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**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

DISPUTE MANAGEMENT

**THE EFFECTIVENESS OF THE APPLICATION OF A CON/ARB PROCESS WITHIN AN ESSENTIAL SERVICE
ENVIRONMENT.**

Purpose

- ❖ To present:
 - ❖ On the effectiveness of the Con/Arb process within an essential service environment.



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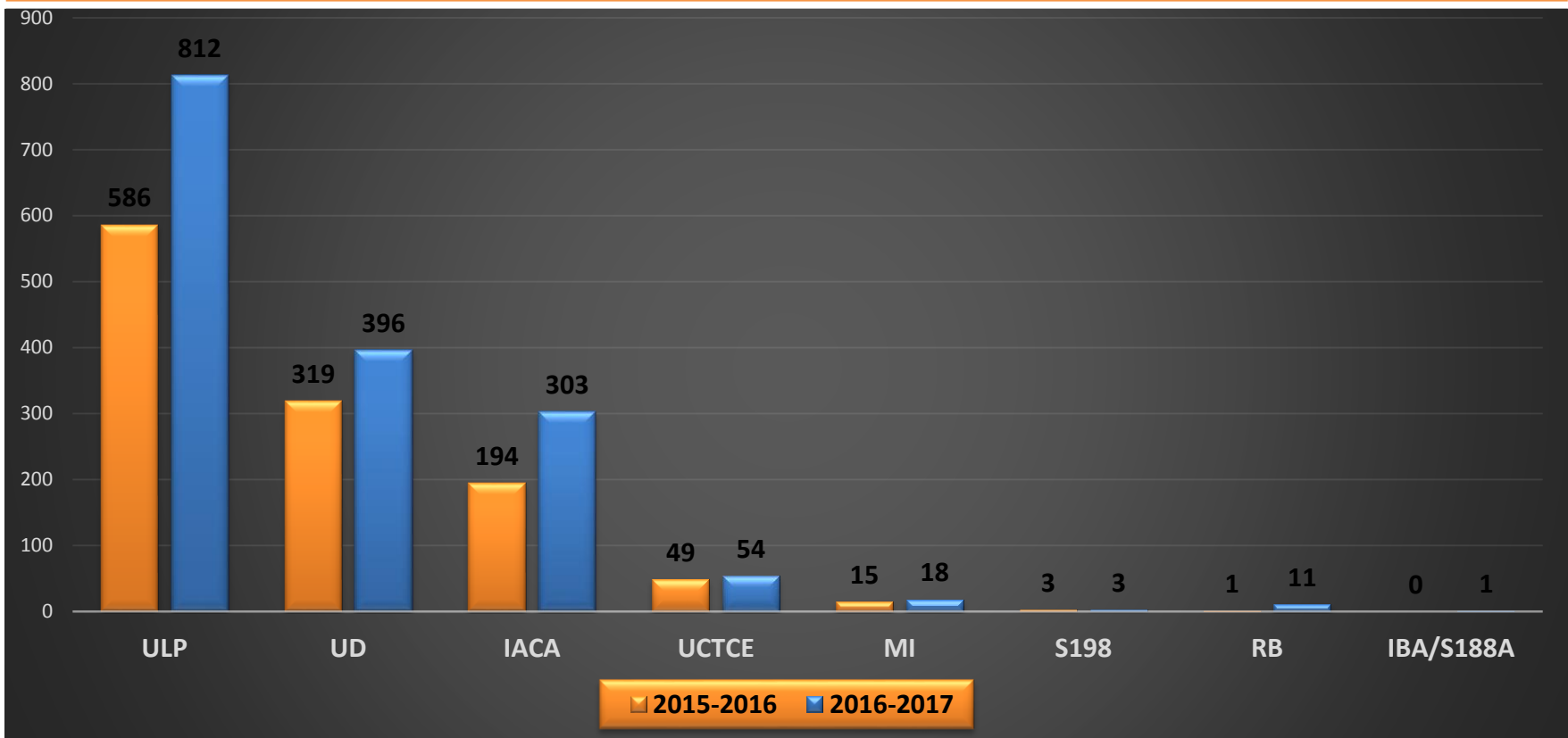
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1. Introduction: PHSDSBC Jurisdiction

- ❖ Council has jurisdiction to adjudicate the following alleged disputes:
 - ❖ Unfair Dismissal Disputes(s191);
 - ❖ Unfair Labour Practice (s186);
 - ❖ Mutual Interest Disputes (s64);
 - ❖ Unilateral Change to Terms and Condition of Employment s64(4) (conciliation only, then LC);
 - ❖ Interpretation of Collective Agreements Disputes (s24) (1);
 - ❖ Essential Service Disputes (s74);
 - ❖ Inquiry by arbitrator (S188A);
 - ❖ Temporary Employment Service (s198, 198A, 198B, 198C and 198D); and
 - ❖ Disputes about Interpretation of Chapter 2 (Refusal to Bargain Disputes).



