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# ***What factors contributed to the failure of the 2011 municipal strike?***

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Degree of Master of Philosophy in Law in approved courses and a minor dissertation paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Degree of Master of Philosophy in Law dissertation , including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate Signature Removed

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## LIST OF ACRONYMS

ANC	African National Congress
CCMA	Commission for Conciliation Mediation and Arbitration
COGTA	Cooperative Governance and Traditional Affairs
COSATU	Congress of South African Trade Unions
CPI	Consumer Price Index
CTMWA	Cape Town Municipal Workers Association
DA	Democratic Alliance
DIMES	Democratic Integrated Employees Society
DMES	Durban Municipal Employees Association
FEDUSA	Federation of Democratic Unions in South Africa
GAWU	General and Allied Workers Union
GEAR	Growth Employment and Redistribution
ILO	International Labour Organisation
Imatu	Independent Municipal and Allied Trade Union
JMEA	Johannesburg Municipal Employees Association
LRA	Labour Relations Act
MWUSA	Municipal Workers Union of South Africa
NEC	National Executive Committee
NUELA	National Union of Employees of Local Authorities
RDP	Reconstruction and Development Programme
SAAME	South African Association of Municipal Employees
SAAWU	South African Allied Workers Union
SALAAWU	South African Local Authorities and Allied Workers Union

Salga	South African Local Government Association
Salgbc	South African Local Government Bargaining Council
Samwu	South African Municipal Workers' Union
TGWU	Transport and General Workers Union
UJMW	Union of Johannesburg Municipal Workers
UN	United Nations

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## INTRODUCTION

Collective bargaining in the municipal sector is rather unique. It boasts some of the highest strike prevalence in recent years.<sup>1</sup> A common feature of such strike action is the associated violence. The collective bargaining relationship is further unique in that the majority trade union, the South African Municipal Workers' Union (Samwu), is affiliated to the Congress of South African Trade Unions (COSATU) who in turn is in alliance with the African National Congress (ANC). The ANC in turn is the outright majority political party in the South African Local Government Association (SALGA), the employers' association.

It would be assumed that given the organic link between Samwu and the ruling ANC that collective bargaining would be smooth sailing. This has proven not to be the case. To the contrary, the bargaining relationship is indicative of apartheid style wage bargaining where ideological characterisations informs bargaining approaches.

This is predominantly informed by local government authorities driving a neo-liberal agenda which includes greater commercialisation and externalisation of the sector informed by capitalist market imperatives. Samwu on the other hand seek to preserve local government as the deliverer of municipal services. It records that:

Our vision for local government has, as a starting point, placing people at the centre of transformation. It encompasses policies that address the needs of the working class and the poor (such as job creation and poverty eradication measures). It envisages reversing existing policies which seek to please local and international capital as opposed to local communities.

It is a vision that is informed by our longer term vision for a socialist South Africa. In advancing this struggle, we hold the view that the state is ultimately an instrument of class rule. The South African state, while it has introduced some social democratic policies and measures that are friendly to the working class, in the main represents the interest of monopoly capital and a growing middle class. Our vision therefore seeks to transcend the constraints imposed on local government by adherence to a neo-liberal macro-economic framework.<sup>2</sup>

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<sup>1</sup> *Tokiso Dispute Resolution Digest (2012)* 16.

<sup>2</sup> SAMWU: *Re-imagining local government (2012)*.

The 2011 round of wage bargaining in the sector followed a trend of collective bargaining in the sector – that of failed negotiations with resulting strike action.<sup>3</sup> Whereas in other strikes Samwu was able to induce settlement with Salga, that was not to be the case in 2011.

This dissertation attempts to look at why the 2011 strike was a failure, from the perspective of Samwu.<sup>4</sup> It looks at the framework of public sector collective bargaining, internationally; within the framework of the constitution and labour legislation; the bargaining parties and their inter-relations; strike theory with a view to locate the failure of the strike within that theory and finally, proposes a set of organisational options for Samwu to consider.

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<sup>3</sup> The union engaged in strike action in 2002, 2005, 2006, 2009 and 2010.

<sup>4</sup> I must declare that I have been employed by Samwu since 2004 and currently hold the position of regional secretary in the Cape Town region. I do this declaration as the dissertation is written both objectively and subjectively given my own role and understanding of the peculiarities in the 2011 wage negotiations and subsequent strike action.

## CHAPTER 1

### The municipal sector and collective bargaining

#### 1.1 Fundamental ILO Conventions

Collective bargaining, like many other features of society has its roots in international policy structures which seek to set the platform for its operation at a National level. The International Labour Organisation (ILO) is the institutional forum that is tasked with this function. The ILO is a specialist agency of the United Nations (UN) and created by the League of Nations following the 1919 Treaty of Versailles that ended the First World War. It has four strategic objectives which are to:

- Promote and realize standards and fundamental principles and rights at work
- Create greater opportunities for women and men to decent employment income
- Enhance the coverage and effectiveness of social protection for all
- Strengthen tripartism and social dialogue<sup>5</sup>

These strategic objectives are achieved by the social partners (governments, employers and labour) setting international standards in the form of Conventions, Recommendations and Codes of Practice which, following its adoption, must be ratified by member Countries.

There are currently 189 ILO Conventions and 202 Recommendations<sup>6</sup> of which eight are deemed fundamental ILO Conventions<sup>7</sup>. Two of these Conventions are primarily concerned with the application of collective bargaining. These are the

<sup>5</sup> Charnovitz, Steve 'The Influence of International Labour Standards on the World Trading Regime - A Historical Overview' (1987) 126 Int'l Lab. Rev. 565-584 and Hepple, Bob 'New Approaches to International Labour Regulation' (1997) 26 Indus. L.J. 353-366. In the Hepple article, at page 357, he notes that 'the dominant feature of ILO standards from the Declaration of Philadelphia 1944 onwards was their promotion of freedom of association, collective bargaining and tripartism. These pro-collective standards now have to fight for survival in an increasingly individualistic climate.'

<sup>6</sup> ILO Information System on International Labour Standards (NORMLEX). Available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO::> (accessed 20 November 2012).

<sup>7</sup> The 8 Fundamental Conventions are: Forced Labour Convention, 1930 (C29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87); Right to Organise and Collective Bargaining Convention, 1949 (C98); Equal Remuneration Convention, 1951 (C100); Abolition of Forced Labour Convention, 1957 (C105); Discrimination (Employment and Occupation) Convention, 1958 (C111); Minimum Age Convention, 1973 (C138); Worst Forms of Child Labour Convention, 1999 (C182). Available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms\\_143046.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_143046.pdf) (accessed 20 November 2012).

Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87) and the Right to Organise and Collective Bargaining Convention, 1949 (C98). Neither Convention 87 nor 98 mentions a right to strike but it is now accepted that implicit in freedom of association is the right to strike.<sup>8</sup> Article 6 of the latter Convention is of particular concern in that the term thereof 'does not deal with the position of public servants engaged in the administration of the State'<sup>9</sup>. South Africa as a member state of the ILO ratified all eight fundamental Conventions.<sup>10</sup>

I hold the view that it is not inadvertent that Convention C98 does not concern the public service<sup>11</sup>. This is because public sector employees, in South Africa and indeed elsewhere, were denied the right to engage in collective bargaining processes<sup>12</sup> ostensibly because they are public 'servants'.<sup>13</sup> As the Explanatory memorandum to the draft Labour Relations Bill aptly puts it;

There is no theoretical justification for separate statutes for the public service, teachers and farm workers. The existence of separate statutes is due largely to historical and partly to political circumstances. Traditionally, public service employees were regarded as servants of the monarch to whom absolute loyalty was owed. The doctrine of state sovereignty, a more modern manifestation of this approach, regards the state as answerable only to the legislature. Any attempt to curtail its right to act unilaterally, through the impact of trade unions, collective

<sup>8</sup> See in this regard Servais, Jean-Michel 'ILO Law and the Right to Strike' *15 Canadian Lab. & Emp. L.J.* 147 (2009-2010) 147-164; Leader, Sheldon 'Can You Derive a Right to Strike from the Right to Freedom of Association' *15 Canadian Lab. & Emp. L.J.* 271 (2009-2010) 271-296; Regenbogen, Sonia 'The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?' (2012) 16(2) *Canadian Labour & Employment Law Journal* 385-418

<sup>9</sup> Ibid 6.

<sup>10</sup> It is worth noting that South Africa has not ratified Convention 151 (Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service), 1978 and its accompanying Recommendation No. 159 (1978). Article 8 of that Convention specifically provides that 'The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.' Available at [http://www.ilo.org/wcmsp5/groups/public/--ed\\_dialogue/--dialogue/documents/publication/wcms\\_168333.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/--dialogue/documents/publication/wcms_168333.pdf) (Accessed on 23 January 2013).

<sup>11</sup> The Public sector is broadly defined to include local states/government.

<sup>12</sup> The Industrial Conciliation Act, 11 of 1924 and its successor excluded the public service with their remuneration and conditions of employment being determined by the Public Services Commission. See in this regard Godfrey, S & Bamu, P 'The state of centralised bargaining and possible future trends' in le Roux, Rochelle & Rycroft, Alan (eds) *Reinventing Labour Law* (2012) at page 238.

<sup>13</sup> Casale, Giuseppe & Tenkorang, Joseph 'Public service labour relations: A comparative overview' (Social Dialogue, Labour Law and Labour Administration Branch, International Labour Office, Geneva August 2008)

bargaining or certain employment protections is eschewed. This approach is regarded as outdated and anachronistic, in South Africa and internationally.<sup>14</sup>

It is worth noting here that the 1990 South African Municipal Workers' Union (Samwu) strike was indicative of the collective bargaining relations within the public sector in South Africa. It was noted that;

The Cape Town strike comes after massive strike action in the public sector in recent months, in particular the railways and hospitals strike. Like the others, the Cape Town strike was illegal in terms of the LRA, which regards municipal services as 'essential services'. But this has been used as a gun to the heads of workers, who have been expected to endure extremely low rates of pay and poor working conditions. The strike has forced the city council to negotiate more seriously with the union. It is part of the breakdown of industrial relations in the public sector, and adds to the increasing pressure on the state to reconsider.<sup>15</sup>

## **1.2 The ILO Convention No. 151, 1978 and Recommendation No. 159, 1978**

As indicated earlier, the core ILO Convention regulating Collective Bargaining, the Right to Organise and Collective Bargaining Convention, 1949 (C98), does not concern the public service. This was largely due to the ideological view that public service employees are 'servants' of the state and, therefore, at the beckon of their Masters.

This situation changed with the advent of neo-liberal policies adopted by states which had the effect of public servants challenging their collective bargaining standing with their employers. This prompted the ILO to recognise the need to set International standards for public sector employees in the form of a Convention. This led to the ILO Convention No. 151, 1978 and Recommendation No. 159, 1978. This much was recognised by the General Conference of the ILO which met in 1978.<sup>16</sup>

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<sup>14</sup> (1995) 16 *ILJ* 278 at 287-288.

<sup>15</sup> Pillay, Devan *'To hell with Councillors'! Municipal Workers strike against Cape Town's 'liberal' City Council* 15 (2) *SALB* at 14.

<sup>16</sup> The introductory statements of that General Conference reads; The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-fourth Session on 7 June 1978, and

It is to be remembered that a key function of the ILO is to 'promoting social justice and internationally recognized human and labour rights, pursuing its founding mission that labour peace is essential to prosperity'<sup>17</sup>. Further substance to this claim is to be found in the following ILO quote;

Public sector decision-makers often seek to maximize social welfare both efficiently and equitably. As a result, they may choose employment policies that minimize the cost of providing public services, or to resolve labour market imperfections elsewhere in the economy. In doing so, policy-makers have inevitably taken decisions which affect employment conditions and the interest of workers. The ILO encourages policy-makers to take into account the interest of workers in order to minimize conflict. For that purpose, ILO constituents adopted the Labour Relations (Public Service) Convention, 1978 (No. 151) and the Labour

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Noting the terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948, the Right to Organise and Collective Bargaining Convention, 1949, and the Workers' Representatives Convention and Recommendation, 1971, and

Recalling that the Right to Organise and Collective Bargaining Convention, 1949, does not cover certain categories of public employees and that the Workers' Representatives Convention and Recommendation, 1971, apply to workers' representatives in the undertaking, and

Noting the considerable expansion of public-service activities in many countries and the need for sound labour relations between public authorities and public employees' organisations, and

Having regard to the great diversity of political, social and economic systems among member States and the differences in practice among them (e.g. as to the respective functions of central and local government, of federal, state and provincial authorities, and of state-owned undertakings and various types of autonomous or semi-autonomous public bodies, as well as to the nature of employment relationships), and

Taking into account the particular problems arising as to the scope of, and definitions for the purpose of, any international instrument, owing to the differences in many countries between private and public employment, as well as the difficulties of interpretation which have arisen in respect of the application of relevant provisions of the Right to Organise and Collective Bargaining Convention, 1949, to public servants, and the observations of the supervisory bodies of the ILO on a number of occasions that some governments have applied these provisions in a manner which excludes large groups of public employees from coverage by that Convention, and

Having decided upon the adoption of certain proposals with regard to freedom of association and procedures for determining conditions of employment in the public service, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this twenty-seventh day of June of the year one thousand nine hundred and seventy-eight the following Convention, which may be cited as the Labour Relations (Public Service) Convention, 1978:

<sup>17</sup>ILO Mission and Objectives. Available at <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (accessed 22 November 2012)

Relations (Public Service) Recommendation, 1978 (No.159), which provide minimum standards and guidance for government employers to follow.<sup>18</sup>

It is worth noting that at present only 57 out of 185 (less than one third) ILO member states ratified convention No. 151.<sup>19</sup> This must be compared to the 183 ILO member states that ratified Convention No. 98 (Right to Organise and Collective Bargaining Convention, 1949).<sup>20</sup> It certainly presents a bleak picture as to the seriousness public sector employment and collective bargaining recognition is given by ILO member states. This should be worrisome from an ILO perspective with recent developments in the European 'PIIGS'<sup>21</sup> countries where austerity measures are, in effect, eroding workers' rights, particularly in the public sector<sup>22</sup>

The sections that follow will look at how the policy perspectives of the ILO, and indeed the facets of neo-liberalism, fit within the South African local government sector, both from a legislative and collective bargaining perspective.

### **1.3 The advent of Neo-Liberalism**

#### **1.3.1 Neo-Liberalism Defined**

The manner in which the public sector (including local government) delivered services rapidly changed during the period 1970 – 1980. These changes were precipitated by the global economic crisis at the time. Governments were persuaded that they needed to restructure the nature of public service delivery more in line with Capitalist principles than the Keynesian welfare state of the time.<sup>23</sup> These changes became known as Neo-liberalism.<sup>24</sup> The key characteristics

<sup>18</sup> Manual on collective bargaining and dispute resolution in the Public Service, Sectoral Activities Department, International Labour Office, Geneva, 2011 at VII - VIII

<sup>19</sup> Available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:20020:0::NO::> (accessed 22 November 2012)

<sup>20</sup> Supra note 18.

<sup>21</sup> The term "PIIGS" is used to describe the worst economically performing Euro Zone Countries. These countries include Portugal, Italy, Ireland and Greece and Spain.

<sup>22</sup> Sarah Krouse (19 March 2012). "[Investing in PIIGS: Portugal](http://www.efinancialnews.com/story/2012-03-19/investing-in-piigs-portugal)". *Financial News*. Available at <http://www.efinancialnews.com/story/2012-03-19/investing-in-piigs-portugal>. (Accessed 22 November 2012)

<sup>23</sup> Brenner, N and Theodore N (2002), Cities and the Geographies of "Actually Existing Neoliberalism.

<sup>24</sup> Harvey, D. (2006), Neo-Liberalism as Creative Destruction. *Geografiska Annaler: Series B, Human Geography*, 88: 145–158; McDonald, David A and Smith, Laila 'Privatising Cape Town: From Apartheid to Neo-liberalism in the Mother City' (2004) 41 *Urban Studies*, No. 8, 1461–1484; Greg Ruiters

of Neo-liberalist policies include privatisation, outsourcing, fiscal discipline and cut backs in social expenditure.<sup>25</sup>

### 1.3.2 The Impact of Neo-liberalism on the public sector

The introduction of these Neo-liberal policies had a negative impact on public sector collective bargaining internationally due mainly to the decline in union density and collective bargaining coverage.<sup>26</sup> This situation has worsened in recent periods due to the Global economic meltdown which started in 2008 in the United States and across the Euro Zone with the Greek economy at a near collapse had it not been for a bail out of that economy. Such bail-outs come at a significant price - the adoption of austerity measures.<sup>27</sup> In the case of Greece this has meant downsizing the public sector; large scale privatisation; wage freezes; increasing of the pensionable age; decreasing the minimum wage; restructuring the tax system; increasing value added tax (VAT); a decrease in labour standards by dismantling collective bargaining systems and move towards non-standard forms of employment practices, etc.<sup>28</sup>

Workers in the 'PIIGS' countries embarked on general strikes against these stringent austerity measures. These general strikes were met with the full might of the armed forces seeking to quell the discontent express by workers. Protesters, unarmed, were beaten by riot police.<sup>29</sup>

South Africa has not been immune to developments of this nature. The adoption of neo-liberal reforms in South Africa date back to the same period as the advent of neo-liberalism internationally. The apartheid state was highly

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'Contradictions in municipal services in contemporary South Africa: Disciplinary commodification and self-disconnections' (2007) 27 *Critical Social Policy* no. 4, 487-508.

<sup>25</sup> McDonald, D. A. (2008) *World Class Syndrome: Neoliberalism and Inequality in Cape Town* at page 71.

