act and is therefore a statutory derivative. See also the case of *Minister of Home Affairs* v *American Ninja IV Partnership* 1993 (1) SA 257 (A) at 268D.

employer who unilaterally raises wages is in effect telling the employees that without collective bargaining, they can secure advantages as great as, or possibly greater than those the union can secure. This weakens the union's bargaining position and amounts to bad faith bargaining.[4]

> "In my judgment, a unilateral salary increase to Union members whilst negotiations are on-going is a classic form of by-passing the negotiation process. It is a form of bypass in that the terms and conditions of service squarely fall within the remit and purview of the Bargaining Council, as established by the Public Service Act. See also *National Union of Mineworkers and Others v Bufflesfontein Gold Mining Co.* (1990) 11 ILJ 346 (IC). In that case, the court reinforced that bypassing the negotiation process is a form of bad faith bargaining, for the simple reason that it conveyed the impression to the employees that they do not need the Bargaining Council or the unions in order to receive a favourable change to the terms and conditions of employment.
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> The respondents cannot invoke their powers to thwart the policy objectives of an Act of Parliament. It is the policy of the Public Service Act that the terms and conditions of employment in the public service should be settled through the process of collective bargaining at the Public Service Bargaining Council. The duty to bargain in good faith precludes unilateral changes to the terms and conditions of employment before negotiations have been concluded. The duty, furthermore, frowns upon disregard of collective labour agreements."[5]

However, the Court found as regards the second issue that the conduct in so far as non-unionized public servants were concerned, was not a breach of the duty to bargain in good faith as the said non-unionized public servants were not part of the PSBC and that the said increment to non-unionized employees did not therefore violate the legislative role of the PSBC. In reaching this conclusion the Court applied the case of *First National Bank Botswana v Botswana Bank Employees Union and Phyllis Pillar and Others*[6], a Court of Appeal decision where the employer unilaterally increased salaries for non-union members

4 *Ibid*, Paragraph 44. See also A. Cox "The Duty to Bargain in Good Faith" *1 Harvard Law Review*, (1957) pp. 1423, (quoted with approval and applied in the judgment).

5 At Paragraphs 62 and 76. See also Paragraph 81.

6 2012 (1) BLR 661 (CA).

and did not increase salaries for union members because negotiations with the Union were ongoing. The Court of Appeal in that case found that such an increase to non-union members was not a breach of the duty to negotiate in good faith because non-union members were not part of the negotiations. The court therefore held that

> "…the respondents' unilateral increase to non-Union Public Service employees cannot be impugned because such increase was purely a contractual matter between the respondents and non-Union employees, who are not subject to the Public Service Bargaining Council."[7]

With respect to the third issue, the Court found that the President cannot exercise his powers in such a way as to disregard the obligations assumed by government both under the Public Service Act and the collective agreements in question. The Court pointed out that executive powers is to be exercised in accordance with the laws passed by Parliament and that any exercise of executive power that is incongruous and incompatible with the express and or implied will of Parliament would be reviewable and subject to judicial scrutiny.[8]

2.2 The BLLAHWU Judgment[9]

2.2.1 The Facts

On the 30th March 2016, the Director of Public Service Management ("DPSM") announced a unilateral salary increment of 3% for all public officers by government. The applicants, who form the employee union parties to the bargaining process, brought urgent proceedings to interdict the implementation of the decision until finalization of review proceedings which they intended to bring, challenging the decision.

The increment came at a time when there is a dispute as regards the constitution and makeup of the PSBC. The Botswana Public Employees Union

7 *Ibid*, Paragraph 80.

8 *Ibid*, Paragraphs 52, 73 and 74. See also *Minister of Home Affairs & Another* v *Botswana Public Employees Union and Others* CACGB-083-12 (CA) (Unreported). See also *The Attorney General and Others v Dickson Tapela and Others* CACGB-096-14 (CA) (Unreported) at paragraph 60.

9 *Botswana Landboards, Local Authorities and Health Workers' Union and Others v The Director of Public Service Management and Others* IC-UR/07/16 (Industrial Court) (Unreported).

