

# JURISDICTIONAL RULING

Panellist/s: Leonard van Leeuwen  
Case No.: GPBC 1266/2020  
Date of Ruling: 19 April 2021

**In the MATTER between:**

**PSA obo Mohalali, MS**  
(Union / Applicant)

and

**Department of Water and Sanitation**  
(Respondent)

**Union/Applicant's Representative:** Jacobus Heyneke  
**Union/Applicant's Address:** Not Provided  
**Telephone:** 082 550 8235 / 082 880 993  
**Telefax:** None  
**E-mail:** flip.vanderwalt@psa.co.za

**Respondent's Representative:** Mitileni, D  
**Respondent's Address:** Not Provided  
**Telephone:** 012336 6893  
**Telefax:** Not Provided  
**E-mail:** mitilenid@dws.gov.za

## **Details of Hearing and Representation**

1. The Arbitration Hearing with regards to an Unfair Labour Practice dispute in relation to promotion, referred in terms of Section 186(2)(a) the Labour Relations Act 66 of 1995, as amended ("LRA") was held at the Offices of the Department of Water and Sanitation in Standerton, on 11 February 2021 and 09 April 2021 respectively.
2. The Employee, Mr Mohalali (hereinafter referred to as the Applicant), was present and represented by Mr Heyneke, a Full time Shop Steward from the Public Servants Association (PSA). The Employer, The Department of Water and Sanitation (hereinafter referred to as the Respondent), was represented by Mr Mitileni.
3. The proceedings were held in English and was both digitally and manually recorded.
4. The Respondent at the commencement of the Arbitration raised a point ***In Limine***, stating that the Bargaining Council does not have the required jurisdiction to determine the matter based on the following point:
  - The referral is late as it was made outside of the required time frame and as such the Bargaining Council does not have jurisdiction to determine the dispute until such time as the Applicant had applied for condonation for the late referral of a dispute and such condonation had been granted.
5. It is common cause that no conciliation took place and that the Council on 19 November 2020 on the expiry of the 30 day since the dispute had been referred had issued the certificate where after the Applicant submitted a request for arbitration.

## **Issue to be decided:**

6. I am required to determine whether the Bargaining Council has the required jurisdiction to determine the dispute.

## **Parties' Submissions:**

## **Documentary**

7. Both parties submitted documentation in support of their respective submissions. The Respondent's Bundle was marked "R" and consisted of 13 pages. The Applicants' Bundle was marked "A" and consisted of 43 pages.

### **Respondent's Submissions**

8. The Applicant became aware of the omission or unfair labour practice as alleged on 02 December 2019 as per his grievance that he submitted. He however only referred a dispute to the Bargaining Council in October 2020 indicating that the dispute occurred on 12 August 2020.
9. His grievance was dealt with on 17 February 2020 in which he was informed that it was not resolved and that he would have the right to declare a dispute. Once you became aware of an unfair labour practice you must refer a dispute within 90 days, which he failed to do.
10. The Grievance policy as contained in PSCBC resolution 14 of 2002 states that an employer has 30 days within which to deal with a grievance should they fail to do so one may refer a dispute to a council with jurisdiction.
11. He only referred a dispute with regards to the interpretation and application to the PSCBC on 23 June 2020 and not an unfair labour practice dispute and as such he cannot rely on the referral to the PSCBC.
12. a Certificate of outcome does not cure a defect in relation to jurisdiction and in support there off referred to ***Cinqplast Plastop v Dunn No and others.***
13. The alleged unfair labour practice or omission relating to the Applicant was with regards a claim that he was appointed on the wrong level which is a once off issue and not continues as submitted by the Applicant.

### **Applicant's Submissions**

14. The Respondent had failed to fully attend to the Applicant's grievance as they indicated at the first level that they were not going to investigate the matter as per the outcome on 17 February 2020. They failed to do anything between this date and June 2020 and as a result they decided to refer a dispute to the PSCBC. During the Conciliation held at the PSCBC the Respondent had agreed with the Applicant's

representative at the time, Mr van der Walt that they would investigate the matter. They however received feedback on 12 August 2020 from the Respondent who indicated that they were unable to resolve the grievance.

15. An Unfair Labour Practice dispute can be ongoing as is the case in the present matter which was confirmed by the Courts in ***National Home Builders Registration Council v NEHAWU obo Siza Nghulele and others [2016] LC (JR2026/13)*** and ***Mandla Lionel Mngadi v Garth Jenkin No and Others [2020] LAC (DA7/2019)***.

### **Analysis of Submissions of Parties**

16. In coming to a decision, I have taken regard of the brief oral submissions by both parties as well as the documentary evidence submitted.
17. The issue of whether the Bargaining Council has the jurisdiction to determine the Dispute is dealt with in terms of Rule 20 of the Rules for the Conducting of Proceedings before the General Public Service Sector Bargaining Council.
18. Jurisdiction is a legal concept which refers to, whether a Court or in this instance the CCMA / Bargaining Council can entertain a matter that has been brought before it. To decide whether a forum has jurisdiction to hear and decide a matter, the following must be determined:
  - Who are the parties involved in the Dispute and do they have the right of appearance in the forum in which they find themselves?
  - What is the cause of action; the nature of the dispute?
  - Where did the cause of action or Dispute arise?
  - When did the cause of action arise?
19. In this instance, the question that is to be asked is: When did the cause of action arise?
20. It was held in ***Bombardier Transportation (Pty) Ltd v Lungile Mtiya NO & Others (2010) 8 BLLR 840 (LC)***, that if a jurisdictional issue has not been dealt with at Conciliation, it must be dealt with at the Arbitration and a binding decision be taken through leading of evidence. It further held that a Certificate of outcome does not confer jurisdiction.