<sup>26</sup> Op cit note 13.

<sup>27</sup> Kouretas Georgios P. & Vlamis Prodromos 'The Greek crisis: Causes and implications' (2010) 57 *Panoeconomicus* no 4, 391-404; Chamley, Christophe & Pinto, Brian 'Why Official Bailouts Tend Not to Work: An Example Motivated by Greece 2010' *The Economists' Voice* February, 2011 1-5.

<sup>28</sup> IRASA and Institute of Development and Labour Law (UCT) Breakfast Discourse led by Emeritus Professor Manfred Weiss on the topic: Crisis Management in the European Union and its Impact on Labour Law and Working Conditions, Leeuwenhof, Cape Town, 12 October 2012.

<sup>29</sup> Anti-Austerity Protests Spark Violence in European Countries - SPIEGEL ONLINE. Available at <http://www.spiegel.de/international/europe/anti-austerity-protests-spark-violence-in-european-countries-a-867316.html> (Accessed on 25 November 2012)

interventionist: it created a range of parastatals to assist capital accumulation; it presided over the consolidation of an Afrikaner nationalist capitalist class; and, finally established a welfare state serving the interests largely of white workers and the white urban and rural middle class.<sup>30</sup> By the early 1970s, growth rates in South Africa began to decline. Facing a mighty political, economic and social crisis, the apartheid regime increasingly adopted neoliberal policies that signalled a shift away from the high degree of state intervention, including cutting back on the 'racially' differentiated social spending. It also became increasingly evident that the days of apartheid rule were numbered.<sup>31</sup> The more far-sighted sections of the South African ruling class began to woo the African National Congress (ANC) secretly.<sup>32</sup>

The South African Municipal Workers' Union (Samwu) strike in Cape Town in 1990 had key demands, such as an end to casualization and the filling of all vacant positions.<sup>33</sup> These demands were directly linked to the prevailing neo-liberal policies.

In the course of the negotiated settlement, the ANC shifted rapidly to the right and dumped the nationalisation clause in the Freedom Charter.<sup>34</sup> By 1996 it moved away from the Reconstruction and Development Program (RDP), its 1994 elections programme, in a completely undemocratic manner,<sup>35</sup> in favour of an

<sup>30</sup> Parnell, Susan, and Pieterse, Edgar "Developmental local government." *Parnell et al* (2002): 79-91.

<sup>31</sup> See in this regard Habib, Adam and Padayachee, Vishnu. "Economic Policy and Power Relations in South Africa's Transition to Democracy" (2000). Available at <http://www.sciencedirect.com.ezproxy.uct.ac.za/science/article/pii/S0305750X99001308> (Accessed on 01 February 2013).

<sup>32</sup> Esterhuysen, Willie *Endgame: Secret Talks and the End of Apartheid* (2012)

<sup>33</sup> *Ibid* 15.

<sup>34</sup> Adopted at the *Congress of the People*, Kliptown, 26 June 1955. The Freedom Charter was the statement of core principles of the South African Congress Alliance, which consisted of the African National Congress and its allies the South African Indian Congress, the South African Congress of Democrats and the Coloured People's Congress. Available at [www.anc.org.za](http://www.anc.org.za) (Accessed on 31 January 2013).

<sup>35</sup> The secretariat report to the 1996 Cosatu National Congress read 'The introduction of GEAR (the reverse GEAR of our society) in June 1996 (two months before it was discussed in constitutional structures of the ANC) followed by Maria Ramos and Trevor Manuel's pronouncement that the strategy is non-negotiable is the most serious example of this problem. GEAR in this respect, however, was not unusual. It followed a pattern of treating the Alliance with contempt by certain Ministers on issues of governance and policy formulation. This approach should be abandoned since all it does is cause unnecessary tensions within the movement as well as retard progress.' Cosatu believed that the adoption

orthodox neoliberal strategy called the Growth Employment and Redistribution (Gear)<sup>36</sup> economic policy.

It is clear that the new democratic state constituted itself as a neoliberal state from the outset. By 2000, the transition from apartheid-capitalism to neoliberal capitalism in the local state arena was completed. The number of municipalities had been reduced to 284, a series of New Public Management reforms<sup>37</sup> had been adopted and other key neoliberal policies were firmly in place.<sup>38</sup>

Tri-partite institutional forums were set up along the lines of the ILO, that is, comprising of government, the business sector and organised labour.<sup>39</sup> These forums, most notably the National Economic Development and Labour Council (NEDLAC)<sup>40</sup> would be 'the vehicle by which government, labour business and community organisations will seek to cooperate, through problem-solving and negotiation on economic, labour and development issues, and related challenges facing the country.'<sup>41</sup>

Whether any of these institutional reforms are going to yield the desired results remains questionable. Already there is growing discontent that the collective bargaining instruments needs a major overhaul.<sup>42</sup> The recent strike wave

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of economic policy, like the RDP, had to be debated within Alliance structures which were not the case with the GEAR policy.

<sup>36</sup> Adelzadeh, Asghar. "From the RDP to GEAR: the gradual embracing of neo-liberalism in economic policy." *Transformation* 31 (1996).

<sup>37</sup> For a commentary on New Public Management reforms see Professor Robert Cameron, Department of Political Studies, University of Cape Town 'New Public Management Reforms in the South African Public Service: 1999-2008' Paper presented at Political Studies departmental seminar, 28 April 2009.

<sup>38</sup> Bardouille, N. C. (2000) *The Transformation of Governance Paradigms and Modalities: Insights into the marketization of the public service in response to globalization*.

<sup>39</sup> A number of these forums were established in the early 1990s. These include the National Economic Forum, the National Electrification Forum, the National Education and Training Forum, the National Health Forum, the National Housing Forum and National Transport Policy Forum.

<sup>40</sup> Successor in title to the National Economic Forum.

<sup>41</sup> Nedlac founding declaration. Available at <http://www.nedlac.org.za/about-us/founding-declaration.aspx> (accessed on 23 November 2012)

<sup>42</sup> Du Toit, D 'What is the future of collective bargaining (and labour law) in South Africa?' (2007) 28 *ILJ* 1405-1436; Godfrey, S & Bamu, P 'The state of centralised bargaining and possible future trends' in le Roux, Rochelle & Rycroft, Alan (eds) *Reinventing Labour Law* (2012) 219-243

in the mining, transport and grape/wine sectors is a clear illustration of these developments where these strikes happened outside the established collective bargaining framework or were taking shape outside the traditional bargaining agents, the trade unions.

## **1.4 The South African Constitution**

The Constitution of the Republic of South Africa<sup>43</sup> is the supreme law of the Republic.<sup>44</sup> The final constitution followed an arduous negotiation process involving multi-party negotiators seeking to advance their respective political positions. Parties reached agreement on a final constitution, albeit after much bloodshed throughout the country.

### **1.4.1 The status of local government as a sphere of government**

The Constitution recognises three spheres of government, that is, National, Provincial and Local government with are 'distinctive, interdependent and interrelated'.<sup>45</sup> Section 41 of the Constitution defines the key principles of co-operative government and intergovernmental relations.<sup>46</sup> The intergovernmental

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<sup>43</sup> Act 108 of 1996.

<sup>44</sup> S 2 of the Constitution.

<sup>45</sup> S 40 of the Constitution.

<sup>46</sup> The key principles set out in section 41 of the constitution are;

- (1) All spheres of government and all organs of state within each sphere must-
  - (a) preserve the peace, national unity and the indivisibility of the Republic;
  - (b) secure the well-being of the people of the Republic;
  - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
  - (d) be loyal to the Constitution, the Republic and its people;
  - (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
  - (f) not assume any power or function except those conferred on them in terms of the Constitution;
  - (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
  - (h) co-operate with one another in mutual trust and good faith by-
    - (i) fostering friendly relations;
    - (ii) assisting and supporting one another;
    - (iii) informing one another of, and consulting one another on, matters of common interest;
    - (iv) co-ordinating their actions and legislation with one another;
    - (v) adhering to agreed procedures; and
    - (vi) avoiding legal proceedings against one another.
- (2) An Act of Parliament must-
  - (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
  - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

relations between the three spheres of government is further spelt out in the Intergovernmental Relations Framework Act<sup>47</sup>

The objects of local government is further defined 'to provide democratic and accountable government for local communities; to ensure the provision of services to communities in a sustainable manner; to promote social and economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matters of local government'.<sup>48</sup>

### 1.4.2. The Bill of Rights

Chapter two of the Constitution stipulates a set of key fundamental rights that all citizens are entitled to. These include the following labour rights;

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
  - (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of a trade union; and
  - (c) to strike.
- (3) Every employer has the right-
  - (a) to form and join an employers' organisation; and
  - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right-
  - (a) to determine its own administration, programmes and activities;
  - (b) to organise; and
  - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

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(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

<sup>47</sup> Act 13 of 2005.

<sup>48</sup> S 152 of the Constitution

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).<sup>49</sup>

The rights of trade unions (and employers) are thus constitutionally entrenched. It is to be pointed out here that the right to strike has constitutional recognition but not so the right to lock out. In that regard the Constitutional Court held;

[The] proposition [that the right of employers to lock out is the necessary equivalent of the right of workers to strike] cannot be accepted. Collective Bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out).<sup>50</sup>

Like most rights, there are limitations. These will be discussed below.

### 1.4.3 The Constitutional limitations

Section 36 of the Constitution permits the rights defined in Chapter two of the Constitution (the Bill of Rights) to be limited 'only in terms of law of general application', like the Labour Relations Act, and providing 'the limitation is reasonable and justifiable in an open and democratic society'. An example of such limitations being the unrestricted constitutional right to strike whereas the labour laws permits strikes only insofar as matters of mutual interest, prohibiting strikes in essential services and over disputes of rights.<sup>51</sup>

## 1.5 The Labour Relations Act (LRA)

<sup>49</sup> S 23 of the Constitution (1996).

<sup>50</sup> *Ex parte Chairman of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at 795. For a more detailed commentary see Cheadle H, Davis D, Haysom N *South African Constitutional Law: The Bill of Rights*, Durban LexisNexis Butterworths 2003 [2004] 1 All SA 521.

<sup>51</sup> Halton Cheadle, *Regulated Flexibility: Revisiting the LRA and the BCEA* (2006) 27 ILJ 663. Disputes of Rights are determined by arbitration or adjudication.

The Labour Relations Act<sup>52</sup> (LRA) heralded the start of the new Industrial relations framework of the new South Africa. Unlike its predecessor, the 1956 act<sup>53</sup>, the current LRA applied to all workers in both the private and public sectors. Also, the new set of laws entrenched a set of minimum rights afforded to registered trade unions termed 'organisational rights'.<sup>54</sup> Whilst it is not the intention here to do a detailed examination of the LRA, it is important to refer to its purpose as set out in the act;

The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution ;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-
  - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
  - (ii) formulate industrial policy; and
- (d) to promote-
  - (i) orderly collective bargaining;
  - (ii) collective bargaining at sectoral level;
  - (iii) employee participation in decision-making in the workplace; and
  - (iv) the effective resolution of labour disputes.<sup>55</sup>

The LRA does not however apply to the 'National Defence Force, the National Intelligence Agency, the South African Secret Services and the South African National Academy of Intelligence'<sup>56</sup>. This is somewhat of departure from

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<sup>52</sup> Act 66 of 1995, as amended.

<sup>53</sup> Act 28 of 1956.

<sup>54</sup> Chapter 3, sections 11 to 15 of the LRA.

<sup>55</sup> Section 1 of the LRA (1995).

<sup>56</sup> Section 2 of the LRA (1995).

Article 1 of the ILO Labour Relations (Public Service) Convention, 1978 where reference is made to the exclusion of the 'armed forces' and the 'police'. So, whilst the police are covered by the scope of public sector collective bargaining arrangements, as is the case with all public sector employees,<sup>57</sup> the armed forces (military) are covered by a separate collective bargaining arrangement.

### 1.5.1 Collective Bargaining and strikes

As pointed out earlier, the constitution accords 'every trade union, employers' organisation and employer has the right to engage in collective bargaining.'<sup>58</sup> The LRA is the legislative framework giving effect to that constitutional provision. It is evident that it promotes collective bargaining at a sectoral level.<sup>59</sup>

There is no compulsion to bargain as the LRA advocates a voluntarist approach to collective bargaining. Employers are therefore not compelled to bargain with trade unions.<sup>60</sup> This is in line with International standards set by the ILO which records that 'Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining.'<sup>61</sup>

To force bargaining with an employer (or group of employers), trade unions sometimes need to engage in protected strike action to achieve their demand for recognition.<sup>62</sup> To best describe the dynamic relationship between collective bargaining and strike action is to quote the Constitutional Court judgment of O'Regan J:

In s 23, the Constitution recognizes the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organizations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and

<sup>57</sup> At present, there is separate bargaining arrangements for the public sector generally and that of local government. There are however moves afoot to move local government into the public service.

<sup>58</sup> Section 23(5) of the Constitution (1996).

<sup>59</sup> Section 1(d)(ii).

<sup>60</sup> S Godfrey, J Maree, D Du Toit & J Theron *Collective Bargaining in South Africa: Past, present and future?* (2010) Juta, Cape Town at pages 89-90. See also Du Toit *et al* Chapter V at page 239.

<sup>61</sup> Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition (2006) at para 925. Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_090632.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf) (accessed on 26 November 2012).

<sup>62</sup> *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC)

workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in s 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.<sup>63</sup>

### **1.5.2. Relevant sections of the LRA concerning Collective Bargaining Arrangements**

This dissertation makes the assumption that the LRA advocates collective bargaining at sectoral level. This does not mean to suggest that collective bargaining cannot exist at plant/factory or industry level.<sup>64</sup> That, however, is not the subject of this work.

In order for collective bargaining arrangements to exist at sectoral level,<sup>65</sup> there are a number of LRA provisions parties must meet. These are all contained in sections 27 to 34 of the LRA.<sup>66</sup> In summary this entails adopting a constitution in accordance with section 30; registration with the Registrar of Labour Relations (Department of Labour)<sup>67</sup>; defining the powers and functions of the bargaining council as spelt in section 28 of the act.

Insofar the status of collective agreements are concerned, agreements concluded in a bargaining council are binding on all employees and employers covered by the scope of the bargaining council. It furthermore has the effect of altering individual contracts of employment.<sup>68</sup> Lastly, collective agreements

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<sup>63</sup> Supra note 62 at para 13.

<sup>64</sup> Centralised Bargaining does not only happen within bargaining councils. National Bargaining forums can be set up and regulated in terms of a recognition/collective agreement. See in this regard Godfrey & Bamu op cit note 12 at 231-232.

<sup>65</sup> The term more commonly used in South Africa is centralised bargaining.

<sup>66</sup> The provisions governing the establishment of the public sector bargaining council (PSCBC) and that of other forms of centralised bargaining, like statutory councils and the like is not dealt with here. Also, part F of the same chapter deals with general provisions concerning councils. That too is not dealt with here.

<sup>67</sup> Section 27 of the LRA. Such registration must be in accordance with the provisions of section 29 of the act.

<sup>68</sup> Section 23(3). See also Du Toit *et al* Chapter V at page 275.

concluded by parties to a bargaining council may be extended to non-parties operating under the registered scope of the bargaining council.<sup>69</sup> This is however seen as a disincentive for trade unions to organise workers in unorganised workplaces<sup>70</sup>

## **1.6 The South African Local Government Bargaining Council (SALGBC)**

The South African Local Government Bargaining Council (Salgbc) was formally established in 2001. Prior to the establishment of the Salgbc, collective bargaining were fragmented in that negotiations were mainly located at local level involving some 700 employers throughout the country.<sup>71</sup> The South African Municipal Workers' Union (Samwu) 1995 National Congress noted for example:

That we have experienced serious problems and frustrations in negotiations due to the division of local government with major cities and small towns controlled by different employer organisations with different political affiliations and ..... That a central problem facing our union is that local government has not yet established new Associations or Employers' Organisations with the result that we will not have bargaining in a more organised manner.<sup>72</sup>

Worse still, is the fact that conditions of employment (and indeed bargaining) were racially segregated resulting in Whites enjoying far superior wages and conditions of service measured against that earned by Black<sup>73</sup> workers. These will be discussed below.

### **1.6.1. Background of Collective Bargaining in the Municipal sector (disparate employment conditions)**

Black African workers, during the initial periods of collective bargaining in the local government sector, were not regarded as permanent employees and, as a consequence, there were no salary grades to the job they were performing. This was due to the segregated conditions of employment prevalent at the time. As Roger Ronnie<sup>74</sup> points out:

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<sup>69</sup> Section 32 of the LRA.

<sup>70</sup> Du Toit, D & Ronnie, R 'The necessary evolution of strike law' in le Roux, Rochelle & Rycroft, Alan (eds) *Reinventing Labour Law* (2012) 195-218

<sup>71</sup> Fragmentation to Unification: The development of Collective Bargaining in Local Government, First Edition, 2011 at page 6.

<sup>72</sup> *Organised Local Government, Samwu National Congress resolution, 1995*

<sup>73</sup> The term Black is generically used to include 'African', 'Coloured' and 'Indian' workers.

<sup>74</sup> Samwu General Secretary between 1994 till 2006.

It was say around 1990 - 1991 that African workers became graded, especially in the smaller towns and cities. The old "Van Der Merwe" Job Evaluation system was extended to cover these workers and an extra couple of wage levels were added into the corresponding wage structures. If I recall correctly it was about five extra levels that then were used to accommodate the so-called "unskilled" workers. Before that, besides not forming part of the grading structure, these workers were also not seen as permanent employees. It was around about this time that SAMWU joined the old Industrial Council. This contributed greatly to changing the status of these workers and laying the base for future collective bargaining in the sector including the realisation of a sector minimum.<sup>75</sup>

This became the driving force of Samwu to establish uniform wages and conditions of service for all municipal employees, irrespective of race and class classification.

