



**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL
HELD VIA VIRTUAL PLATFORM**

CASE NO: GPBC1816/2021

In the matter between:

R NAIDOO

APPLICANT

And

**DEPARTMENT OF INTERNATIONAL RELATIONS
AND CORPORATION**

RESPONDENT

Panelist : Adv. IP Kgatla

Heard : on papers

Delivered : 26 May 2026

Union/Applicant's representative: Ms. Jadene Oeschig (SVN Attorneys)

Respondent's representative: : Adv. Floretter Storm (State Attorney, Pretoria)

JURISDICTIONAL RULING

INTRODUCTION AND BACKGROUND OF THE MATTER

- [1] The above-mentioned matter was referred to **GPSSBC** for arbitration in terms of section 191 of the Labour Relations Act 66 of 1995(LRA), as amended. The arbitration was set down before me on the 4th of March 2026, via virtual platform (MS teams).
- [2] **Ms. Jadene Oelschig** appeared on behalf of the Applicant in her capacity as an Attorney from SVN Attorneys. The Respondent was represented by **Adv. Floretter Storm**, on brief from the State Attorney (Pretoria).

POINT IN LIMINE

- [3] The Respondent raised the following *points in limine*:
- The prayer for the payment of one (1) month notice raises a new dispute in terms of Section 73A of the BCEA.
 - The Applicant earns above the threshold and the prayer for severance pay should be taken to the Labour Court.
 - The matter in relation to Section 73A of the BCEA claim, which arises from the relief sought by the Applicant in the pre-arbitration minutes was not properly referred to the **GPSSBC**.
 - The claim for severance pay as per the relief sought in the pre-arbitration minutes was not prayed for or mentioned in the referral form and has therefore prescribed.
- [4] The parties are directed to make written submissions as follows:
- Respondent founding- 13 March 2026
 - Applicant answering- 20 March 2026
 - Respondent replying- 27 March 2026
- [5] The Respondent's founding submissions were brought to the attention of the Commissioner on the 13th of March 2026, the Applicant's answering submissions were submitted on the 25th of March 2026, and the Respondent's replying submissions were brought to the attention of the Commissioner on the 1st of April 2026.
- [6] For convenience, the parties in this interlocutory application are referred to as they are cited in the main application.

SURVEY OF EVIDENCE

- [7] The parties did not lead oral evidence but submitted written arguments and annexures in support of their arguments therein. It follows that the proceedings were partially recorded and that the written arguments of both parties form part of the record of the proceedings.

- [8] The Respondent's written submissions to the *points in limine* can be summarized as follows:
- [9] The **GPSSBC** lacks jurisdiction to determine the payment claim as it is excluded by the threshold prescribed by section 73A of the Basic Conditions of Employment Act, 75 of 1997 (the **BCEA**).
- [10] Section 73A of the BCEA allows employees who earn below the threshold prescribed by the Minister in terms of section 6(3) to refer claims for payment due in terms of the BCEA to a Bargaining Council or the CCMA.
- [11] The Applicant has requested, in the pre-arbitration minute, that the **GPSSBC** make an award that the Respondent must pay her severance pay and one month's notice pay. These claims are for statutory payment in terms of the BCEA as contemplated by section 73A, and are therefore, subject to the threshold requirement in section 73A.
- [12] In terms of the information submitted by the Applicant, she earned an amount of **R80 618-16** per month at the time her employment was terminated, which is far above the prescribed earnings threshold of **R261 748-45** per annum.
- [13] Section 74 allows an employee who refers an unfair dismissal dispute in terms of the LRA and a claim for payment in terms of the BCEA, to consolidate these two disputes to be heard by the same arbitrator.
- [14] In **Safegaard Chemicals t/a Maris Polymers South Africa v Frydas and Others**, the Labour Court did not agree with the Respondent and held that the CCMA does not have such jurisdiction as the threshold in section 73A still applies. It stated that:

*"[41] It was common cause that the first respondent's monthly earnings was **R50 000.00**. In terms of section 6(3) of the BCEA, the first respondent's earnings was therefore above the threshold provided for in section 73A (2) of the BCEA.*

[42] Section 73A (2) of the BCEA expressly excludes the CCMA from awarding any amount owing to an employee if such earnings are above the threshold prescribed in terms of section 6(3) of the BCEA.

