PSCBC RESOLUTION 01 OF 2018 DISPUTE - LABOUR APPEAL COURT SITTING ON 02 DECEMBER 2020 (COURT HEARING)

DECEMBER 2020

This communication serves as an update to the last report issued by the national union on this PSCBC Resolution 01 of 2018 dispute. The report shared details on what transpired on the 28 August 2020, which was the last sitting of the arbitration hearing. This arbitration process was stayed pending the completion of the counter application filed by the DPSA and Treasury (The State).

It is important to note that NEHAWU has not abandoned the arbitration process in the PSCBC, as that process has been stayed pending the determination of the constitutionality and overall validity of Resolution 1 of 2018 in the Labour Court. NEHAWU still maintains that the enforcement of a collective agreement is best executed at the PSCBC arbitration process and NEHAWU's role in the Labour Court matter is only limited to challenging the invalidity and unconstitutionality of the Resolution and not its enforcement as a claim to enforce does not belong in the Labour Court as a forum of first instance.

The matter was accordingly set down for the 02nd December 2020 in the Labour Appeal Court, which proceeded on a virtual platform and all parties had 45 minutes to address the three judges of the Appeals' Court.

Our legal team clearly explained that this is rather an issue of impossibility rather than that of unlawfulness. Impossibility would mean that the state is still bound to comply even though compliance might be deferred to a different date or the subject matter of a payment plan.

Our legal team also stated that legality is an issue that arises at the beginning of the contract and not somewhere in the middle of implementing the contract. This point was made in reference to the fact that the state has already complied with clause 3.1 and 3.2 of the collective agreement. This is the problem that DPSA throughout in that they seem to suggest that unlawfulness arose much later on after the implementation of the agreement, in essence DPSA states that the unlawfulness arose as soon as the implementation of clause 3.3 became due and payable because it exceeded the envelope.

However DPSA also concedes to the fact that they consciously entered into the agreement to avoid political unrest and chaos as it was the year of elections. The DPSA thought they would convince the unions into cost cutting measures that included retrenchments which the unions out rightly rejected. On this point the courts appreciated that it was not a condition for the validity of the collective agreement as it fell outside of the agreement.

The Court seemed to be hinging on the provisions of Section 78 and 79 of the Public Service Regulations, in essence the courts seemed to state that there seems to be an issue of lawfulness around the agreement. This is premised on the argument that the Minister of Finance was supposed to specifically consent to the collective agreement. Our legal team contested this point by indicating that by virtue of Cabinet approving the agreement, which the Minister of Finance is part of, then there is full compliance with Section 78 and 79 respectively. Further to this point there is nowhere it shows the Minister of Finance divorcing himself to the Cabinet minutes.

As things stand the judgement is reserved, therefore the courts will notify the parties when the court outcome will be issued on a future date.

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