### **1.6.2. Parties to the Salgbc**

There are currently three parties to the Salgbc, the employers' association, Salga, and the trade unions, Imatu and Samwu. Below I look at each of the parties, including their history and how they are constituted.

It is important to note here that the recognition of parties to the Salgbc is regulated by clause 4 of the Salgbc constitution. In terms of that provision, the parties to the council shall be the founding parties (Salga, Imatu and Samwu), any registered employers' organisation representing at least fifteen per cent of the total number of employers within the scope of the council and any registered trade union representing at least fifteen per cent of employees within the registered scope of the council<sup>76</sup>. Thus, for example, should a registered trade union seek admission to the Salgbc it shall require of such trade union to have at least 33 282 municipal employees as members of such union.

#### **1.6.2.1. South African Local Government Association (Salga)**

The employers' association, Salga, was established in terms of the Organised Local Government Act.<sup>77</sup> It is the representative and collective bargaining body of all 284 municipalities in the Republic.<sup>78</sup> Whilst this may entitle Salga to enter into binding collective agreements on behalf of its members (municipalities) in

<sup>75</sup> Interview with Roger Ronnie, 12 December 2012.

<sup>76</sup> Constitution of the South African Local Government Bargaining Council (2007) page 7.

<sup>77</sup> Act 52 of 1997. This piece of legislation is in accordance with section 163 of the South African Constitution (1996).

<sup>78</sup> Constitution of Salga.

accordance with the provisions of the LRA, there have been many instances where collective agreements were challenged by its constituent members. Of equal concern is the fact that collective agreements reached at centralised bargaining level, like wages, must first be ratified by individual Councils in terms of the Municipal Finance Management Act<sup>79</sup> (MFMA). This is notwithstanding the provision of section 71 of the Municipal Systems Act<sup>80</sup> which reads that ‘Municipalities must comply with any collective agreements concluded by organised local government within its mandate on behalf of local government in the bargaining council established for municipalities’.

#### **1.6.2.2. Independent Municipal and Allied Trade Union (Imatu)**

The Independent Municipal and Allied Trade Union (Imatu) was formed in 1996 following the merger of the former South African Association of Municipal Employees (SAAME), the Johannesburg Municipal Employees Association (JMEA), National Union of Employees of Local Authorities (NUELA), Durban Municipal Employees Association (DMES) and the South African Local Authorities and Allied Workers Union (SALAAWU).<sup>81</sup> The union has a reported membership base of 70 000<sup>82</sup> members, inclusive of private sector employers. Imatu is not affiliated to a trade union federation after they disaffiliated from the Federation of Democratic Unions in South Africa (FEDUSA), a non-political aligned trade union federation on or about June 2012.

#### **1.6.2.3. South African Municipal Workers’ Union (Samwu)**

The South African Municipal Workers’ Union (Samwu) is the largest of the two trade union parties to the Salgbc. Samwu was formed in October 1987 following the unification of the Cape Town Municipal Workers Association (CTMWA), General and Allied Workers Union (GAWU), Municipal Workers Union of South Africa (MWUSA), South African Allied Workers Union (SAAWU) and the Transport and General Workers Union (TGWU). The Democratic Integrated Employees Society (DIMES) and the Union of Johannesburg Municipal Workers (UJMW)

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<sup>79</sup> Act 56 of 2003.

<sup>80</sup> Act 32 of 2000, as amended.

<sup>81</sup> Op cit note 71 at 27.

<sup>82</sup> This figure was obtained from the Imatu website. Available at <http://www.imatu.co.za/about-imatu/mission-statement/> (Accessed on 11 December 2012). It is to be noted that the March 2011 Salgbc data reflect Imatu membership at 62 096.

joined Samwu later.<sup>83</sup> The union's current membership is 155 000, inclusive of private sector workers performing a municipal function<sup>84</sup>. Samwu is affiliated to the Congress of South African Trade Unions (COSATU) which in turn is in alliance with the ruling ANC.

### 1.6.3. Municipal employment; union membership and wage levels

What follows are data that illustrates the current level of employment within the municipal sector, the level of union organisation, in terms of membership, and the wage levels within the industry.

#### Municipal Employment & Unionisation levels (March 2011)<sup>85</sup>

PROVINCES	TOTAL EMPLOYEES	SAMWU	IMATU	DUAL MEMBERS	OTHER UNION MEMBERS	NON UNION EMPLOYEES	TOTAL NON-UNION EMPLOYEES
KwaZulu Natal	39 779	21 962	15 301	1 866	9	2 507	2 516
Eastern Cape	24 990	17 499	5 084	572	82	2 374	2 456
Western Cape	42 346	22 032	15 286	21	269	4 759	5 028
Northern Cape	7 202	5 464	953	-	2	802	804
North West	10 685	7 797	2 077	37	25	786	811
Mpumalanga	12 754	9 848	1 904	43	140	862	1 002
Limpopo	11 507	8 825	2 002	1	62	618	680
Free State	14 270	10 268	2 571	35	186	1 256	1 442
Gauteng	58 349	36 600	16 918	1 441	351	4 480	4 831
<b>TOTAL</b>	<b>221 882</b>	<b>140 295</b>	<b>62 096</b>	<b>4 016</b>	<b>1 126</b>	<b>18 444</b>	<b>19 570</b>

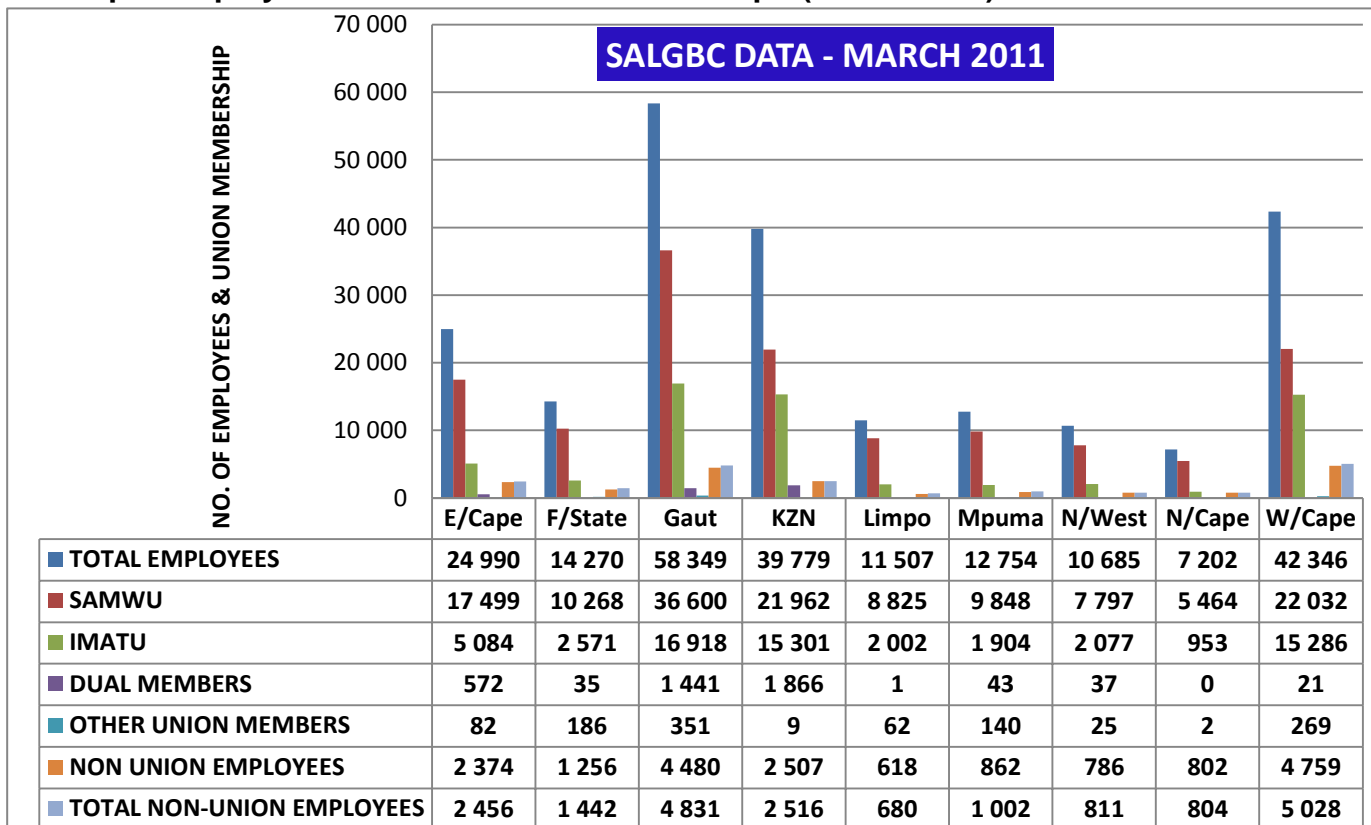
<sup>83</sup> Op cit note 71 at 26-27.

<sup>84</sup> Secretariat report to the Samwu 10<sup>th</sup> National Congress, Mangaung, 2012

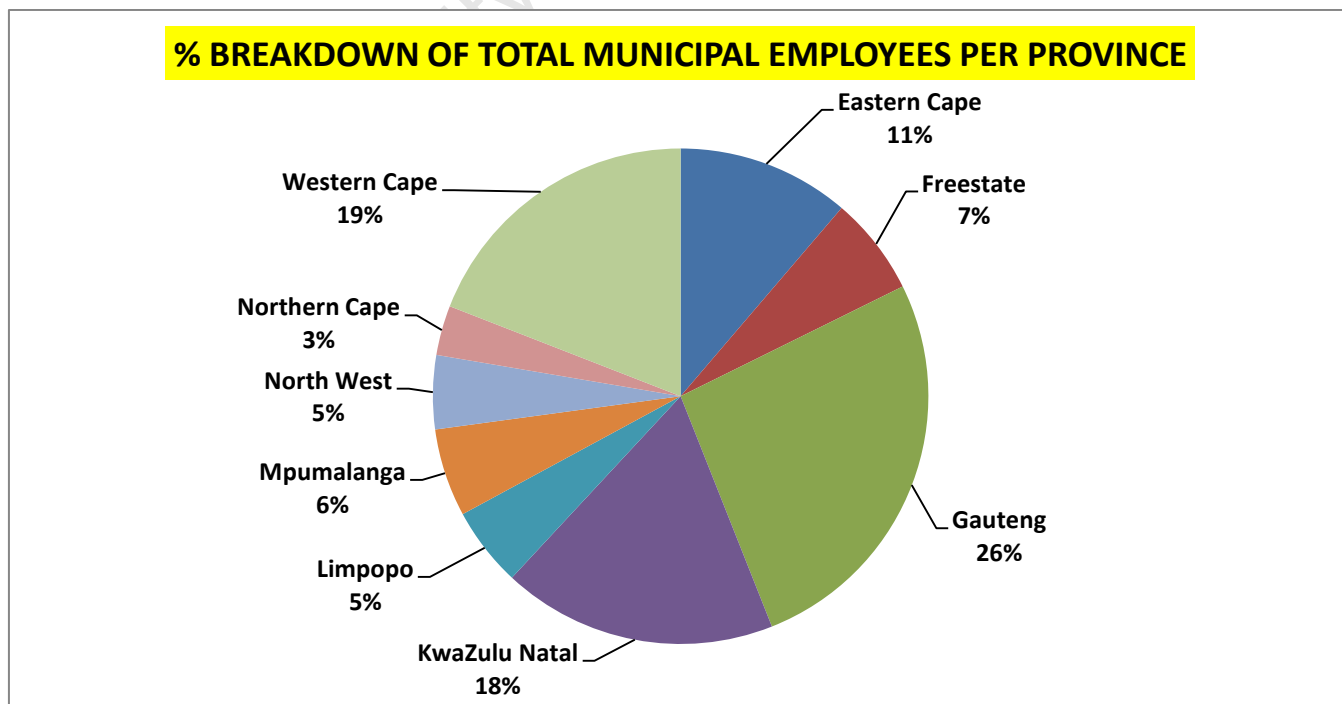
<sup>85</sup> Salgbc Website. Available at

[http://www.salgbc.org.za/index.php?option=com\\_jdownloads&Itemid=110&view=viewcategory&catid=259](http://www.salgbc.org.za/index.php?option=com_jdownloads&Itemid=110&view=viewcategory&catid=259) (accessed on 27 November 2012)

### Municipal Employment & Unionisation levels Graph (March 2011)



### Municipal employment per province (in per cent)



Jointly the two trade unions represent 91 per cent of total employment within the sector with Samwu at 63 per cent and Imatu at 28 per cent. This is a

very high per cent of union representation in an individual bargaining council compared to private sector centralised bargaining.<sup>86</sup>

### **Wage levels in the local government sector<sup>87</sup>**

#### **Minimum wages for the period 2002 – 2012**

<b>Year</b>	<b>Minimum Wage</b>
2002	R 2100
2003	R2321.13
2004	R2517.64
2005	R2668.69
2006	R 2850/2907
2007	R3093.92
2008	R3350
2009	R 3850 / R 4000 (1/01/10)
2010	R4339
2011	R4620
2012	R4927

As can be seen from the above table, the minimum wage within the sector more than doubled over the last ten years. In per cent age terms, measured against inflation, the minimum wage rose by 335 per cent between 1997 and 2009 whilst over the same period inflation rose by only 80 per cent.<sup>88</sup> This can be attributed to the fact that the unions, in particular Samwu, tabled separate demands for salary adjustments (real wage increases) and an increase in the minimum wage. In many respects, an increase in the minimum wage resulted in a larger per cent increase for lower categories of workers.

<sup>86</sup> See in this regard Godfrey et al *Collective Bargaining in South Africa: Past, present and future?* at pages 118-119.

<sup>87</sup> Collective Bargaining Report to the Samwu Central Executive Committee, October 2012.

<sup>88</sup> Godfrey & Bamu op cit note 12 at 227.

### Negotiated increases for the period 2002 – 2012 measured against inflation<sup>89</sup>

YEAR	Percentage wage increase	Inflation
2002	8.5%	9.2%
2003	10.53%	5.8%
2004	7.85%	1.4%
2005	6%	3.4%
2006	7.5%	4.7%
2007	6.43%	7.1%
2008	8.3%	11.5%
2009	13%	7.1%
2010	8.48%	4.3%
2011	6.08%	5.0%

### Municipal Wage levels measured against other industries<sup>90</sup>

Minimum Wage Across Sectors – 2011	
Food / Agriculture	R 2533
Building / Construction	R 2612
Transport / Freight	R 3626
Communications	R 3800
Retail / Catering	R 4390
<b>Municipal</b>	<b>R 4927</b>
Food Manufacturing	R 5012

<sup>89</sup> Supra note 87.

<sup>90</sup> Supra note 87.

Health / Education	R 5073
Metal and Engineering	R 5380
Finance	R 6109
Mining	R 6476
Chemical	R 6723

The above data confirms that municipal wage rates are not 'high' if measured against other key sectors. It in fact is close to the median of the reported sectors. Also, a minimum wage should not be confused with a 'living' wage. Samwu defines a 'living wage' to be 'concerned with whether or not a worker is able to earn sufficient income, in order to be able to afford for his or her family a minimum acceptable living standard'.<sup>91</sup> It is worthy to note that none of the advocates of a living wage, most notably Cosatu and its affiliated unions, are yet to define the monetary value of a living wage.

There is an emergent school of thought globally that public sector unions are significantly better off than private sector unions. It is argued that the state, unlike private enterprise, is not profit driven and consequently able to offer higher wages and conditions without the fear of 'going out of business' or reducing staff complement to offset higher wages; that public sector unions effectively elect their public representatives and are thus able to exert political power over them; public sector unions can use their political power to demand expansion of the public service thus increasing their membership base and, effectively, the bargaining strength; organising in the public sector is much easier as the only employer is the local state thus ensuring regular stream of union financial resources, etc. It is noted that:

A further important advantage that public-sector unions have over their private-sector counterparts is their relative freedom from market forces. In the private sector, the wage demands of union workers cannot exceed a certain threshold: if they do, they can render their employers uncompetitive, threatening workers' long-term job security. In the public sector, though, government is the monopoly provider of many services, eliminating any market pressures that might keep unions' demands in check. Moreover, unlike in the private sector, contract

<sup>91</sup> Samwu National Congress (2012) draft resolution.

negotiations in the public sector are usually not highly adversarial; most government-agency managers have little personal stake in such negotiations. Unlike executives accountable to shareholders and corporate boards, government managers generally get paid the same – and have the same likelihood of keeping their jobs – regardless of whether their operations are run efficiently. They therefore rarely play hardball with unions like business owners and managers do; there is little history of “union busting” in government.<sup>92</sup>

Experiences in South Africa have been vastly different. The local government sector has experienced significant job losses, mainly due to privatisation of municipal services; wage rates are relatively moderate compared to other sectors of the economy; wage bargaining mostly gets resolved through power play; the relationship between trade unions and elected representatives is on a proverbial low and the sector is riddled with allegations of widespread corruption. The National Treasury noted that:

Personnel management in local government has been marred in many instances by poor recruitment practices, political interference in the appointment and dismissal of employees, the inability to attract and retain suitably qualified staff, high vacancy rates and the lack of performance management systems and other related symptoms.... While the total vacancy rate in metros has been approximately 25 per cent since 2006, there are notable differences between them. Tshwane reports a very high vacancy rate: from 48.3 per cent in 2006 it increased to over 51 per cent in 2009. The increase correlates with the number of jobs lost in this municipality since 2006. However, the level indicates that Tshwane is currently operating with less than half of its approved positions filled.<sup>93</sup>

The relationship between the two trade unions is also not at the required level to challenge the employer in a concerted manner. The causes are suggested in this view:

There is no coordinated bargaining strategy between the trade unions which can be attributed to a lack of trust and the parties' respective view on strike action. It is generally accepted that the ordinary Imatu member would rather want to see a

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<sup>92</sup> National Affairs 'The trouble with public sector unions, Daniel Disalvo, issue number 5, fall 2010. Available at <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions> (Accessed on 24 January 2013)

<sup>93</sup> National Treasury 'Managing Municipal Personnel', 2011. Available at <http://www.treasury.gov.za/publications/igfr/2011/lg/10.%20Personnel%202011%20LGBER%20-%20Final%20-%2009%20Sept%202011.pdf> (Accessed on 25 January 2013).

dispute resolved through litigation whereas Samwu would pursue strike action. It has also not assisted with Samwu strikes turning violent.<sup>94</sup>

The outcome of the 2011 wage negotiations could have had a different result if Samwu persisted with their intended strike prior to the 2011 local government elections. As noted earlier, that strike was called off after the national leadership of the ANC met with the NEC of Samwu during which meeting the ANC leaders committed themselves to resolve the burning issues raised by Samwu, including the wage demands.<sup>95</sup> Following the elections, the ANC reneged on those commitments. The union accordingly lost the leverage it had to demand a decent wage increase. This is indicative of the political relationship between the union and the ruling ANC.