[43] Section 73A (1) of the BCEA would apply to the first respondent's unpaid salaries and the 13th cheque claim if the first respondent's earnings were below the threshold. However, the first respondent's earnings were above the threshold and therefore the first respondent is statutorily prohibited from claiming these amounts at the CCMA.

[46] Only an amount that is owing to an employee in terms of the BCEA can be consolidated in proceedings for an unfair dismissal in terms of section 74 of the BCEA. The amounts that the first respondent claimed that is owing are excluded by section 73A (2) of the BCEA and therefore there is no amount owing in terms of the BCEA. Even if section 73A (2) was not applicable (which it is) the unpaid salaries and 13th cheque claims are also contractual claims that the CCMA does not have jurisdiction to adjudicate on. Accordingly, reliance by the first respondent on section 74 of the BCEA is misplaced."

- [15] A claim for payment in terms of the BCEA was never included in or referred simultaneously with the unfair dismissal referral made in terms of section 191 and no such a referral relating to the payment claim was made thereafter.
- [16] The LRA does not include severance pay and/or one month's pay notice as a remedy available to an employee who refers an unfair labour dispute. Such a claim must be referred in addition to the unfair dismissal dispute.
- [17] The only dispute referred by the Applicant was an unfair labour dispute, no severance pay or notice pay claims were referred in conjunction with the unfair dismissal dispute.
- [18] In ***Douglas v Gauteng MEC for Health***, the court reiterated that the "*Labour Courts have consistently held that a dispute as framed in the initial referral to the CCMA or bargaining council is definitive, and that it is not competent for a party to change the nature of the dispute at the second stage of referral to arbitration or adjudication.*"
- [19] In ***Buz v Minister of Defence and Military Veterans and Others***, the Labour Court confirmed that the Prescription Act applies to claims for money emanating from the BCEA. As such, it applies to claims for severance pay and one month's notice pay, and these claims prescribe after a period of three (3) years.
- [20] Any claim for severance pay or notice pay that the Applicant may have had, has prescribed. The date that the alleged debt (severance pay and one month's notice pay) became due and payable was the date of termination of employment, which is the 30th September 2021. Therefore, the debt prescribed on 1 October 2024.
- [21] The Applicant's written submissions in response to the Respondent's submissions on the *points in limine* can be summarized as follows:
- [22] The Respondent relies on section 73A of the BCEA and the earnings threshold to contend that the **GPSSBC** lacks jurisdiction to determine the severance and notice pay claims.
- [23] These claims are raised as an ancillary or related relief within an unfair dismissal arbitration over which the **GPSSBC** unquestionably has jurisdiction, following the Labour Court ruling.
- [24] The Applicant relies on section 74(2) of the BCEA, which permits an arbitrator hearing an unfair dismissal dispute to determine any claim for an amount owing in terms of the BCEA, and submits that section 74(2) should be interpreted and applied in a manner that permits the efficient determination of connected claims arising from the same dismissal.
- [25] The dispute referred was the dismissal of the Applicant and the monetary claims are intertwined with the dismissal dispute in the practical and forensic sense that substantially the same evidence will be led.
- [26] The amended pre-arbitration minute did not introduce a new factual cause unrelated to the dismissal already before the **GPSSBC**.
- [27] The severance and notice pay claims were not expressly stated in the original referral in the same terms as later recorded, however, this should not lead to the exclusion of such relief on an unduly technical basis where the dispute remains one and the same.