("BOPEU") obtained a judgment from the Industrial Court finding that the constitution of the PSBC did not permit for admission to the Council of an acting jointly arrangement and as a result all but one of the employee union parties to the Council were not members of the Council. The affected employee union parties noted an appeal against the said judgment. The DPSM and Attorney General entered a notice to abide the outcome of that appeal. Less than 2 weeks thereafter, the DPSM implemented the said unilateral increment.

The DPSM's justification for implementing the increase was that since the PSBC was "dysfunctional", there was nobody it could bargain with. They further alleged that issues of salary negotiations are not sectoral issues that can be bargained at a lower level and that in any event the increments in question have now been awarded and reversing them would have "far-reaching implications" for the government. The dysfunctionality of the PSBC as alleged by the DPSM and Attorney General arose from the finding of the Industrial Court that there was no employee union party at the PSBC and that only one of the employee union party was properly a member of the PSBC.

The Industrial Court granted the applicant unions a rule nisi interdicting the unilateral increment. In confirming the rule nisi however, the Court limited its application to only employees who were members of the Applicant unions reasoning that the PSBC does not bargain for non-unionized employees and the interdict should therefore not operate in respect of non-unionized employees.

2.2.2 The Issues

It must be pointed out from the outset that the findings of the Court as regards the issues which arose are not final and determinative of the said issues. This is because a final pronouncement on the same points/issues will be determined when the review application is decided. The Court at the stage of the interdict had to make a preliminary finding on these issues to determine whether or not the applicants were entitled to the grant of the interim rule nisi sought. The following issues arose for the Court's determination.

1. Whether government's actions in unilaterally implementing a salary increase for all public officers was *prima facie* a breach of its duty to

bargain in good faith?

2. Whether if so, the breach is limited to the applicants and their members, or extends to non-unionized employees of the public service as well as members of management?

2.2.3 The Findings of the Court as Regards Bad Faith Bargaining

The court as a starting point found that the PSBC was not defunct as alleged by the DPSM and Attorney General, nor did the judgment in question render it defunct.[10] Further, that the noting of an appeal against the said judgment of the Industrial Court did not render the PSBC defunct but simply put the operations of the PSBC on hold until such a time as the Court of Appeal has pronounced on the appeal.[11] As regards the first issue, the Court found the government's conduct to be a breach of the government's duty to bargain with the applicants in good faith. This as reasoned by the Court, is because by virtue of the PSBC not being defunct, the applicant unions had a clear right to be engaged in negotiations before the salaries of their members are altered in any way.[12]

As regards the second issue, the court found that non-unionized employees do not fall within the bargaining council and the government's conduct as regards them was therefore not unlawful. In coming to this conclusion, the Court reasoned that a reading of the Public Service Act leads one to the conclusion that the legislative intent behind the PSBC was for the PSBC to deal specifically and solely with employees belonging to recognized trade unions admitted to the PSBC. That being the case therefore, the issues of pay and any attendant increases to non-unionized employees of the government are contractual matters between the government and those particular employees.[13]

10 Paragraph 7, Judgment of the Court in IC-UR-07/16.

11 The Court of Appeal on the 17th June 2016 delivered its judgment in the said judgment. The Court of Appeal's judgment is not without its criticism. However the subject matter of that judgment falls beyond the scope of this paper. For purposes hereof it suffices to mention that the import of the Court of Appeal judgment is that there is still a Bargaining Council whose employee trade union membership needs to be verified.

12 Paragraphs 41 -43, Judgment of the Court in IC-UR-07/16.

13 *Ibid*, Paragraphs 14, 35 and 39.

3. SHORTCOMINGS/CRITIQUE OF THE JUDGMENTS

3.1 The BOFEPUSU Judgment

The judgment provides a laudable and succinct elucidation of the law as regards collective bargaining between the employer and recognized trade unions. The judgment is also laudable for its findings as regards the manner of exercise of the powers of the President in the collective bargaining process.