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<sup>94</sup> Interview with Imatu Western Cape Regional Manager, Ettiene Bruwer, 24 January 2013. Some of the comments was made in his personal capacity and may not necessarily be the views of Imatu nationally.

<sup>95</sup> See also Samwu press release titled 'SAMWU National Strike suspended', Tahir Sema, 10 May 2011.

## CHAPTER 2

### Key features of the 2011 municipal strike

This chapter shall illustrate the key features of the 2009 – 2012 wage and salary collective agreement concluded between the parties to the Salgbc, the unions demand that salary negotiations be re-opened consequential to the year on year Consumer Price Index (CPI) data, the legal challenge mounted by the employers' association, Salga, the failed negotiation and mediation processes, the eventual strike action of, primarily Samwu, the nature of the strike and what may have informed that and finally, the strike outcome.

#### 2.1 The 2009 – 2012 Wage and Salary Collective Agreement

Given that the 2006 – 2009 wage and salary collective agreement was to terminate at the end of June 2009, the trade unions parties submitted their joint proposals for the purposes of concluding a new wage and salary collective agreement. Key amongst their demands were a single year<sup>96</sup> wage agreement, an across the board increase of twenty six per cent or R3 150 (whichever is the greater) for all employees falling under the registered scope of the SALGBC and a minimum wage of R6 500 per month.

Salga in turn tabled a counter offer of a three year wage and salary agreement with year one being six points two per cent, year two and three the average CPI plus nought point five per cent with no adjustment in the minimum wage.

After protracted negotiations which yielded no positive outcome, the trade unions gave notice of protected strike action on the 17<sup>th</sup> July 2009 with the strike to commence on the 27<sup>th</sup> July 2009.<sup>97</sup> Strike action commenced on the 27<sup>th</sup> July 2009 and lasted for five days.<sup>98</sup> The outcome of the strike resulted in, amongst other, a

<sup>96</sup> The preceding wage agreement was for a three year period.

<sup>97</sup> As has been the history of collective bargaining in the sector the 2002, 2005 and 2006 wage bargaining also resulted in national strike action.

<sup>98</sup> "Municipal Workers call off strike". Mail and Guardian online. Available at <http://mg.co.za/article/2009-07-31-municipal-workers-call-off-strike> (Accessed on 04 December 2012).

thirteen per cent salary adjustment effective 01 July 2009, the second year, CPI plus one point five per cent, the third year, CPI plus 2 per cent, the minimum wage is adjusted to R3 850 effective 01 July 2009 and further adjusted to R4 000 as of the 1<sup>st</sup> of January 2010.

The agreement also provided that *'should the average CPI be lower than 5% or higher than 10% for the period referred to in clauses 6.2 and 6.3 above, any party may be entitled to re-open the negotiations.'* It was the interpretation and application of this clause which ultimately led to the 2011 strike.

## **2.2 Re-opening substantive negotiations and the demand for an 18 per cent or R2 000 wage adjustment**

The three year salary and wage agreement reached in July 2009 should have meant that the municipal sector enjoy labour peace until 2012, at least insofar wage related strike action was concerned<sup>99</sup>. This was not to be the case. The LRA prohibits strike action during the currency of a collective agreement regulating the matter in dispute.<sup>100</sup>

The average CPI for the period 1 February 2010 until 31 January 2011<sup>101</sup> was lower than the threshold defined in clause 6.5<sup>102</sup>. Given this situation, the trade union parties resolved to re-open negotiations on the wage component of the collective agreement.

The unions subsequently tabled a wage demand for a salary adjustment of R2 600 or 18 per cent, whichever is the greater.<sup>103</sup> This wage demand, in effect, was seeking a salary adjustment of more than four times the recorded CPI figure at the time. Forbes recalled that:

The wage demand was a not based on a particular formula. It was a spontaneous response from members that was indicative of the material and socio-economic

<sup>99</sup> During 2010 Samwu went on strike over Salga's refusal to agree on a Wage Curve Collective Agreement. That strike resulted in an agreement between the parties, including Imatu. The terms of that agreement are however the subject matter of court proceedings at the Labour Appeal Court following a favourable ruling to the unions in the Labour Court.

<sup>100</sup> s 165(3)(a)(i).

<sup>101</sup> Clause 6.3 of the salary and wage collective agreement (as so does clause 6.2) defines the period for which the average CPI needs to be determined that shall inform the actual per cent increase for the ensuing wage adjustment.

<sup>102</sup> The actual CPI came out at 4.08.

<sup>103</sup> The trade unions jointly submitted their wage demands on the 8<sup>th</sup> April 2011.

conditions they find themselves in. If viewed from the perspective of the ordinary Samwu member, many of whom care for extended (unemployed) family members, the monetary demand, in particular, reflected their needs to, at least, sustain their existing means of livelihood. It cannot be argued that an average CPI calculation is going to alleviate them from their poverty situation. After all, food inflation and the cost of schooling for poor working people and the rest are much higher than for rich people.<sup>104</sup>

Salga did not take kindly to the stance taken by the trade unions. As has been indicative of the volatile bargaining relationship between the parties, Salga elected to challenge the union's right to re-open wage bargaining.

### 2.3 The legal challenges

Salga applied a different interpretation of clause 6.5 to that taken by the unions. In a circular to their member municipalities they stated that:

SALGA considered the demands from the trade unions and has the view, supported by a legal opinion from four different law firms, that Salary and Wage negotiations cannot be re-opened in terms of clause 6.5 of the existing salary and wage agreement as the CPI for the period being 5.53% is neither below 5% or above 10% for the period referred to in clause 6.2 and 6.3.<sup>105</sup>

The trade unions, on the other hand, contended that a literal interpretation of the agreement entitled them to re-open wage bargaining. This, so they argued, is premised on the clear wording used in clause 6.5, that is, that clauses 6.2 and 6.3 refers to two separate periods for the calculation (and accordingly determination) of the salary adjustment and not, as Salga contended, that the two years combined constituted a single period.

Confronted with the two conflicting interpretations parties invoked the provisions of clause 15 of the wage agreement.<sup>106</sup> Needless to say, parties could not reach agreement during the conciliation stage of the dispute. The matter was

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<sup>104</sup> Interview with Dale Forbes, Samwu Collective Bargaining Officer, 12 December 2012. A press statement issued by the union on 11 April 2011 read 'SAMWU's wage demands have been informed by the increase in price of many basic necessities and the cost of day to day living.'

<sup>105</sup> Salga Circular 16/2011, Xolile George, Chief Executive Officer, 28 April 2011.

<sup>106</sup> Clause 15 of the agreement provides for disputes relating to the Interpretation and Application of the collective agreement. In terms of that provision parties should seek to reach agreement via conciliation failing which the matter must be determined via arbitration.

accordingly set down for arbitration on the 21<sup>st</sup> June 2011.<sup>107</sup> Ruling in favour of the unions the commissioner commented that the interpretation advanced by the employer's body would lead to an absurdity if negotiations could only be re-opened after one occasion, that is, after January 2011. He concluded that:

This would have meant that, if inflation reached an unexpected level after the period specified in Clause 6.2, an inflation related increase would nevertheless have to be implemented on 1 July 2010 but negotiations to bring an across the board increase to more realistic levels would only be allowed later, when the CPI figures for January 2011 became available. (The Respondents contend that this would be 8 months later in approximately mid March 2011).<sup>108</sup>

The determination on whether negotiations could be re-opened or not is an important factor as the LRA does not permit parties to re-open negotiations or engage in strike action for the duration of an existing agreement.<sup>109</sup> The favourable ruling to the trade unions thus created the legal ground to effectively compel the other bargaining party, Salga, to negotiate with them.

Over the same period that parties engaged in an Interpretation dispute, the trade unions lodged a mutual interest dispute alleging that Salga is unwilling to meet their wage demands. This matter came before the appointed commissioner who, incidentally, also conciliated the Interpretation dispute. His attempt to consolidate the two disputes into one was not well met by the parties. As such, the Interpretation dispute was arbitrated with the outcome detailed above.

Attempting to conciliate the mutual interest dispute, the conciliator attempted to identify the importance of mutual relations between the parties as bargaining adversaries with the aim of finding an interest based settlement. This he did by recommending a settlement offer that would take account of the factors and principles enshrined in the current wage agreement yet, if favourably considered, would lead to, in his opinion, a mutually acceptable resolution to the wage dispute. With that in mind he recommended that clause 6.3 of the wage agreement read that *'All employees, except those employees excluded in clause 4 above, shall receive for the financial year 2011/2011 (sic) with effect from 1 July*

<sup>107</sup> The arbitration award appears under Salgbc case number HQ051115.

<sup>108</sup> Paragraph 78 of the arbitration award.

<sup>109</sup> S 65(3)(a)(i) of the LRA. See in this regard *Cape Gate (Pty) Ltd v NUMSA & others* [2007] 5 BLLR 436 (LC).

2011 an across the board increase based on a notional CPI percentage of 5,5%, plus two (2%) percent.’ This recommendation would require the trade unions to move from their demand of 18 per cent of R2 000 and Salga from their 6.08% wage offer.

Neither the trade unions nor Salga accepted the recommendation of the conciliator. This is indicative of the historical bargaining relationship between the parties as opposed to seeking a mutual gain to negotiations. As John Brand points out:

The facilitator and the parties also need to be sensitive to a negotiation paradox. On the one hand a mutual gain approach to negotiations is likely to deliver a strong outcome, but the process of achieving this may be perceived to be weak by the party’s principals. On the other hand a tough and militant adversarial stance may appear to be strong to the principals but it usually delivers a weak outcome. The facilitator and the parties need to manage this in a way which does result in a strong outcome but without the representatives appearing to be weak. As appreciation of the benefits of mutual gain negotiation is cascaded down into organisations the problem is easier to manage.<sup>110</sup>

What appeared to be a sensible approach to resolve the wage impasse was out rightly dismissed ostensibly due to internal mandating principles. The logic of that rejection is baffling for if the CPI figure was 5 per cent neither party could re-open negotiations and union members had to accept a 7 per cent wage adjustment. Commenting on the 7, 5 per cent settlement facilitator proposal, a Samwu press statement read:

After extensive consultation with members, The NEC resolved that the 7,5% did not represent a meaningful wage increase to address the needs of municipal members, their families and other dependent on their wages, amongst the unemployed. We noted that inflation continues to show significant increases – the June CPI figure rose by 0,4% above the May figure. Furthermore, inflation which impacts on poorer sections of municipal workers is close to 8%, whilst transport and electricity costs continue to shoot through the roof.<sup>111</sup>

The stage was thus set for a tough round of negotiations between the parties.

## 2.4 The negotiations

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<sup>110</sup> Brand, John, ‘STRIKE AVOIDANCE – HOW TO DEVELOP AN EFFECTIVE STRIKE AVOIDANCE STRATEGY – paper presented at the 23<sup>rd</sup> Annual Labour Law Conference, Sandton, August 2010.

<sup>111</sup> Samwu press release, Tahir Sema, Samwu National Media and Publicity Officer, 03 August 2011.

The trade unions, having dispensed with the potential legal impediment argued by Salga, now had further difficulty of convincing their bargaining adversary to reach a mutually acceptable wage agreement.

Salga on the other hand stuck to their belief that their 6.08% wage offer represented the terms of the existing wage agreement and, given lack of available funding, the best they could offer workers as an increase. It argued that;

Labour's argument for a higher percentage is, amongst others, the current salary trends in other sectors that recently had wage settlements with increases of between 8% - 10.5% after a (sic) strikes running into weeks. SALGA's view at that Conciliation and now is that this need not be the basis for rejecting the 6.08% the wage and salary agreement provides for. This is so, amongst others, for the following non-exhaustive reasons:

1. NUM, in mines, has rejected an 11% increase that was offered by Impala Platinum (the world's second largest platinum producer) on the **minimum wage** as that will result in a minimum wage less than the R4500.00 they demand.
2. Ceppwawu, in the Petroleum /Chemical industry secured a new minimum wage of R4400.00 after the strike.
3. NUMSA in metal industry secured a minimum wage of lowest R3317.00 and R4500.00 after the strike and 8 – 10% increase.
4. Public Service's lowest paid employee is presently at R4193.00 with a possibility of R4478.00 if 6.8% is implemented. However there is no guarantee that it will be implemented.
5. Local Government's current minimum wage of R4339.00 for a category 1 (small) municipality and above that in higher municipal categories indicated clearly that a minimum wage of **R4602.82** after the implementation of the 6.08% is above all these other sector employers some of which are profit making sectors.<sup>112</sup>

Samwu in turn issued a press statement reaffirming that:

Our demand for an 18% increase across the board or R2000, whichever is greater, is very necessary to meet the economic hardship that municipal workers suffer. It is clear that the new SALGA councillors are no different from the old. They both follow national government's anti-working class policies of neo-liberalism. By this they want to squeeze workers whilst promoting the interest of capitalists and, of course, enriching themselves in the process. SALGA is attempting to use the new Municipal Systems Amendment Act to hide behind. This Act provides that SALGA has to consult with the Fiscal and Finance Commission before entering into a negotiated agreement. We say consult all you like but we are the negotiating partner.<sup>113</sup>

<sup>112</sup> Salga Circular 33/2011, Xolile George, Chief Executive Officer, 05 August 2011.

<sup>113</sup> Samwu press release, Tahir Sema, Samwu National Media and Publicity Officer, 08 August 2011.

This was certainly not the foundation needed to ensure that parties engage in constructive negotiations to ensure a collective agreement favourable to both parties. As it turned out, parties engaged in no formal and constructive negotiations at all. As Forbes recalled:

The most problematic part of the 2011 wage negotiations is the fact that we never engaged in formal, structured negotiations as would be expected of negotiating parties. Our time was consumed in legal processes to determine whether negotiations would be permitted as opposed to seeking agreement on wages. Salga was steadfast in their view that they would not be prepared to offer any more than the 6.08% they offered. Naturally we rejected this offer which was premised on a below 5% CPI plus the already agreed 2% over-and-above that. This was simply not acceptable to our members. In the end the only engagement between the parties happened during the mediation process whilst the strike was already underway. In hindsight, even though we won the right to re-open wage bargaining, in real terms there was no bargaining at all.<sup>114</sup>

## 2.5 The mediation process

Following the failure of the parties to engage in meaningful negotiations Samwu gave notice of strike action which commenced on the 15<sup>th</sup> August 2011. By the 23<sup>rd</sup> August 2011 parties agreed to a mediation session with the hope to resolve the national strike action by Samwu members.

At the commencement of the mediation process Salga raised reservations about the potential of reaching agreement particularly as they already advised municipalities to implement the 6.08 per cent and, more importantly, the impact of the Samwu strike was minimal in terms of strike support.<sup>115</sup> Notwithstanding that, they were prepared to engage in the mediation session as they are mindful of the fact that there is a relationship and that there is a need for sound relationship between the parties. If there were to be movement, Salga argued, it would only be based on fractional movement on the 6.08 per cent and must take account of the amendments to the Municipal Systems Act which places an obligation to consult the National Fiscal and Financial Commission and the Minister of Cooperative Governance and Traditional Affairs (COGTA). Salga were thus entering the mediation session from a position of strength.

<sup>114</sup> Ibid no 110.

<sup>115</sup> Interview with City of Cape Town official, 18 January 2013. Imatu gave notice to commence strike action on the 19<sup>th</sup> August 2011 but by then have not called out their members on strike.

The trade unions, facing the daunting task of seeking a wage settlement whilst at the same time not wanting to lose face with their constituent members, were more open to the mediation talks. This was understandable given that their members were not supporting the call for strike action.

After much wrangling between the parties the mediation process ended in a stalemate with both parties at the same position when they entered mediations. This after the trade unions rejected Salga's final wage offer of 6.3 per cent and Salga rejecting the union's final demand of 7.75 per cent.