- [28] The prescription argument is premature. The Respondent repeatedly characterizes the event as a “dismissal”, whereas the Applicant’s case is that the Commissioner must still determine whether the termination constituted a retrenchment or dismissal for operational requirements.
- [29] Until that characterization is authoritatively determined in these proceedings, it cannot be said with certainty that the severance pay and notice pay debts became due in the manner alleged by the Respondent.
- [30] The issue of prescription should not be determined in a vacuum divorced from the unresolved merits of the dismissal dispute.
- [31] The Applicant humbly submits that the Commissioner ought to find that the payment claims are sufficiently intertwined with the dismissal dispute to be entertained in the same proceedings. Alternatively, if the Commissioner concludes that section 73A limits the **GPSSBC**’s power to determine those payment claims because of the Applicant’s earnings levels, despite the application of section 74(2) of the BCEA, then such a finding should not affect the **GPSSBC**’s jurisdiction over the unfair dismissal dispute or the Applicant’s right to proceed on that dispute without further delay.
- [32] The dispute remains embedded in an unresolved remitted unfair dismissal arbitration in which the nature of the termination is itself still to be determined.
- [33] The Respondent’s replying submissions to the Applicant’s response to the *points in limine* can be summarized as follows:
- [34] The *points in limine* do not relate to the unfair dismissal dispute referred to the **GPSSBC** by the Applicant, they relate only to the claim for payment of severance pay and one month notice pay, which was only included as a claim for the first time in the pre-arbitration minutes on 3 March 2026.
- [35] This is a dispute referred to the **GPSSBC** by the Applicant and the relief that may be sought in terms of the dispute is addressed in the Respondent’s submissions. The relief in section 189 of the LRA read with sections 191 and 194, that an employee may seek when an unfair dismissal dispute is referred does not include severance pay or notice pay. Such payment claims arise in terms of sections 37, 38 and 41 of the BCEA, read with section 73A and are not before the **GPSSBC** for determination.
- [36] The inclusion of a payment claim, that is not a relief in terms of sections 191 of the LRA relating to the Applicant’s unfair dismissal dispute, is not merely a framing of the relief. This is a payment claim in terms of the BCEA that should be properly referred to the **GPSSBC** or the Labour Court. The **GPSSBC** cannot entertain a relief sought by an Applicant if it does not have the jurisdiction to do so and the Respondent has stated why the **GPSSBC** lacks jurisdiction to entertain the payment claim.
- [37] Regarding prescription, the Applicant states that the payment is not yet due as the Commissioner must still determine whether the termination constituted a retrenchment or dismissal for operational requirements. Shortly after termination, the Applicant’s Attorney stated in a letter that her dismissal was for operational requirements in terms of section 189, and at that stage, she would have known of any claim for payment that she may have as a result of the termination and such a claim should have been pursued timeously but it was not done.

- [38] Prescription of claims for payment by an employee starts to run when the payment becomes due, on the date of termination. The claim was referred to in the pre-arbitration minutes for the first time on 3 March 2026, at a time when it had already prescribed.
- [39] The Respondent persists with its submissions dated the 13th of March 2026 that the **GPSSBC** does not have jurisdiction to resolve the Applicant's payment claim for severance and one month's notice because the Applicant earned above the threshold prescribed by section 73A of the BCEA, the claim was not referred to the **GPSSBC** in accordance with the BCEA and has prescribed.
- [40] The Respondent's submission that the **GPSSBC** lacks jurisdiction mainly on the basis that the Applicant prays for reinstatement as a remedy cannot be accepted on the basis that the Commissioner's powers to issue and/ or grant an appropriate remedy are clearly laid down in terms of section 193 of the Labour Relations Act.
- [41] The remedies alluded to above are not dependent on what the Applicant prays for in the referral form but on what the Commissioner deems appropriate in the specific circumstances, and such remedies are not available merely for the taking.