The main shortcoming of the judgment is its findings as regards non-unionized employees. The reason for the Court's decision on this point is not difficult to see. The Court took the view, erroneously, the author argues, that the PSBC is a body whose scope is limited to the unions who are members of the PSBC as well as the government. The PSBC is not however a bargaining council for just the government and the public sector unions who are members thereof, but a bargaining council for the entire public service. This means that it bargains for the entire public service, unionized and non-unionized employees alike. As will be set out below, one of the various multifaceted functions of the PSBC in terms of the Public Service Act ("PSA") is to function like a joint industrial council with the result that its outcomes and resolutions bind every public officer who is bound by the PSA whether or not the said officer is a member of any of the member unions to the PSBC.

The PSBC is not a body whose scope is limited to the member unions of the said council. The PSBC is not simply one of the bargaining structures in the public service, but is in fact the only bargaining structure in the public service. In terms of section 50 of the PSA[14], the PSBC is established as a bargaining council for the public service. The council is therefore a statutory council.

Whilst the parties in this statutory council are the government as employer and admitted recognized trade unions whose members are public officers to whom the Public Service Act applies,[15] the Council is to in terms of section 51(2) (l) perform all the functions of a joint industrial council established

14 Cap. 26:01. The section reads as follows: "A bargaining council for the public service, to be known as the Public Service Bargaining Council", shall be established and registered in terms of this Part."

15 Section 52 of the Act provides in this respect that "The Council shall consist of representatives of the Government in its capacity as employer, and representatives of trade unions admitted, in accordance with the Council's constitution."

in terms of section 36 of the Trade Disputes Act[16].

A joint industrial council is defined as follows in section 2 of the Trade Disputes Act:

> " … 'joint industrial council' means a body constituted for an industry in accordance with the provisions of section 36, for the purpose of negotiating terms and conditions of employment for all employees in that industry."

A joint industrial council according to the above definition very clearly settles terms and conditions of employment for all employees in that industry through the process of negotiation. The employees in question need not be unionized or non-unionized for the decisions of the outcomes and resolutions at the said council to be binding on them. All that is required is that they be employees of that industry. The industry here will be the public service as set up in the Public Service Act. By providing in section 51 (2) (l) that the PSBC shall perform all the functions of a joint industrial council as understood under the Trade Disputes Act, the legislature very clearly points out that the PSBC bargains for everyone in the public service, unionized or non-unionized. This approach is in fact consistent with what obtains in other jurisdictions with statutory councils, like South Africa.

Contrary to the finding that non-union members are not subject to the PSBC, such non-unionized employees as pointed out above fall within the registered scope of the Council, not least because the PSBC is a joint industrial council but also because in terms of the constitution of the said Council, all employees of the public service save for those excluded by the PSA, are members of the Council.[17] One may counter this last proposition with an

16 The section reads as follows:
"51 (2) The Constitution of the Council shall provide, amongst other things, for the following matters –
(a) – (k) ….
(l) the performance, by the Council, of all the functions of a joint industrial council established in terms of section 36 of the Trade Disputes Act,…"

17 In terms of Article 3.1 of the said Constitution, "The registered scope of the Public Service Bargaining Council is the Government as the employer and all employees of the Public Service as defined by Article 2.11 of this Constitution." Article 2.11 defines the public service as meaning "Government ministries and departments, including any sections or units within them, excluding Botswana Defence Force, Botswana Police Service, and the Prisons Service." The Industrial Court in the *BLLAHWU* case found that the registered scope as set out in the constitution is *ultra vires* the PSA in that it seeks to extend the scope beyond the limits of Part XIII of the PSA. The reasoning as will be shown below is with respect flawed. Since the decision is not a final one as the parties can still argue the same points when seeking final relief, the

argument that such stipulation in the constitution would be *ultra vires* the PSA. It is argued that it is not *ultra vires* because the PSA in section 51 (2) (a) allows the constitution to set out the category or categories of employees to be covered by the Council.[18] So that, provided the category or categories of the employees are covered by the PSA itself, there is nothing wrong with the constitution of the Council providing that such employees fall within its scope.

Since, as herein argued, non-unionized employees fall within the registered scope of the PSBC and are members of the PSBC, it was therefore bad faith bargaining for the government to award increments to non-unionized employees. It is trite that it is bad faith conduct for an employer to award increments to employees falling within a bargaining unit whether before or after negotiations. All that is needed to be shown is that the employee in question falls within the bargaining unit. As strenuously pointed out above, non-unionized employees fall within the bargaining unit because they are members who are affected by the outcomes and resolutions that take place in the bargaining forum of the public service, the PSBC.