It is to be noted that halfway through the mediation process the parties released the mediator arguing that they may be in a better position reaching settlement between them than having him around. This approach yielded no positive results as it would appear that neither party seriously considered the concerns expressed by the other. They in fact created no fertile ground to reach a potential settlement by engaging in positional bargaining with no consideration for the views of the other party. On this John Brand notes that:

A major challenge for both the facilitator and the parties is to regularly stand back from the total negotiation and to think about possible trades across issues. Whilst it is useful to work on issues in separate task teams, it is important to avoid being trapped in issue silos. Often if one party is prepared to address the other party's concerns on one issue, the other party may be prepared to do likewise on another issue. Particularly when distributive issues are being dealt with, one needs to seek to "expand the pie" by addressing employer interests on the one hand and to facilitate meeting employee distributive needs on the other. It is therefore necessary, at appropriate times, to break out of issue silos and to look for trades between issues.<sup>116</sup>

The strike being in its second week, a failed mediation process, dogmatic bargaining strategies adopted by both parties, grandstanding via the media – a recipe for disaster. Andrew Levy comments that:

Unless the intervention takes place at a time when the parties have moved sufficiently far along their respective concession and resistance curves, or have modified their bargaining attitude ratio to the point where they are actively seeking settlement, it is unlikely that conciliation will succeed.<sup>117</sup>

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<sup>116</sup> Supra note 110.

<sup>117</sup> Levy, A. (2012). Why are we having so many strikes? Understanding the current wave of Industrial action. *The Dispute Resolution Digest 2012*, 14.

## 2.6 The strike commences

### 2.6.1 The level of support for the strike

As mentioned above, Salga's stance during the mediation process was partly informed by the poor level of support evident during the strike. Levy predicts that as low of 20 per cent of the workforce heeded the strike call. He attributes this to the fact that the municipal sector had the most number of strikes over the preceding three years and that workers simply did not want to lose more money. This I believe is too simplistic and economistic. Municipal workers, particularly members of Samwu, have always heeded the call for strike action, particularly when it concerns wage adjustments.

It cannot however be argued that the 2011 strike was not unique in the sense that there was widespread workers' rejection for strike action. Strike statistics indicate that only 16 166 out of 208 539 municipal employees nationally supported the 2011 wage strike.<sup>118</sup> This represents a paltry 7.75 per cent strike support. Some of the reasons for the poor level of support can be attributed to 'strike fatigue'<sup>119</sup>; strikes to advance 'political' agendas<sup>120</sup>; failure to secure an agreement on wage curve and categorisation after two weeks of strike action<sup>121</sup> and widely reported discontent within Samwu.<sup>122</sup> This view was confirmed during an interview where it was acknowledged that:

Firstly, the most important aspect of the strike is that IMATU did not support the strike due to the violence caused by the previous SAMWU strike coupled with the

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<sup>118</sup> Supra note 115.

<sup>119</sup> As noted by Levy, the municipal sector had the most number of strikes over the preceding three year period. This should also include the 2005 and 2006 wage strike.

<sup>120</sup> Samwu mobilised its members in May 2011 around demands against the new Municipal Systems Act. This strike, which was meant to start just prior to the Local Government elections, was averted at the eleventh hour after engagement with the ruling ANC. As much as the strike did not proceed, members were mobilised for strike action and it was felt that they were used as political pawns to achieve some concessions from the state. Worse, the ruling ANC later reneged on some of the commitments made to avert the strike action.

<sup>121</sup> In April 2010 Samwu members engaged in strike action over a long outstanding wage curve and categorisation agreement. Following strike action, parties settled but the terms of the settlement agreement is still the subject matter of court proceedings. The resulting effect is that striking workers have not enjoyed the success of their two week strike action.

<sup>122</sup> See in this regard Sowetan Live. Available at <http://www.sowetanlive.co.za/news/2011/08/23/joburg-not-backing-samwu-strike> and <http://www.sowetanlive.co.za/news/2011/08/18/internal-row-hits-samwu-strike> (accessed on 19 December 2012).

intimidation of their members when they chose to march. The second comment I want to make is the strike was unsuccessful because SAMWU Gauteng did not bring out their members and the employer knew that and used that strategically. The third comment I want to make is that at a political level there was a general feeling that the unions have sacrificed service delivery demands and the demands of the community for better salaries and wages and that they would rather face striking workers than disgruntled communities. So the timing of the strike was bad and the demands were bad. The fourth comment is that the unions had no appreciation for the international financial climate and their demands were over the top, especially given the other financial matters being bargained, like TASK, the wage curve, etc. So, within a declining financial market the wage demands of the unions created a resistance with the employer. When the parties then engaged each other even with Charles Nupen, Salga were upfront with the facilitator that there was no money and that retrenchments were a reality. On the issue of the implementation of the 6.08%, my understanding is, and I speak under correction, this related to the previous multi terms agreement and that there was a discrepancy in that agreement which resulted in a dispute. On the public service issue, I think the unions were blind to the fact that the government sees the 3 tiers as one and that negotiations from the employer's side now is linked to that on the public service (in terms of the one public service regime). As things stand now, local government is out of sync with the public service and there has to be an appreciation that there cannot be disparities across the sectors. This is the reality. The amendments to the MSA were so designed that the relevant Ministers have to be consulted first so that the issue of fiscal and monetary values can be considered and applied. Therefore, before any negotiations, SALGA consults the relevant Ministers. Increases across the various sectors will in future, and in my view, mirror each other.<sup>123</sup>

## 2.6.2 Violent protest

Brand emphasises that the form of strike action is largely informed by the negotiating conduct of the bargaining parties. He asserts that:

Strike action can take two forms. The first is conventional, non violent strike action which is preceded by good faith negotiation. The second is violent strike action which is preceded by bad faith negotiation. It is conceivable for violent strike action to follow good faith negotiation and peaceful strike action to follow bad faith negotiation but these permutations are less common.<sup>124</sup>

Strike action in the South African context has historically been violent and indicative of the collective bargaining relations between the bargaining adversaries.<sup>125</sup> There has, in effect, been no transition from the forms of strike

<sup>123</sup> Supra note 115.

<sup>124</sup> Supra note 110.

<sup>125</sup> For a more detailed account of South African strike/protest action see J F Myburgh SC '100 Years of Strike Law' (2004) 25 *ILJ* 962; Puke Maserumule 'A Perspective on Developments in Strike Law' (2001) 22 *ILJ* 45; M S M Brassey 'The Dismissal of Strikers' (1990) 11 *ILJ* 213; Jeremy Gauntlett SC & Owen Rogers 'When all else has failed: Illegal strikes, ultimatums and mass dismissals' (1991) 12 *ILJ* 1171; Carole Cooper 'Strikes in Essential Services' (1994) 15 *ILJ* 903; Carole Cooper 'Sympathy Strikes' (1995) 16 *ILJ* 759;

action evident during the Apartheid era and now under a Constitutional state. This is largely due to the continued distrust between employers and trade unions particularly when there is a recognised and growing wage gap between the rich and poor.

The municipal sector is no different. The media has certainly not been sympathetic to Samwu strikes given high incidents of refuse being strewn onto the streets and set alight. To this Samwu responded by releasing a press statement which attempted to clarify the union's position on trashing and, as it argued, the class character thereof.

Many of our members are invisible to the public. They clean the streets at night, and gather in the trash that the public expects to be taken away, and often at great human cost. Our members do the work that many of the commentators would never dream of doing. Maybe the commentators and others should spend just one shift with the City night cleaners and open their eyes to the appalling conditions they have to endure. We collect dead animals and worse on the roadside, we unblock sewers, we fix water pipes in the freezing cold, respond to emergencies and much more besides. And yet the gap between these vital workers and those who are supposed to manage service delivery is as wide as it was under apartheid. That is the reality. When a street cleaner upturns a rubbish bag, does it not occur to journalists and commentators that this might be an act of defiance, of for one being visible, of not being taken for granted? Part of any industrial action is to make visible what it is that workers do, to force an awareness on the public of the value of these workers, not just as producers of goods, but as human beings

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Clive Plasket 'Industrial disputes and the offence of Intimidation' (1990) 11 *ILJ* 669; Clive Plasket & Richard Spoor 'The new offence of Intimidation' (1991) 12 *ILJ* 747; Alan Rycroft 'The Employer's 'Level of Tolerance' in a lawful strike' (1993) 14 *ILJ* 285; Kenneth Creamer 'The meaning and implications of the inclusion in the Constitution of a right to strike and the exclusion of a lock-out right: Towards asymmetrical parity in the regulation of industrial action' (1998) 19 *ILJ* 1; H M Seady & P S Benjamin 'The right to strike and freedom of association: An international perspective' (1990) 11 *ILJ* 439; Judy Parfitt 'Work-place ballots: Rules and procedures' (1992) 13 *ILJ* 294; Andrew Levy 'Can anybody hear me? The *Audi* Rule and the dismissal of unprocedural strikers' (2010) 31 *ILJ* 825; I Moodley 'The Key to Unlocking the 'Lock-out' (1990) 11 *ILJ* 1; H J Fabricius SC 'The Dismissal of strikers: A New Value judgment?' (1996) 17 *ILJ* 611; J J Gauntlett & D F Smuts 'Boycotts: The Limits of Lawfulness' (1990) 11 *ILJ* 937; B Grant 'Political Stayaways: The dismissal of participants' (1990) 11 *ILJ* 944; John Grogan 'Strike dismissals in the Public Sector' (1991) 12 *ILJ* 1; Barry Jammy 'Of Go-Slows and Fast Responses' (1991) 12 *ILJ* 482; Colin Kahanovitz 'Secondary Strikes: When are they permissible?' (2006) 27 *ILJ* 2026; A A Landman 'No place to hide – A trade union's liability for riot damage: A note on *Garvis & others v SATAWU* (2011) 32 *ILJ* 834; A A Landman 'Protected industrial action and immunity from the consequences of economic duress' (2001) 22 *ILJ* 1509; A A Landman 'A trade union's delictual liability regarding its members: *Jada & others v SAMWU* (2000) 21 *ILJ* 101; Catherine O'Regan 'Interdicts restraining strike action – implications of the Labour Amendment Act 83 of 1988' (1988) 9 *ILJ* 959; Tiziano Treu 'Strike Regulation and Job Security' (1992) 13 *ILJ* 1053; Dr Bernd Waas 'A comment on the South African law of strikes and lock-outs from a German perspective' (1997) 18 *ILJ* 214

who have lives, who have families to support, who have dreams. As a union we do not condone this action, but we at least try and understand it.<sup>126</sup>

One element of the 2011 municipal strike that cannot be justified is the looting of small traders at the union's Cape Town march.<sup>127</sup> At that march, a small section of the striking workers (and presumably some criminal elements) looted some small traders operating within the centre of the Cape Town inner city. This prompted the City of Cape Town to apply for an interdict of the strike which was granted by the Labour Court.

It is a truism that the violence associated with the Cape Town strike had much to do with the fact that their counterparts in other parts of the country did not heed the call for strike action. Brand argues that such violence is ordinarily associated with die-hard supporters following dwindling levels of support for strike action.

The unions have generally found the strikes hard to sustain because it is difficult for workers to lose pay for any protracted period in the South African situation and, as support for a strike has waned, the violence has often tended to escalate as die-hard supporters try to keep it alive.

Whilst the Samwu press release on the scattering of refuse is likened to the nature of the industry they engage in, and, as such understandable, looting, particularly of small scale hawkers, cannot be condoned. As noted earlier, South Africa has a rich history of turbulent strike action.<sup>128</sup> Whether that feature is likely to change in the foreseeable future remains to be seen.

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<sup>126</sup> Samwu press statement, 17 August 2011. See also the Times live at <http://www.timeslive.co.za/local/2011/08/17/samwu-strike-coverage-exaggerated> (Accessed on 21 January 2013).

<sup>127</sup> See also the City of Cape Town press release on the violent strike action in the city centre. Available at [www.politicsweb.co.za/politicsweb/view/.../page71654](http://www.politicsweb.co.za/politicsweb/view/.../page71654) (Accessed on 21 January 2013).

<sup>128</sup> See in this regard W Bendix, P Bibb, J Ibbotson 'The 1987 SATS Strike: An IR Institutional Environmental Perspective' (1988) *South African Journal of Industrial Relations*; G Simpson '[Murder on the Mines: Who is guilty?](#)' (1989) *South African Labour Bulletin*, Vol. 14, No. 3; S Meer and A Sitas 'Conflict – in the community and in the factories' (1989) *SALB* Vol 13 No 4/5; D Dison *Violence and the Law: An examination of some recent trials*, Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 9, 26 October 1989; E Webster & G Simpson '*Crossing the Picket Line: Violence*

### 2.6.3 Internal union discontent

Whilst Levy dismisses the idea that the Samwu strike was a failure due to internal union discontent, it was indeed a major factor. A significant number of the Samwu membership is based in Gauteng and Kwazulu Natal with 50 786 and 25 070 members respectively.<sup>129</sup> It is therefore not surprising that with the Gauteng membership not supporting the strike action and only 8 per cent on strike in Kwazulu Natal, it would be a failure. So too has been the case with other parts of the country where strike support has been poor.

The table below details the Samwu metropolitan membership as at May 2011. The purpose of presenting this data is to illustrate that unless you have all of the bigger metros supporting strike action it is doomed to fail.<sup>130</sup>

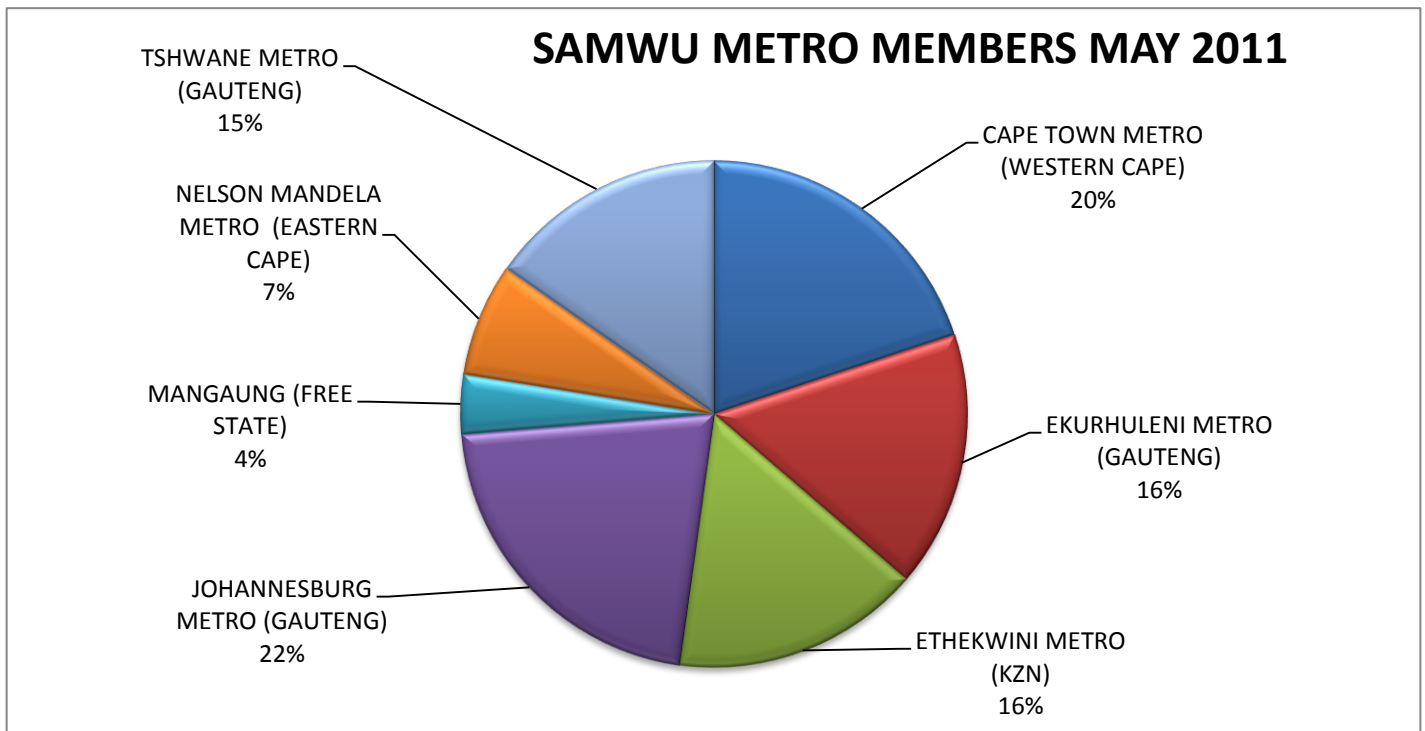
METROPOLITAN MUNICIPALITY	SAMWU MEMBERS MAY 2011
CAPE TOWN METRO (WESTERN CAPE)	12 570
EKURHULENI METRO (GAUTENG)	10 337
ETHEKWINI METRO (KZN)	10 036
JOHANNESBURG METRO (GAUTENG)	13 566
MANGAUNG (FREE STATE)	2 408

*in industrial conflict -the case of the Afcot strike'* (1990) *Industrial Relations Journal of South Africa*, 11, No. 4; J Joffe 'Violence and the Law in the 1989 Railway Strike' Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 2, 25 April 1990; L Segal & G Simpson 'Off the Rails: Violence in the Railway Strike of 1987' Paper presented at ASSA conference, July 1990; Andrew M Colman 'Crowd psychology in South African murder trials' *American Psychologist* (1991) Vol 46(10)1071-1079; G Simpson *Violence and Social Change: Some effects on the workplace and some possible solutions*. Paper presented to the National EAP Committee of the Institute for Personnel Management Conference *The Role of the EAP in Managing Trauma*, Johannesburg, August 1991; G Simpson & L Vogelmann 'Overcoming Violence: The role of business' *The Innes Labour Brief, Special Brief*, October 1992; K Von Holdt 'Alusaf: violence and racism in Northern Natal' (1993) *SALB* Vol 17 No 3 Jun; G Simpson 'Business and Endemic Violence in South Africa: Surviving the disaster or managing the transition?' Paper presented at *The 6th South African Disaster Recovery Conference*, Midrand, 16 - 17 March 1994;

<sup>129</sup> Secretariat report, Samwu 10<sup>th</sup> National Congress, August 2012.