ANALYSIS OF EVIDENCE, ARGUMENTS AND FINDINGS

- [42] The Respondent submits that the **GPSSBC** lacks jurisdiction to amongst others make a determination for the payment of a claim on the basis that the same claim for payment is excluded by the threshold prescribed by Section 73A of the BCEA, which allows employees earning below the threshold amount determined by the Minister to refer such matters to the CCMA or a Bargaining Council with jurisdiction in terms of Section 6(3) of the Act.
- [43] The contention of lack of jurisdiction on the part of the **GPSSBC** by the Respondent is premised on the remedies prayed for by the Applicant in this matter. It is true that the Applicant earns above the threshold amount prescribed by the Minister.
- [44] Having perused submissions made by both parties, it is my considered view that the Respondent's *point in limine* is solely reliant on the relief sought by the Applicant, which in my view is a secondary issue. In labour disputes, the remedy appropriate in specific circumstances only becomes relevant once there is a determination of wrongdoing on the part of the Respondent/employer, and is closely related to or associated with the nature of the dispute. It is not a discretionary function on the part of the Commissioner who does not have inherent powers.
- [45] In more simpler terms, the first task of the Commissioner is to make a determination on the nature of the dispute, and once that has been done, a determination of wrongdoing on the part of the Respondent and ultimately the appropriate remedy.
- [46] It is trite law that the South African labour legislative regime prescribes or gives clear guidelines as to the appropriate remedies applicable to certain disputes.
- [47] For purposes of completeness, it is trite law that the nature of the dispute lies in the evidence and therefore can only be determined following the hearing of oral evidence, and this question was clearly answered in

the case of **Hospersa obo TS Tshambi v The Department of Health, KwaZulu Natal (DA1/2015) [2016] ZALAC 10 (24 March 2016)**, where the LAC as per Sutherland JA had the following to say:

[13] It is plain that the arbitrator was muddled. He did not make a decision whether the dispute had been referred within a reasonable time, rather he concluded that a period had been prescribed by the Prescription Act for this particular dispute and had not yet elapsed"

"[14] On review, the Labour Court set the ruling aside. The Labour Court reasoned that the dispute was not a section 24 dispute but was indeed a dispute about unfair labour practice concerning an unfair suspension contemplated by section 186(2)(b) of the LRA. By implication, the referral was late and in the absence of a condonation application, the matter ought not to be entertained."

[15] In my view, the invocation of section 24 by the appellant and bland acceptance of that characterization by the arbitrator was plainly wrong. The Labour Court criticized the attempts to invoke section 24 as a contrivance to circumvent the obviously late dispute of an unfair labour practice dispute. I agree that such an inference can be properly made"

*[16] An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of the dispute correctly. An arbitrator must make an objective finding about what is the type of dispute to be determined. This Court in the case of **Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw)**, addressed directly the question of whether the employees' characterization of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought, this Court held that the latter should prevail. As a result, in **Wardlaw**, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The Constitutional Court disposed of this issue in **CUSA v Tao Ying Industries and Others**: 'A Commissioner must, as the LRA requires, deal with the substantial merits of the dispute. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to the dispute cannot change its underlying nature. A commissioner is to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and evidence presented during the arbitration. '.... the informal nature of the arbitration process permits the arbitrator to determine what the real dispute is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in'*

*[48] In the circumstances, I see no reason why the Commissioner seized with this matter should be made to make a determination on an aspect that is not yet ripe, in this case, the nature of the dispute associated with the remedy giving rise to the *point in limine* has not been established and determined.*

[49] The *point in limine* is therefore ahead of its time and was limping to the door of the **GPSSBC**, only to be certified dead on arrival.

[50] I see no reason why the *point in limine* as raised by the Respondent should succeed, and therefore come to the following conclusion(s):

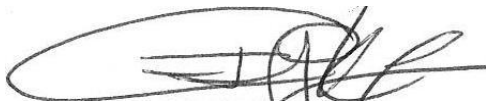
RULING:

[51] The Respondent's *point in limine* is dismissed.

[52] The **GPSSBC** is clothed with the requisite jurisdiction to entertain and make a determination in this matter.

[53] The **GPSSBC** is requested to set this matter down for arbitration as soon as reasonably practicable.

[54] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'Adv. Itumeleng Kgatla', with a large, stylized initial 'I' and 'K'.

Name: Adv. Itumeleng Kgatla

Arbitrator: GPSSBC