It is therefore contended that the judgment in finding that the decision as regards non-unionized employees does not amount to bad faith bargaining failed to appreciate that the PSBC is a joint industrial council and as a joint industrial council, its scope covers all public officers governed by the PSA. The decision is therefore with respect wrong as regards its findings on non-unionized employees and in finding that an increment to them does not run counter to the duty by government to bargain in good faith.

The contention that the PSBC is a joint industrial council for the entire public service was recently echoed by the Court of Appeal in the case of *Attorney General & Anor v. National Amalgamated Local and Central Government & Parastatal Workers' Union*[19] albeit by way of *obiter dictum*. The Court stated:

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findings of the court on this point are not determinative of the issue whether the registered scope of the Council as set out in its constitution is *ultra vires* the PSA.

18 The section reads as follows –

"51 (2) The Constitution of the Council shall provide, amongst other things, for the following matters –

(a) the category or categories of employees to be covered by the Council;"

19 Case No. CACGB-068-15 (Court of Appeal) (Unreported), judgment dated 23 August 2016.

> "**Adjustments to Government salaries, if any, are usually determined annually after negotiations in the Public Service Bargaining Council, and once determined are applied across the board, including to non-unionized public officers.** The Public Service Bargaining Council accordingly protects the interests of all public officers, both unionized and non-unionized."[20] (Emphasis added)

The Court of Appeal in clear terms confirms that outcomes of salary negotiations at the PSBC apply also to non-unionized employees. If as reasoned in the BOFEPUSU and BLLAHWU case, non-unionized employees are not members of the PSBC and therefore unaffected by its outcomes, why then would the increments at the PSBC extend to them one might ask. The above *dictum* leads one to conclude that should the matter find its way to the Court of Appeal, the Court is likely to affirm the contention that the PSBC settles terms and conditions for all public officers and that any unilateral increment to non-unionized employees will amount to bargaining in bad faith.

The reliance on the Court of Appeal judgment in the *FNBB* case[21] in reaching the conclusion as regards non-unionized employees is also with respect misplaced. The *FNBB* case dealt with the bargaining relationship at a workplace level and was therefore distinguishable. The bargaining relationship in the BOFEPUSU case was not at workplace level but at industry level. The PSBC is not a workplace bargaining forum but a bargaining council for the entire public service and a joint industrial council. A joint industrial council as defined above negotiates for all employees falling within the industry in question. All employees in the industry fall within its registered scope and granting an increment to an employee falling within the registered scope of collective bargaining is bargaining in bad faith. Unlike in the *FNBB* case, the non-unionized employees here fell within the registered scope of the PSBC

3.2 The BLLAHWU Judgment

A recurring theme from this case, as with the BOFEPUSU case, is the court's

20 *Ibid*, at paragraph 8.
21 See note 6 above

erroneous interpretation and understanding of the PSBC. It is with respect unreasonable to argue that the PSBC exists only for the Government as employer and the various employee trade unions that are admitted to the Council. It flies in the face of the express provisions of the PSA that the PSBC is a Council for the entire public service. The court's approach in reading section 51 of the PSA in isolation is also with respect flawed. It is a trite principle of statutory interpretation that when interpreting a statutory provision dealing with an issue, that statutory provision is to be interpreted together with all other statutory provisions touching on the same issue, in order to get a holistic picture of what the legislative intent behind the provision is. Had the court interpreted the entire provisions touching on collective bargaining as contained in the PSA, it would not have reached a conclusion that the PSBC exists only for the government and the trade unions.

4. CONCLUSION

The PSBC is a joint industrial council, meaning that it settles terms and conditions of service for all public officers in the public service, whether unionized or non-unionized. Any grant of an increment to non-unionized employees therefore amounts to bargaining in bad faith. The BOFEPUSU and BLLAHWU decisions to the effect that the grant of an increment to non-unionized employees does not amount to bad faith bargaining are, with all due respect, wrongly decided and do not reflect the true legal position. The true legal position as contended in this review is likely to be set if and when the Court of Appeal gets an opportunity to reflect these cases.