<sup>130</sup> Metropolitan Councils (category A municipalities) are located in larger towns or cities. Unlike Local Councils and District municipalities, they perform all the Constitutionally defined local government functions.

NELSON MANDELA METRO (EASTERN CAPE)	4 544
TSHWANE METRO (GAUTENG)	9 636



Whilst the reasons for the strike boycott are not clear cut, reports suggest that it includes allegations of theft of union finances and infighting amongst the provincial leadership to members taking issue with the union president signing an altered agreement resulting in no gain to members following strike action the previous year.<sup>131</sup>

To make matters worse, the Cape Town strike, which was well supported at the start, lost momentum not because workers did not rally behind the wage demands but rather due to poor support in other parts of the country. This cannot bode well for a union whose slogan is 'An Injury to one is an Injury to All'. The Samwu Western Cape provincial secretary noted that;

We had great difficulty convincing members to maintain the level of strike action evident during the first few days. Media reports of the strike boycott in other parts had members questioning why they should strike for others. As one member said, 'Why must we strike when members in Joburg are working'?<sup>132</sup>

<sup>131</sup> Supra note 122.

<sup>132</sup> Interview with Samwu Western Cape Provincial Secretary, Andre Adams, 12 December 2012.

### 2.6.4 The strike outcome

Perhaps the most noteworthy feature of 2011 was a strike called in the municipal sector by SAMWU. It was a complete failure. At no stage did more than 20 per cent of the workforce heed the strike call, and in most cases, the call was rejected totally. There have not been many strikes in the recent history of South African labour that have failed as dismally.<sup>133</sup>

With such a commentary it is hardly surprising that the media, particularly labour economists, like Levy, had a field day ridiculing Samwu for what they believed was a ridiculous wage demand to start with. The union leadership certainly did not strengthen their internal support base with members being on strike for over two weeks without being able to force Salga to move from their initial offer of 6.08 per cent. As the City of Cape Town interviewee commented, 'SAMWU Gauteng did not bring out their members and the employer knew that and used that strategically'.<sup>134</sup>

What is most surprising is the fact that the national leadership of Samwu misread the preparedness of their members to engage in strike action. Surely the mood of members had to be known to them given that the unions tabled their wage demands in April 2011 and the strike only commenced in August 2011. Apart from the Cape Town strike, the national support for strike action was dismal. There is a view that given the poor level of support during the strike that the provincial leadership to the NEC misled the national body about their members' preparedness for strike action. Whether that means that leadership has lost touch with their constituent members is a debatable issue.

Of equal concern is the fragile relationship between the bargaining parties, the trade unions and Salga, and between the trade unions themselves. The relations between the latter is fragile primarily because of Imatu's consistent lack or poor showing during strike action thereby relying on the strength of Samwu members to gain wage demands. The relations between the trade unions and

<sup>133</sup> Op cit note 117 at 16. See also

<http://www.google.com/url?sa=X&q=http://dailymaverick.co.za/article/2011-08-28-how-not-to-strike-for-dummies-samwu-edition&ct=ga&cad=CACQARgAIAEoBDAAOABAlpHy8gRIAVgAYgJlbg&cd=vwAHxTsBwmA&usg=AFQjCNFSr5Ctte29Zj8nDlc9UKTPESgy7Q> (Accessed on 21 January 2013).

<sup>134</sup> Supra note 115.

Salga continues to be fragile because parties are unable to engage in meaningful negotiations in the interest of building sound ongoing relations informed by mutual gain for both. Whether that is to change remains to be seen.

## CHAPTER 3

### Analysing the strike

#### **Positional bargaining: the trade unions demand and the employer's offer – doomed from the onset?**

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in “saving face” – in reconciling future action with past positions – making it less and less likely that any agreement will wisely reconcile the parties' original interest.<sup>135</sup>

All of what is said by Fisher and Ury is indicative of the 2011 wage bargaining between the unions and Salga. The trade unions, most notably Samwu, even at the time of needing to accept a dismal strike failure and after failed negotiations, reverted back to their original wage demand of 18 per cent. This demand, Samwu argued, would be further explored with Salga. Needless to say, that never happened.

Salga, on the other hand, maintained what should be regarded as their principled position throughout the negotiations process – no form of movement whatsoever. They were prepared to sustain a three week long strike without making any concession. Their bargaining leverage, so to say, was the fact that Samwu was not well mobilised for strike action. Both these positional bargaining postures may have been driven by egos when measured against their media statements.

The wage demand of the trade unions was clearly not for an 18 per cent wage increase. Had that been the case Samwu would not have released a press

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<sup>135</sup> Fisher, Roger, and William Ury, with Bruce Patton, ed. *Getting to Yes: Negotiating An Agreement Without Giving In*. Second edition. New York: Penguin Books, 1991 at page 5.

statement barely a week into the strike that the union was holding out for a double digit wage increase and would be prepared to move from their 18 per cent demand if Salga moved from their offer of 6.08 per cent. The 18 per cent demand was therefore used as an inducement to get Salga to improve on their wage offer.

To make matters worse, both parties failed to consider any form of settlement consideration during the conciliation process or the mediation. It is doubted that the two experienced facilitators would have induced settlement between the disputing parties given their positions adopted. In hindsight, if the unions had done a proper assessment on the state of their members to pursue strike action, the recommendation of Professor Rycroft would have been accepted, at least by the trade unions. There would have been greater ease to justify a 7.5 per cent wage settlement than to justify no improved offer from the employer.

Wage bargaining in the recent period has been pegged against the CPI over the preceding twelve months which usually gives an indication of future spending patterns. Unions have accordingly aligned their wage demands with the prevailing CPI at the time of wage bargaining. Thus, if CPI over the last twelve months was, for example, 5 per cent, and it is estimated that CPI is likely to grow by 2 per cent over the next twelve months, ie a total of 7 per cent, then in order to secure members with a means to sustain themselves, unions must, at least, settle on an improvement on the 7 per cent CPI estimation. This would mean that any settlement lower than 7 per cent would mean a deflationary increase and, as such, setting workers aback financially.

### **3.2 Can there be an ongoing relationship between the bargaining parties?**

Institutionally, the trade unions and Salga will continue to engage in collective bargaining under the Salgbc. Whether that institutional relationship will equate to healthy working relations remain to be seen.

The choice of the collective bargaining relationship and, inherent therein, the ability to reach mutually acceptable settlements is ultimately determined by the negotiating parties. It is noted that;

Several approaches to negotiation have been proposed in the literature. In their classic work on the subject, Walton and McKersie (1965) identified four subprocesses in labour-management negotiations:

- ✓ *distributive* bargaining through which pure conflicts of interest are resolved;
- ✓ *integrative* bargaining through which parties solve common problems and seek complementary interest;
- ✓ *attitudinal restructuring* whereby parties seek to influence each other's attitudes and adjust the basic bonds which relate them;
- ✓ *intra-organisational bargaining* through which each side attempts to reach an internal consensus.

These distinctions are reflected also in the positional bargaining on the merits debate so eloquently led by Fisher, Ury, Brown, Goldberg, and their colleagues. An important factor underlying choice of approach to negotiation lies in the extent to which parties are concerned about their own and each other's outcomes - in a sense, whether they are concerned only about how much they can achieve for themselves out of the exchange, or whether they also have concerns about the relationship, and the extent to which other parties' needs might be met for purposes of nurturing positive longer-term ties.<sup>136</sup>

The Imatu interviewee pointed out that fundamental to the poor relations between the bargaining parties is a total lack of trust. He stated that unless the trust relationship is built, collective bargaining in the sector is likely to suffer. That may require of the bargaining parties to operate independent of the trust relationship for collective bargaining to succeed.

At the core of human relationships is a fragile interpersonal dynamic: trust. With trust, deals get done. Without it, deals are harder to negotiate, more difficult to implement, and vulnerable to changing incentives and circumstances. What is the secret to creating and sustaining trust in negotiation? A simple but sturdy norm in human behaviour: the norm of reciprocity.<sup>137</sup>

Having said that, the working relationship between the parties suffered a set-back when Salga gave notice to terminate the Main Collective Agreement of the Salgbc. They served notice<sup>138</sup> on the Salgbc on 21 May 2012 that the terms of the collective agreement shall lapse on the 1<sup>st</sup> July 2012. The effect of such a notice of termination means that all collective agreements, levels of bargaining,

<sup>136</sup> Anstey, Mark *Managing Change negotiating conflict*. Third edition, Juta Cape Town (2008).

<sup>137</sup> Fisher, Roger, and William Ury, with Bruce Patton, ed. *Getting to Yes: Negotiating An Agreement Without Giving In*. Second edition. New York: Penguin Books, 1991 at page 59.

<sup>138</sup> This was done in compliance with section 23(4) of the LRA. That section reads that "Unless the *collective agreement* provides otherwise, any party to a *collective agreement* that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties".

dispute resolution mechanisms and the like will be of no legal effect after the termination date.

The unions challenged this notice of termination arguing that given the nature of the Main collective agreement a notice period shorter than twelve months would be unreasonable and as such invalid and that, in any event, the terms of the Salgbc collective agreements on members' employment conditions are protected by section 23(3) of the LRA.<sup>139</sup> Salga's notice of termination became the subject matter of wage bargaining in 2012 where it was agreed that parties shall continue to engage in further bargaining to amend the current main collective agreement. This had to be concluded by the 31<sup>st</sup> December 2012.<sup>140</sup> Negotiations are however ongoing on a new main collective agreement.

The above is indicative of the bargaining relationship between the two parties. As has been evident during the failed wage bargaining, much of that was preceded by litigation between the parties and less or no interest based bargaining. Salga, in 2003, also threatened to withdraw from the Salgbc. Given that the South African system of collective bargaining is premised on voluntarism<sup>141</sup>, regard must be had for the continued existence of a bargaining relationship in the sector. This will require of the bargaining parties, in the words of Ury *et al* to 'show reciprocity'.

### 3.3 Is there such a thing as good faith bargaining?

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<sup>139</sup> Section 23(3) of the LRA reads "Where applicable, a *collective agreement* varies any contract of employment between an *employee* and employer who are both bound by the *collective agreement*". This means that the 'old' conditions of employment shall continue to be enjoyed by existing employees within the registered scope of the Salgbc. The case authority on the application of section 23(3) is to be found in SOUTH AFRICAN MARITIME SAFETY AUTHORITY v MCKENZIE 2010 (3) SA 601 (SCA).

<sup>140</sup> Clause 11.2 of the 2012 – 2015 Salary and Wage collective agreement reads "... the parties have until 31 December 2012 to conclude a new collective agreement referred to herein". A literal interpretation could have the resulting effect that should no collective agreement be reached, the Main Collective agreement lapses. As at 29<sup>th</sup> January 2013, parties are continuing to negotiate a new agreement.

<sup>141</sup> For a commentary on the voluntarism system of collective bargaining in South Africa see S Godfrey, J Maree, D Du Toit & J Theron *Collective Bargaining in South Africa: Past, present and future?* (2010) Juta, Cape Town at pages 89-90. See also Godfrey & Bamu op cit note 12 at 219-220.

The South African constitution recognises the right to engage in collective bargaining.<sup>142</sup> What is not defined either in the constitution or the enabling legislation (LRA) is how the bargaining parties must conduct themselves. The LRA however requires of the bargaining parties to promote orderly collective bargaining.<sup>143</sup> As much as 'orderly' collective bargaining is not defined it presupposes that parties should bargain rationally and focusing on issues as opposed to individuals.

The LRA, unlike the 1956 act, places no obligation on the bargaining parties to negotiate in good faith. Even if the current act prescribed good faith bargaining, I doubt that, in the South African context, such a concept would have succeeded. Rycroft, commenting on a draft Bill seeking to amend the 1956 LRA, notes that:

For those who believe collective bargaining should be a no-holds-barred exercise, the requirement of acting reasonably will be regarded as a harmful fiction. It has even been suggested that 'good faith' is not part of the bargaining process and is, in fact, impossible of attainment under the conditions of a capitalist economic system. Yet the legal requirement of good faith bargaining in many jurisdictions has meant that courts have had to come to terms with the reality of the power struggle involved in collective bargaining. It has, for example, been accepted in Ontario that 'hard bargaining, albeit ruthless, is not bad faith bargaining'<sup>144</sup>

South African politics are rooted in class politics. This has led to there being an inherent and historical context within which wage bargaining took place.<sup>145</sup> Many of those characteristics continue to be evident in a Constitutional democracy. Thus, even though Samwu is affiliated to Cosatu with the latter being in Alliance with the ruling ANC, that has not translated into harmonious working relationship between Samwu and Salga which, as has been pointed out, is impaired with trust issues. To that extent, the 2009 Samwu national congress noted that:

Salga represents the petit-bourgeois or middle class and has consistently followed the bourgeoisie's neo-liberal programme, Gear. A capitalist agenda is transmitted

<sup>142</sup> Section 23(5). It is to be noted that the right to engage in collective bargaining cannot be equated with a duty to bargain. See in this regard *SANDU v Minister of Defence & others; Minister of Defence & others v SANDU* (2006) 27 ILJ 2276 (SCA).

<sup>143</sup> Section 1(d)(i)

<sup>144</sup> Rycroft, Alan *The Duty to Bargain in Good Faith* (1988) 9 ILJ 202.

<sup>145</sup> For a detailed commentary see S Godfrey, J Maree, D Du Toit & J Theron *Collective Bargaining in South Africa: Past, present and future?* (2010) Juta, Cape Town.

through SALGA from the ANC and generally follows the 1996 class project's leadership style.<sup>146</sup>

Given the ideological differences between, in particular Samwu, and their bargaining adversary, Salga, it is questionable whether they are indeed able to establish a harmonious bargaining arrangement. They are at opposite poles around matters such a privatisation, commercialisation of the sector and the manner local government is run. Critical in all of this is the wage gap within the sector where many municipal managers earn millions per year in poor performing municipalities.<sup>147</sup> As one Samwu press statement read:

SAMWU notes with concern that Municipal Managers earn far in excess of high ranking politicians. What is more worrying to us, is that while Municipal Managers get paid exorbitant salaries, workers are time and time again refused a decent living wage in the form of annual wage increases and more equitable wage curves.

It is worrying that Municipal Managers of six of South Africa's cities all earn more than their political bosses, this is before the huge increases they stand to receive in July this year. Tshwane city manager Jason Ngobeni and his Johannesburg counterpart, Trevor Fowler, after the absurd increases of about 20% being proposed, now stand to earn R3.25m and R3.23m a year from 1 July 2012.

It is ridiculous that these managers get paid millions, even though the Municipalities they work for are plagued with corruption, nepotism, crisis and the poor delivery of services.

President Zuma earns about R2.5m a year, Deputy President Motlanthe about R2.2m and Chief Justice Mogoeng Mogoeng is paid R2.23m a year.

The severity of the challenges faced by many Municipalities warrants many of these managers to be sacked, let alone receive handsome remunerations and performance bonuses.

Once workers learn that their city manager receives such hefty salaries, we can expect nothing less than outrage, given that in some Municipalities, the lowest paid workers get paid as little as R3000 per month.<sup>148</sup>

### **3.4 Collective bargaining and the law. A look at key LRA sections**

#### **3.4.1 Disclosure of Information (s 16) and Consultation (s 189(6))**

<sup>146</sup> Samwu National Congress, 2009, Collective Bargaining resolutions, Bela Bela, Limpopo.

<sup>147</sup> It could be argued that the wage gap is greater in the private sector. That may well be so but the local government sector is unique in that even at poor performing municipalities, municipal managers continue to earn exorbitant salaries.

<sup>148</sup> Samwu press release, Samwu National Media and Publicity Officer, 28 May 2012.

Disclosure of information for the purposes of collective bargaining is regulated by section 16 of the LRA.<sup>149</sup> To rely on the provisions of section 16 of the LRA, a

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<sup>149</sup> That section reads;

- (1) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
- (2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).
- (3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.
- (4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.
- (5) An employer is not required to disclose information-
  - (a) that is legally privileged;
  - (b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
  - (c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
  - (d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.
- (6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.
- (7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
- (8) The Commission must attempt to resolve the dispute through conciliation.
- (9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.
- (10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.
- (11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively

trade union (or trade unions acting jointly), must demonstrate that they are the recognised collective bargaining agents and that the information sought will advance effective and transparent negotiations between the parties.

Failure to disclose must be for reasons set out in s16 (5) of the act. Disputes of this nature fall under the exclusive jurisdiction of the Commission for Conciliation Mediation and Arbitration (CCMA).

The application of this LRA provision, I argue, is premised on bargaining parties having a degree of trust between them. If there is no trust relationship an employer is less likely to disclose information the trade union(s) is likely to use against it. The municipal sector is one such case in point where some information like, for example, the actual remuneration of senior management and that of Councillors could be used to justify higher wage demands for lower category employees.<sup>150</sup> This will similarly be the case where the trade unions demand information relevant to outsourced services, municipal revenue generation etc in order to counteract, for example, the outsourcing of such services.

As the Imatu interview pointed out, there is no trust relationship between the parties and this has caused major obstacles in the collective bargaining arena. This view is shared by the Samwu staff interviewed. Perhaps more strikingly, the bargaining patterns, that of power play to induce agreement, has been the order of the day within the Salgbc almost on an annual basis.

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the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.

- (12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.
- (13) When making an order in terms of subsection (1 2), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.
- (14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award.

<sup>150</sup> Supra note 148.