Nature of Disputes Referred



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3. What is a Con/Arb Process?

- ❖ The **Council Rules on Conduct of proceedings** makes provision of the **Con/Arb process** in terms of section 191(5A) of the LRA
- ❖ Is a combination of a conciliation and arbitration process
- ❖ Both processes are treated as two separate processes
- ❖ The process will start with conciliation and if the parties cannot resolve the matter amicably
- ❖ The matter will immediately thereafter proceed to arbitration



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4. The Purpose of the Con/Arb Process

- ❖ The Con/Arb process is put in place for the purpose of:
 - ❖ **Promoting the principle of speedy resolution of disputes**, in that the matter is finalised in one day; and
 - ❖ **It is cheaper than the separate Conciliation and Arbitration process**, with regards to costs that may be incurred by the parties.



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5. Legal Representation in the Con/Arb Process

- ❖ If the dispute concerns an **alleged unfair dismissal relating to conduct or capacity**, legal representation is not automatic
- ❖ Parties **must apply for legal representation** in terms of the Council rules



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6. Objection to the Con/Arb Process

- ❖ In terms of the Council rules **a party to a dispute is entitled to object** to the Con/Arb process
- ❖ This may be done **in two ways**:
 - ❖ The **referring party to object to the Con/Arb process** in the LRA 7.11 forms;
 - ❖ The opposing party to send a **formal written notice objecting to Con/Arb** to the applicant and the Council; and
 - ❖ **The notice must be filed at the Council at least 5 working days** prior to the scheduled date of the hearing.
- ❖ Parties have **no legal obligation to provide reasons** for the objection



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7. Objection to the Con/Arb Process...cont

- ❖ If there is an objection to Con/Arb and the matter remains unresolved, **a certificate of non-resolution** will be issued
- ❖ **The applicant must then apply for arbitration.** This fact was confirmed in *Ceramic Industries Ltd v CCMA & Another* (2005) 12 BLLR 1235 (LC), where it was held that if a party objects to Con/Arb the whole process is then switched to the old regime
- ❖ **Where no objection to the Con/Arb process**, commissioners are required, to arbitrate the dispute immediately after conciliation
- ❖ If a party has failed to appear, **a commissioner does have discretion** to postpone the arbitration process provided that there is good cause shown as to why they failed to appear
- ❖ See *Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking (Duens Bakery) v CCMA & Others* [2011] 8 BLLR 771 (LC)



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8. The Nature of Disputes Where the Con/Arb Process is Compulsory

- ❖ The Council schedules a Con/Arb process as required in terms of section 191(5A) **if the dispute concerns:**
 - ❖ Dismissal of an employee for any reasons relating to probation; and
 - ❖ Unfair labour practise relating to probation.
- ❖ Unless there is an objection to the Con/Arb process being scheduled.



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9. Effectiveness of the Con/Arb Process Within an Essential Service Environment

- ❖ The Con/Arb process **proved to be less effective** in the Health and Social Development sector, due to the following reasons:
- ❖ The **number of objections to the Con/Arb process are more than the number of cases resolved through the Con/Arb process;**
- ❖ **Both parties object** to the Con/Arb process (employer and labour);
- ❖ The **objection takes place before and at the scheduled Con/Arb process;**



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Effectiveness of the Con/Arb Process Within an Essential Service Environment...Cont

- ❖ **If no objection** to the process, the scheduled Con/Arb process is **not finalised same day**;
- ❖ The process proceeds to arbitration; however, **the arbitration is adjourned to another date**;
- ❖ **The process is costly to the Council administration**;
- ❖ It is acknowledged that **parties are comfortable with the separate processes** (conciliation and arbitration);



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10. Issues Hindering the Effectiveness of the Con-Arb Process

- ❖ There is a **lack of understanding** of what the Con/Arb process is intended to achieve;
- ❖ **The mandating process;**
- ❖ **Parties are not prepared, lack of commitment and skills;**
- ❖ **Complexity of the disputes** that requires extensive expert witness evidence;
- ❖ **Numerous witnesses;**
- ❖ **To obtain legal representation;**
- ❖ The need to review evidence and hold a **pre-arbitration conference.**



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11. Emerging Trends on Disputes Referred

- ❖ **Settlement agreements** that are not enforceable in terms of section 142A of the LRA;
- ❖ **Benefits disputes that are regulated in terms of collective agreements** are referred as Unfair Labour Practice disputes under section 186(2)(a);
- ❖ **Lack of understanding of collective agreements** in the Public Service by Commissioners;
- ❖ **PSCBC collective agreements disputes** referred to the PHSDSBC;
- ❖ **Increase in salary deduction disputes** referred to the Council;
- ❖ **Increase in grievances** not resolved at the departmental level; and
- ❖ **Joinder applications** to join the DPSA and Treasury



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