If there had been a genuine attempt on the side of both parties to engage in meaningful negotiations principled on good faith bargaining, the 2011 wage negotiations (or any negotiations for that matter), may have had a different outcome. It is however debateable whether good faith bargaining is the driving force behind meaningful negotiations.

The City of Cape Town official interviewed never suggested that Salga could not afford a wage adjustment higher than 6.08 per cent. He pointed out that Salga had knowledge that the Gauteng province of Samwu did not support the strike; they viewed their position as principled given the existence of a multi-year agreement and the fact that local government wage bargaining had to be brought in line with that of the public sector. Disclosure of information I believe would not have moved Salga from their principled position adopted.

The same would apply to the trade unions. Their wage demand for an 18 per cent or R2000 salary adjustment must be measured against the declared CPI figure over the agreed period.<sup>151</sup> The unions would have had great difficulty gaining public support knowing full well that the declared CPI was 4.08 per cent. Worse still, Samwu issued a press release stating that their real mandate is clearly not for an 18 per cent but rather a double digit increase. This is not the hallmarks of a trust relationship where, as bargaining parties, they are able to sit around the table to negotiate an interest gain wage agreement. Disclosure is indicative of a mutual gain relationship and not the other way around.

I will argue that the same line of argument applies for the purposes of consultation as envisaged by section 189(6) of the act. It is however worthwhile to note how the scheme of the LRA is meant to operate in the following commentary:

It is trite law that s 189 of the Labour Relations Act 66 of 1995 (LRA) imposes on employers three main duties prior to retrenchment: to consult, to make disclosure, and to attempt to reach consensus on a variety of issues. These duties are closely intertwined: without disclosure, consultation is uninformed, making consensus difficult to achieve... This consultation process is meant to be a rational process. As s 189(5) and (6) puts it, the employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting. The employer must *consider* and *respond* to the

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<sup>151</sup> As pointed out earlier, trade unions use the CPI data as a measurement to determine wage demands.

representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.<sup>152</sup>

### 3.5 At what stage do you settle? The concept of 'ripeness to settle'

At what stage is settlement most likely? The concept of 'ripeness to settle' is defined as;

"Ripeness" describes the conditions under which efforts to resolve conflict appear to be timely, and recognizes the cyclical character of conflict with its ebbs and flows and peaks and troughs. Much of the scholarly writing on ripeness suggest that the most likely circumstances for effective intervention towards settlement is when there is a "hurting stalemate" between the parties, where each party is trapped without obvious options for escaping or avoiding the conflict. Hurting stalemate provides an incentive for the parties to ask themselves what they want and need out of this conflict and how they can take the necessary steps to reduce the negative impact of the dispute on their lives, their businesses, their reputations, and their long-term plans. Parties who find themselves in a hurting stalemate are motivated to settle, but they are also resentful and bitter, and negotiations are often very acrimonious.<sup>153</sup>

Inherent in the 'ripeness' concept is a preparedness on both parties to reach settlement either between themselves or via a conciliated/mediated process. The 2011 municipal wage bargaining never reached the stage where both parties had 'a shared perception of the desirability of a compromise'. Had that been the case, Salga would have moved from their original offer of 6.08 per cent following strike action.

Strike action in itself ordinarily induces a 'ripe' situation to settle as a means to minimise conflict which could harm relations and the image of the bargaining parties. That is if your strike action is effective. As was evident, Salga had a

<sup>152</sup> Rycroft, Alan 'Pre-Retrenchment Disclosure? Well, Maybe Not... *Robinson & Others v Pricewaterhousecoopers*(2006) 27 ILJ 836 (LC)*Chester Wholesale Meats (Pty) Ltd v Niwusa*(2006) 27 ILJ 915 (LAC) (2006) 27 ILJ 2014.

<sup>153</sup> Julie Macfarlane 'Why Do People Settle' (2001) 46 McGill L.J. 663 at 710. See also Marieke Kleiboer 'Ripeness of Conflict: A Fruitful Notion?' *Journal of Peace Research*, Vol. 31, No. 1 (Feb., 1994), pp. 109-116; William Zartman, *Ripe for Resolution: Conflict and Intervention in Africa* (2ed 1989); Landon E. Hancock 'To Act or Wait: A Two-Stage View of Ripeness' *International Studies Perspectives* (2001) 2, 195-205; Dean G. Pruitt 'Whither Ripeness Theory?' Working Paper No. 25, Institute for Conflict Analysis and Resolution, George Mason University.

knowledgably understanding of the organisational challenges Samwu were facing and were prepared to weather strike action.

Samwu's best alternative to a negotiated agreement (BATNA)<sup>154</sup> was to engage in strike action to force a settlement with Salga. When this yielded no positive results, they (and Imatu) opted to walk away from the bargaining table without concluding any collective agreement. Salga effectively had all the leverage to determine the bargaining outcome.

As stated earlier, the concept of 'ripeness' require both parties to seek a settlement to resolve their dispute. Where one party has far greater leverage over the other, in this case Salga, the drive to settle is diminished and, consequently, the 'ripeness' to settle.

### **3.6 Applying strike theory to the 2011 strike – where did it all go wrong?**

Andrew Levy, commenting on the 2011 municipal strike noted that 'there have not been many strikes in the recent history of South African labour that have failed as dismally'. That, it must be said, are views expressed by a labour economist. Organisationally Samwu must have felt the pain even more. This section explores where it all went wrong, before, during and after the strike action.

#### **Before the Strike**

Perhaps the most decisive mistake Samwu made was to call off their strike action prior to the local government elections. They had all the leverage and would have been in a position to secure a wage settlement favourable to their members. As it ended up, they bowed under political pressure from the top brass of the ruling ANC who promised them concessions post the elections. None of those concessions were realised and, with that, the leverage Samwu had.

How important was the union's wage demand in the context of the three year wage agreement? Was proper research done on this? It must be accepted that the 2011 negotiations happened by default. If CPI stood at, for example, 5 per

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<sup>154</sup> The term Best Alternative to a Negotiated Agreement (BATNA) is a concept coined by Roger Fisher and William Ury. See in this regard Fisher, Ury and Patton, *Getting to Yes: Negotiating an agreement without giving in*, second edition, Random House Business Books, 1991.

cent than there would have been no re-opening of negotiations and workers would have needed to be content with a 7 per cent wage adjustment. The unions could do nothing under those circumstances given the currency of the wage agreement. Equally important, could a demand of 18 per cent or R2000 be justified as a legitimate demand that members will rally around in a period of relative low inflation if inflation is used as the yardstick to determine wage increases?

There is a sense that members were not regularly kept informed on the legal processes to determine whether wage negotiations could be re-opened or not. This would signal a breakdown in communication between leadership and the membership base. Whilst it is accepted that these legal processes takes long to be determined (and therein the difficulty to regularly communicate any progress) it is critical to at least use those periods to prepare members for potential outcomes and responses thereto. This appeared not to have been the case.

Were members prepared for strike action? Levy commented that Samwu members were suffering from strike fatigue given the high prevalence of strike action in the sector. Was this tested before the strike? Perhaps the bigger question is this: what per cent of Samwu members indicated their support for strike action? Surely the National leadership of the union had to be aware of the discontent within the Gauteng province of the union. After all, media reports of that discontent surfaced in the media prior to the intended strike action. Was there any intervention and, if not, why not? With the union's Gauteng province being the largest in terms of membership base, it would be suicidal to pursue strike action without their support. One Samwu NEC member interviewed believed that the national structure was misled by provinces to believe that members are ready for strike action. If that is the case surely it implies that there is a breakdown between leadership and their base constituency, the membership.

A strike committee at the workplace is a useful tool to prepare workers for strike action and to manage the strike when in progress. The strike committee could also be the link to keep contact with the union office. There appear to be little evidence that strike committees existed to manage the strike or that there was any move to establish strike committees.

Lastly, it is important to sensitise the broader community about the intended strike action. This is particularly important in the municipal sector where services are rendered to local communities. Communities need to understand the reasons for the strike action with a view of supporting it. This appears not to have been the case and is indicative of a poor media communication strategy.

### **During the strike**

Assuming members indicated their support for strike action prior to the strike, were those members participating in the strike? Unions tend not to keep record of members supporting strike action and are accordingly not able to account for the level of support during strike action. It is therefore by no accident that the strike data relied on was supplied by the employer body. Surely the level of support during the strike determines the strategies to be adopted at that time. So if, as Levy commented, that only 20 per cent of Samwu members supported the strike action than that surely could be used by the union as a barometer to suspend or call off the strike action.

It would also appear that the union had no strike plan or programme of action. Too often strikes take the form of marches in major cities. This requires much coordination in terms of transport arrangements (which are costly), compliance with legislative processes<sup>155</sup> and, perhaps more importantly, it removes workers from the site of struggle, their workplace. The latter is of particular importance as strike action at the workplace could deter strike breaking or the use of replacement labour.

Internal union communication is critical particularly to brief members on the state of negotiations. Far too often workers hear about the state of negotiations through the mainstream media like television, radio and print media. The primary source of information must be internal union communication as, after all, the strike primarily affects striking workers. A systematic communication strategy would assist the union to communicate the state of negotiations and also facilitate obtaining fresh mandates when needed.

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<sup>155</sup> Any march must be preceded with an application in terms of the Gatherings act, act 205 of 1993.

Discipline during the strike is an important indicator of how serious workers are to fight for their demands. This would include, amongst other, attending union report back meetings, ensuring that striking workers are not ill behaved like drunkenness and the type of violent behaviour (looting) during the Cape Town march. Such conduct has the effect of swaying public opinion against the strike action.

It would also assist to get political support for the strike action. This would however be a difficulty in the municipal sector when your political ally is also your employer.

What was lacking is a clear education programme teaching workers on the nature of strike action and the importance thereof. In this regard the following quote aptly spell out the politics of strike action:

Strikes ... teach the workers to unite; they show them that they can struggle against the capitalists only when they are united; strikes teach the workers to think of the struggle of the whole working class against the whole class of factory owners and against the arbitrary, police government. This is the reason that socialists call strikes "a school of war", a school in which workers learn to make war on their enemies for the liberation of the whole people, of all who labour, from the yoke of government officials and from the yoke of capital<sup>156</sup>

### **After the Strike**

Most importantly, an assessment of the strike is a prerequisite. This assessment should ideally include, amongst other, whether, in the opinion of members, the strike was a success or failure; whether the strike was supported, not only by members but the broader community; whether there are any lessons to be learned from the strike; whether members gained any political consciousness; how the union should respond to potential disciplinary actions against members etc The importance of a strike assessment cannot be overstated as the lessons of the last strike are meant to prepare you for any potential future strike action.

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<sup>156</sup> V.I. Lenin

## Chapter 4

### Concluding remarks - Are there lessons to be learned?

#### 4.1 The bargaining arrangement – A need to rethink?

Collective bargaining has become a sophisticated area of trade union activities. Long gone are the days when workers simply demanded X per cent or X rand increases. But why? There is no legal impediment stating what parties must demand or settle on either in terms of monetary or per cent wage adjustments. That is left to the bargaining parties. Why then can workers not demand what they believe is a legitimate improvement to their wage and conditions of employment? After all, your bargaining power is measured not by the skill of your negotiating team but rather your organisational strength.<sup>157</sup> It is that area that these concluding remarks will focus on. In suggesting a number of areas for consideration I am mindful that these suggestions are preliminary and not exhaustive.

The above may, in part, be correct but it is negated by present-day realities. South Africa no longer operates within its own cocoon as has been the case under apartheid. Developments within the economy, including local government, either impacts or is impacted on by global trends. One significant impact is the changing nature of formal permanent employment. A large section of the working population is located in the informal or less formal employment relations than 20 years ago. More significantly is the fact that many of these workers are not unionised or enjoying formal collective bargaining arrangements. Labour broking is perhaps the most common of such experiences. Notwithstanding these trends, trade unions have done little to recruit and organise these categories of workers. The key demand has been for the outright banning of labour broking. Such a demand is not likely to stand the test of a Constitutional Court ruling, if challenged, if regard is to be had for a similar challenge in the Namibian Supreme Court of Appeal<sup>158</sup> and the fact that it is regulated by International law.<sup>159</sup> The better option is to organise

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<sup>157</sup> I do however believe that if you have skilled negotiators than you are closer to attaining your goals than having individuals with a lack of negotiating skills.

<sup>158</sup> AFRICA PERSONNEL SERVICES (PTY) LTD V GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND OTHERS 2009 (2) NR 596 (SC).

<sup>159</sup> See in this regard Article 1(b) of the International Labour Organisation (ILO) Convention 181 on Private Employment Agencies. Available at <http://actrav.ilo.org/octrav-english/telearn/global/ilo/law/ilo181.htm>. (Accessed on 02 February 2013).

labour broker staff with a linked demand that they should be directly employed by municipalities.

Critical to any negotiations is researching the sector you operate in. After all, your demands must be informed by the peculiarities of your sector, locally and internationally. So if, for example, there is an emerging school of thought advancing a perspective that public sector unions are more privileged than their private sector counterparts, it becomes important to understand and counter such perspectives. For if you do not that perspective becomes the dominant view that shapes the mind of the broader public.

So too is the importance of understanding the political landscape you operate in – at the earliest opportunity. Unions, in the current period, have become organisations responding to developments rather than setting the scene for change. This is a departure from the height of the union movement between the periods 1973 to 1994 when unions, at least those affiliated to COSATU, tabled demands broader than workplace issues. In this regard, and mindful of the Samwu characterisation of Salga, how do you define that relationship given that the ruling ANC is in effect the political party controlling Salga? As pointed out earlier, the suspension of the Samwu strike prior to the 2011 municipal elections is a case in point. As such, your political affiliation must be based alongside class lines and not some auxiliary reasons.

Also, contemporary collective bargaining in the municipal sector concerns itself primarily with wage and wage related demands.<sup>160</sup> For a union that operates in a sector that is the deliverer of service delivery, demands that would improve service delivery to, in particular, working class communities should be a key component of wage bargaining demands. This has however not been the case. This is rather surprising given the extensive congress resolutions Samwu adopted affecting local communities. There is an almost immediate need for the trade union to build an axis with community organisations. The high level of service delivery

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<sup>160</sup> I note however that the last two rounds of wage bargaining had as a key demand the filling of vacant positions within the sector. The 2009 wage collective agreement, for example, stipulated that 'All vacant, funded, critical and essential posts at all levels in Municipalities shall be filled on or before 1 July 2010, after such posts have been submitted to the appropriate forum for consultation.' The wording of the agreement has however been the subject of conflicting interpretations with the resulting effect that not much reliance could be placed on its enforcement.

protest over the last few years is indicative of such a need.<sup>161</sup> Such an axis is also likely to lay to rest the view that trade unions only seek to advance the interest of their members.

The fact that wage and wage related conditions of employment are exclusively negotiated at central level presents its own problems. The following quote perhaps best articulate that view:

... focusing entirely on centralised bargaining almost inevitably leads to a weakening of shopfloor organisation, and less control by union members over the collective bargaining process. The result is the distancing of union officials from members and a decline in democratic decision-making in the union. In the old industrial council system this resulted in bureaucratic trade unions and the disappearance of worker militancy.<sup>162</sup>

Unless unions find the balance between centralised collective bargaining and bargaining subject matters that directly involve rank and file members, the above observation may prove to be the future of Samwu – and with that the ‘disappearance of worker militancy’. Even under a framework of centralised collective bargaining, the direct involvement of members is crucial. Too often members are presented with a set of recommendations which is difficult to influence. As a result they assume no ownership of the demands submitted for bargaining. A system needs to be devised where members are comfortable to interact even with the most complicated of bargaining subject matters.

To achieve the above point will require an overhaul of union education. Union education, despite congress resolutions to the contrary, is only located at the level of shop stewards. Even that training is limited in respect of meeting the challenges of current day unionism. Education, particularly political education, is required at the level of ordinary members enabling them to uphold constituency based mandating and accountability of union leaders and officials.

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<sup>161</sup> News 24 (21 January 2013) reported that there were 3 258 police recorded service delivery protest in the country between January 2009 and November 2012. This amount to service delivery classified protest every second day in South Africa. Available at <http://www.news24.com/SouthAfrica/News/SA-has-a-protest-every-two-days-20130121> (Accessed on 02 February 2013).

<sup>162</sup> Godfrey & Bamu op cit note 12 at 222.

Wage demands must take the form of constituency based proposals thus ensuring that members are directly involved in determining wage demands. These proposals should in turn be reported and debated at local shop stewards committees and regional shop stewards councils. These shop stewards meetings should not simply take the form of reporting on their mandates as a means to consolidate workplace demands but should be vigorously debated amongst all. Where possible, representative bodies of the local communities must be invited to articulate their specific demands. These must be followed by provincial collective bargaining conferences and ultimately, a national collective bargaining conference. Naturally, the outcome of the national conference should be reported to members as an outcome of their demands. This is the democratic centralism that should exist in developing union positions, not just around wage demands but other policy considerations. Ideally, such a model will serve an even better purpose if it is a joint collaboration between Samwu and Imatu.

As Godfrey and Bamu points out, unless there is a strong sense of shop floor organisation, members could lose their militancy and, I argue, a sense of organisation. The recent developments in the mining industry and indeed the agricultural sector should be an eye opener to the traditional trade unions. The final conclusion is a warning to trade unions, as well as employers: Shape up or else.

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## **Bibliography**

### **Statutes**

Constitution of the Republic of South Africa 1996.

The Labour Relations Act 66 of 1995.

Organised Local Government Act 52 of 1997.

### **Cases (South African)**

*Cape Gate (Pty) Ltd v NUMSA & others* [2007] 5 BLLR 436 (LC).

*Ex parte Chairman of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC)

*National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC).

Explanatory Memorandum (1995) 16 ILJ 278.

SOUTH AFRICAN MARITIME SAFETY AUTHORITY v MCKENZIE 2010 (3) SA 601 (SCA).

*SANDU v Minister of Defence & others; Minister of Defence & others v SANDU* (2006) 27 ILJ 2276 (SCA).

### **Cases (Foreign)**

AFRICA PERSONNEL SERVICES (PTY) LTD V GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND OTHERS 2009 (2) NR 596 (SC).

### **Interviews**

Interview with Samwu Western Cape Provincial Secretary, Andre Adams, 12 December 2012.

Interview with Dale Forbes, Samwu Collective Bargaining Officer, 12 December 2012.

Interview with Imatu Western Cape Regional Manager, Ettiene Bruwer, 24 January 2013.

Interview with Roger Ronnie, 12 December 2012.

Interview with City of Cape Town official, 18 January 2013.

## Secondary Sources

A A Landman 'A trade union's delictual liability regarding its members: *Jada & others v SAMWU* (2000) 21 *ILJ* 101

A A Landman 'No place to hide – A trade union's liability for riot damage: A note on *Garvis & others v SATAWU* (2011) 32 *ILJ* 834

A A Landman 'Protected industrial action and immunity from the consequences of economic duress' (2001) 22 *ILJ* 1509

Adelzadeh, Asghar. "From the RDP to GEAR: the gradual embracing of neo-liberalism in economic policy." *Transformation* 31 (1996).

Alan Rycroft 'The Employer's 'Level of Tolerance' in a lawful strike' (1993) 14 *ILJ* 285

Andrew Levy 'Can anybody hear me? The *Audi* Rule and the dismissal of unprocedural strikers' (2010) 31 *ILJ* 825

Andrew M Colman 'Crowd psychology in South African murder trials' *American Psychologist* (1991) Vol 46(10)1071-1079

Anstey, Mark *Managing Change negotiating conflict*. Third edition, Juta Cape Town (2008).

B Grant 'Political Stayaways: The dismissal of participants' (1990) 11 *ILJ* 944

Bardouille, N. C. (2000) *The Transformation of Governance Paradigms and Modalities: Insights into the marketization of the public service in response to globalization*.

Barry Jammy 'Of Go-Slows and Fast Responses' (1991) 12 *ILJ* 482

Brand, John, 'STRIKE AVOIDANCE – HOW TO DEVELOP AN EFFECTIVE STRIKE AVOIDANCE STRATEGY – paper presented at the 23<sup>rd</sup> Annual Labour Law Conference, Sandton, August 2010

Brenner, N and Theodore N (2002), Cities and the Geographies of “Actually Existing Neoliberalism

Carole Cooper ‘Strikes in Essential Services’ (1994) 15 *ILJ* 903

Carole Cooper ‘Sympathy Strikes’ (1995) 16 *ILJ* 759

Casale, Giuseppe & Tenkorang, Joseph ‘Public service labour relations: A comparative overview’ (Social Dialogue, Labour Law and Labour Administration Branch, International Labour Office, Geneva August 2008)

Catherine O'Regan ‘Interdicts restraining strike action – implications of the Labour Amendment Act 83 of 1988’ (1988) 9 *ILJ* 959

Chamley, Christophe & Pinto, Brian ‘Why Official Bailouts Tend Not to Work: An Example Motivated by Greece 2010’ *The Economists’ Voice* February, 2011 1-5.

Charnovitz, Steve ‘The Influence of International Labour Standards on the World Trading Regime - A Historical Overview’ (1987) 126 *Int'l Lab. Rev.* 565-584

Cheadle H, Davis D, Haysom N *South African Constitutional Law: The Bill of Rights*, Durban LexisNexis Butterworths 2003 [2004] 1 *All SA* 521.

Cheadle, Halton ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ (2006) 27 *ILJ* 663.

Clive Plasket & Richard Spoor ‘The new offence of Intimidation’ (1991) 12 *ILJ* 747

Clive Plasket ‘Industrial disputes and the offence of Intimidation’ (1990) 11 *ILJ* 669

Colin Kahanovitz ‘Secondary Strikes: When are they permissible?’ (2006) 27 *ILJ* 2026

D Dison *Violence and the Law: An examination of some recent trials*. Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 9, 26 October 1989

Dean G. Pruitt ‘Whither Ripeness Theory?’ Working Paper No. 25, Institute for Conflict Analysis and Resolution, George Mason University.

Dr Bernd Waas ‘A comment on the South African law of strikes and lock-outs from a German perspective’ (1997) 18 *ILJ* 214

Du Toit *et al Labour Relations Law* 5ed (2006) LexisNexis, Durban.

Du Toit, D & Ronnie, R ‘The necessary evolution of strike law’ in le Roux, Rochelle & Rycroft, Alan (eds) *Reinventing Labour Law* (2012) Juta and Company Limited, Cape Town.

- Du Toit, D 'What is the future of collective bargaining (and labour law) in South Africa?' (2007) 28 *ILJ* 1405-1436
- E Webster & G Simpson 'Crossing the Picket Line: Violence in industrial conflict - the case of the Afcol strike' (1990) *Industrial Relations Journal of South Africa*, 11, No. 4
- Esterhuysen, Willie *Endgame: Secret Talks and the End of Apartheid* (2012)
- Fisher, Roger, and William Ury, with Bruce Patton, ed. *Getting to Yes: Negotiating An Agreement Without Giving In*. Second edition. New York: Penguin Books, 1991.
- Fragmentation to Unification: The development of Collective Bargaining in Local Government, First Edition (2011) South African Local Government Bargaining Council, Durban.
- G Simpson & L Vogelman 'Overcoming Violence: The role of business' *The Innes Labour Brief, Special Brief*, October 1992
- G Simpson 'Business and Endemic Violence in South Africa: Surviving the disaster or managing the transition?' Paper presented at *The 6th South African Disaster Recovery Conference*, Midrand, 16 - 17 March 1994
- G Simpson 'Murder on the Mines: Who is guilty?' (1989) *South African Labour Bulletin*, Vol. 14, No. 3
- G Simpson *Violence and Social Change: Some effects on the workplace and some possible solutions*. Paper presented to the National EAP Committee of the Institute for Personnel Management Conference *The Role of the EAP in Managing Trauma*, Johannesburg, August 1991
- Godfrey, S & Bamu, P 'The state of centralised bargaining and possible future trends' in le Roux, Rochelle & Rycroft, Alan (eds) *Reinventing Labour Law* (2012) Juta and Company Limited, Cape Town.
- H J Fabricius SC 'The Dismissal of strikers: A New Value judgment?' (1996) 17 *ILJ* 611
- H M Seady & P S Benjamin 'The right to strike and freedom of association: An international perspective' (1990) 11 *ILJ* 439
- Harvey, D. (2006), Neo-Liberalism as Creative Destruction. *Geografiska Annaler: Series B, Human Geography*, 88: 145–158
- Hepple, Bob 'New Approaches to International Labour Regulation' (1997) 26 *Indus. L.J.* 353-366
- I Moodley 'The Key to Unlocking the 'Lock-out' (1990) 11 *ILJ* 1

IRASA and Institute of Development and Labour Law (UCT) Breakfast Discourse led by Emeritus Professor Manfred Weiss on the topic: Crisis Management in the European Union and its Impact on Labour Law and Working Conditions, Leeuwenhof, Cape Town, 12 October 2012.

J F Myburgh SC '100 Years of Strike Law' (2004) 25 *ILJ* 962

J J Gauntlett & D F Smuts 'Boycotts: The Limits of Lawfulness' (1990) 11 *ILJ* 937

J Joffe '*Violence and the Law in the 1989 Railway Strike*' Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 2, 25 April 1990

Jeremy Gauntlett SC & Owen Rogers 'When all else has failed: Illegal strikes, ultimatums and mass dismissals' (1991) 12 *ILJ* 1171

John Grogan 'Strike dismissals in the Public Sector' (1991) 12 *ILJ* 1

Judy Parfitt 'Work-place ballots: Rules and procedures' (1992) 13 *ILJ* 294

Julie Macfarlane 'Why Do People Settle' (2001) 46 McGill L.J. 663

K Von Holdt 'Alusaf: violence and racism in Northern Natal' (1993) *SALB* Vol 17 No 3 June

Kenneth Creamer 'The meaning and implications of the inclusion in the Constitution of a right to strike and the exclusion of a lock-out right: Towards asymmetrical parity in the regulation of industrial action' (1998) 19 *ILJ* 1

Kouretas Georgios P. & Vlamis Prodromos 'The Greek crisis: Causes and implications' (2010) 57 *Panoeconomicus* no 4, 391-404

L Segal & G Simpson '*Off the Rails: Violence in the Railway Strike of 1987*' Paper presented at ASSA conference, July 1990

Landon E. Hancock 'To Act or Wait: A Two-Stage View of Ripeness' *International Studies Perspectives* (2001) 2, 195–205.

Leader, Sheldon 'Can You Derive a Right to Strike from the Right to Freedom of Association' 15 *Canadian Lab. & Emp. L.J.* 271 (2009-2010)

Levy, A. (2012). Why are we having so many strikes? Understanding the current wave of Industrial action. *The Dispute Resolution Digest 2012*

M S M Brassey 'The Dismissal of Strikers' (1990) 11 *ILJ* 213

Marieke Kleiboer 'Ripeness of Conflict: A Fruitful Notion?' *Journal of Peace Research*, Vol. 31, No. 1 (Feb., 1994), pp. 109-116

- McDonald, D. A. 2008. *World Class Syndrome: Neoliberalism and Inequality in Cape Town*. New York and London: Routledge.
- McDonald, David A and Smith, Laila 'Privatising Cape Town: From Apartheid to Neo-liberalism in the Mother City' (2004) 41 *Urban Studies*, No. 8, 1461–1484
- Parnell, Susan, and Pieterse, Edgar "Developmental local government." *Parnell et al* (2002): 79-91
- Pillay, Devan 'To hell with Councillors!' *Municipal Workers strike against Cape Town's 'liberal' City Council South African Labour Bulletin*.15 (2)
- Professor Robert Cameron, Department of Political Studies, University of Cape Town 'New Public Management Reforms in the South African Public Service: 1999-2008' Paper presented at Political Studies departmental seminar, 28 April 2009.
- Puke Maserumule 'A Perspective on Developments in Strike Law' (2001) 22 *ILJ* 45
- Regenbogen, Sonia 'The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?' (2012) 16(2) *Canadian Labour & Employment Law Journal*
- Ruiters, Greg 'Contradictions in municipal services in contemporary South Africa: Disciplinary commodification and self-disconnections' (2007) 27 *Critical Social Policy* no. 4, 487-508
- Rycroft, Alan 'Pre-Retrenchment Disclosure? Well, Maybe Not... *Robinson & Others v Pricewaterhousecoopers*(2006) 27 ILJ 836 (LC)*Chester Wholesale Meats (Pty) Ltd v Niwusa*(2006) 27 ILJ 915 (LAC) (2006) 27 ILJ 2014.
- Rycroft, Alan *The Duty to Bargain in Good Faith* (1988) 9 ILJ 202.
- S Godfrey, J Maree, D Du Toit & J Theron *Collective Bargaining in South Africa: Past, present and future?* (2010) Juta, Cape Town
- S Meer and A Sitas 'Conflict – in the community and in the factories' (1989) *SALB* Vol 13 No 4/5
- Salga Circular 16/2011, Xolile George, Chief Executive Officer, 28 April 2011.
- Salga Circular 33/2011, Xolile George, Chief Executive Officer, 05 August 2011.
- Samwu press release titled 'SAMWU National Strike suspended', Tahir Sema, 10 May 2011.
- Samwu press release, Tahir Sema, Samwu National Media and Publicity Officer, 03 August 2011.

Samwu press release, Tahir Sema, Samwu National Media and Publicity Officer, 28 May 2012.

Samwu press statement, 17 August 2011.

SAMWU. 1995. Resolution: Organised Local Government.

SAMWU. 2009. Resolution: Assessing our bargaining partners in the SALGBC.

SAMWU. 2012. Draft Resolution: Living Wage.

SAMWU: 2012. Resolution: Re-imagining local government

Servais, Jean-Michel 'ILO Law and the Right to Strike' *15 Canadian Lab. & Emp. L.J. 147 (2009-2010)* 147-164

Tiziano Treu 'Strike Regulation and Job Security' (1992) *13 ILJ* 1053

W Bendix, P Bibb, J Ibbotson 'The 1987 SATS Strike: An IR Institutional Environmental Perspective' (1988) *South African Journal of Industrial Relations*

William Zartman, *Ripe for Resolution: Conflict and Intervention in Africa* (2ed 1989)

#### Websites

"Municipal Workers call off strike". Mail and Guardian online. Available at <http://mg.co.za/article/2009-07-31-municipal-workers-call-off-strike>

(Accessed on 04 December 2012).

Anti-Austerity Protests Spark Violence in European Countries - SPIEGEL ONLINE. Available at <http://www.spiegel.de/international/europe/anti-austerity-protests-spark-violence-in-european-countries-a-867316.html>

(Accessed on 25 November 2012).

City of Cape Town press release on the violent strike action in the city centre. Available at [www.politicsweb.co.za/politicsweb/view/.../page71654](http://www.politicsweb.co.za/politicsweb/view/.../page71654)

(Accessed on 21 January 2013).

Forced Labour Convention, 1930 (C29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87); Right to Organise and Collective Bargaining Convention, 1949 (C98); Equal Remuneration Convention, 1951 (C100); Abolition of Forced Labour Convention, 1957 (C105); Discrimination (Employment and Occupation) Convention, 1958 (C111);

Minimum Age Convention, 1973 (C138); Worst Forms of Child Labour Convention, 1999 (C182). Available at [http://www.ilo.org/wcmsp5/groups/public/-/asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms\\_143046.pdf](http://www.ilo.org/wcmsp5/groups/public/-/asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_143046.pdf)

(Accessed 20 November 2012).

Habib, Adam and Padayachee, Vishnu. “*Economic Policy and Power Relations in South Africa's Transition to Democracy*” (2000). Available at <http://www.sciencedirect.com.ezproxy.uct.ac.za/science/article/pii/S0305750X99001308>

(Accessed on 01 February 2013).

How not to strike for dummies. Daily Maverick. Available at <http://www.google.com/url?sa=X&q=http://dailymaverick.co.za/article/2011-08-28-how-not-to-strike-for-dummies-samwu-edition&ct=ga&cad=CAcQARgAIAEoBDAAOABAlpHy8gRIAVgAYqJlbg&cd=vwAHxTsBwmA&usq=AFQjCNFSr5Ctte29Zj8nDlc9UKTPESqy7Q>

(Accessed on 21 January 2013).

ILO Convention 151 (Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service), 1978 and Recommendation No. 159 (1978).

ILO Information System on International Labour Standards (NORMLEX). Available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO::>

(Accessed 20 November 2012)

ILO Mission and Objectives. Available at <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>

(Accessed 22 November 2012).

Imatu website. Available at <http://www.imatu.co.za/about-imatu/mission-statement/>

(Accessed on 11 December 2012).

Internal row hits Samwu strike. Sowetan Live. Available at <http://www.sowetanlive.co.za/news/2011/08/23/joburg-not-backing-samwu-strike> and <http://www.sowetanlive.co.za/news/2011/08/18/internal-row-hits-samwu-strike>

(Accessed on 19 December 2012).

International Labour Organisation (ILO) Convention 181 on Private Employment Agencies. Available at <http://actrav.itcilo.org/octrav-english/telearn/global/ilo/law/ilo181.htm>.

(Accessed on 02 February 2013).

Manual on collective bargaining and dispute resolution in the Public Service, Sectoral Activities Department, International Labour Office, Geneva, 2011 at VII – VIII Available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:20020:0::NO::>

(Accessed 22 November 2012).

National Affairs 'The trouble with public sector unions, Daniel Disalvo, issue number 5, fall 2010. Available at <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>

(Accessed on 24 January 2013).

National Treasury 'Managing Municipal Personnel', 2011. Available at <http://www.treasury.gov.za/publications/igfr/2011/Ig/10.%20Personnel%202011%20LGBER%20-%20Final%20-%2009%20Sept%202011.pdf>

(Accessed on 25 January 2013).

Nedlac founding declaration. Available at <http://www.nedlac.org.za/about-us/founding-declaration.aspx>

(Accessed on 23 November 2012).

Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition (2006) at para 925. Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_090632.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf)

(Accessed on 26 November 2012).

Salgbc Municipal Employment & Unionisation levels (March 2011). Available at [http://www.salgbc.org.za/index.php?option=com\\_jdownloads&Itemid=110&view=viewcategory&catid=259](http://www.salgbc.org.za/index.php?option=com_jdownloads&Itemid=110&view=viewcategory&catid=259)

(Accessed on 27 November 2012).

Samwu press statement, 17 August 2011. See also the Times live at <http://www.timeslive.co.za/local/2011/08/17/samwu-strike-coverage-exaggerated>

(Accessed on 21 January 2013).

Sarah Krouse (19 March 2012). "[Investing in PIIGS: Portugal](http://www.efinancialnews.com/story/2012-03-19/investing-in-piigs-portugal)". *Financial News*. Available at <http://www.efinancialnews.com/story/2012-03-19/investing-in-piigs-portugal>.

(Accessed 22 November 2012).

South Africa has a protest every two days. News 24 (21 January 2013). Available at <http://www.news24.com/SouthAfrica/News/SA-has-a-protest-every-two-days-20130121>

(Accessed on 02 February 2013).

The Freedom Charter. Available at [www.anc.org.za](http://www.anc.org.za)

(Accessed on 31 January 2013).

University of Cape Town