21. In ***IMATU and others v City of Johannesburg and other [2014] 6 BLLR 545 (LAC)*** the Court held that jurisdiction is a matter of law. This implies that a Commissioner can entertain a jurisdictional point regarding the late referral for conciliation even at arbitration, even when a certificate has been issued. This was also confirmed by the Court in ***SAMWU obo Manentza v Ngwathe Local Municipality and others [2015] (LAC)***.
22. It was confirmed by the Certificate of outcome dated 19 November that the Applicant had referred the Dispute to the Bargaining Council on 13 October 2020. A Conciliation could not be scheduled, and a Certificate was issued by the Bargaining Council due to the fact that 30 days has expired since the Referral of the Dispute.
23. As a result, the Respondent was not afforded the opportunity to raise the issue with regards to jurisdiction at Conciliation due to the reasons previously mentioned. I am thus compelled to determine the Respondent's said objection that was raised at Arbitration and to decide on whether the Bargaining Council does have the required jurisdiction to determine the Dispute.
24. It was the Respondent's submission that the Bargaining Council lacks jurisdiction to determine the Dispute as the Applicant's referral was late and that he first had to apply for condonation of the late referral and such lateness had to be condoned before the Bargaining Council would have jurisdiction to determine the dispute.
25. In terms of section 191(1)(b) (ii) of the LRA a dispute relating to an unfair labour practice must be referred within 90 days of the date of the act or omission that constitutes an unfair labour practice, or within 90 days of the date on which the Applicant had become aware of the act or occurrence.
26. It is common cause that the Applicant had become aware of the alleged unfair Act or omission on 02 December 2019 and that he on 05 December 2019 submitted a grievance in this regard. It is also further common cause that he received feedback with regards to the grievance on 17 February 2020 in which the Respondent had indicated that they were unable to resolve the dispute in question and that the Applicant had indicated that he would refer a dispute in this regard. The Applicant then on 23 June 2020 had referred a dispute relating to the interpretation and application of a collective agreement on behalf of the Applicant and two others to the PSCBC which remained unresolved as per the Certificate that was issued 23 July 2020 as contained on page 6 of bundle "R". The dispute was about the Respondent's failure to adhere to the collective agreement as they had failed to follow the said processes within relation to the Applicant's grievance. It is alleged by the Applicant that although the dispute remained unresolved the Respondent

indicated that they would investigate the matter and give them feedback per e-mail on 12 August 2020 where after they then referred the unfair labour practice dispute.

27. On a strict interpretation of section 191(1)(b)(ii) of the LRA it appears that the Applicant had to refer the dispute to the Bargaining Council before 01 March 2020 as he had become aware of the act or omission on 02 December 2019 and as a result it would then have been referred outside of the said time frame as it had only been referred on 13 October 2020.
28. PSCBC Resolution 14 of 2002 deals with the Grievance Rules for the Public Service as contained in bundle "R" and Part C: Grievance Resolution Levels states that should the grievance in relation to an unfair labour practice not be attended to within 30 days the aggrieved employee has the right to refer the matter to the relevant sectoral council to deal with it in terms of the dispute resolution procedures. If one should take this into consideration and work from the assumption that he should have referred it within 90 days from the expiry of the 30 days since he had lodged the grievance which would have been 02 January 2020 and as a result, he then had to refer the dispute before 01 April 2019 which would still render the referral late. The referral would also still be late on a strict interpretation even if one only started to calculate the 90 days from the date, he received feedback on his grievance which was 17 February 2020.
29. It is however the Applicant's submission that the dispute was ongoing as it relates to him allegedly being appointed on the wrong salary level which in essence entails a salary dispute which is thus ongoing for as long as the Respondent fails to correct his salary level which results in him being paid the incorrect salary.
30. The Respondent disputed the fact that it was ongoing and stated that it was a single act as the Applicant is seeking a salary adjustment from level 6 to level 7 and as such it could not be ongoing as he applied for a position and was subsequently appointed on the said position and with the remuneration as per the advertisement.
31. It needs to be mentioned without going in to the merits that the dispute emanates from the fact that other employees were allegedly appointed after the Applicant in the same positions as he was but on a higher salary level.
32. In support the Applicant had referred to ***National Home Builders Registration Council v NEHAWU obo Siza Nghulele and others [2016] LC (JR2026/13) and Mandla Lionel Mngadi v Garth Jenkin No and Others [2020] LAC (DA7/2019).***
33. The issue in ***National Home Builders Registration Council v NEHAWU obo Siza Nghulele and others [2016] LC (JR2026/13)*** was an unfair labour practice dispute relating to promotion in 2013 in which he

claimed his advancement to grade 5 should have taken effect on 11 May 2010. The Court in its judgment referred to the matter of **SABC Ltd v CCMA & others [2010] (LAC)** in which the Court stated the following.

“While an unfair labour practice/ unfair discrimination may consist of a single act it may also be continues, continuing or repetitive.”

34. The Court found that although the employees claim to higher grading and remuneration was squarely based on the applicability of the Applicant's career path and retention Strategy for Technical Staff policy, the principal of the continues nature of the alleged unfair labour practice in its view was similar in nature to the SABC case and accordingly found that he was entitled not just to raise the claim within 90 days of not receiving the advancement but for as long as he was denied it.
35. Further the said Court having regard **to Appolo Tyres SA (Pty) Ltd v Commission for Conciliation, mediation & Arbitration & others** found that a dispute in the form of an upgrading could constitute an unfair labour practice dispute relating to promotion.
36. The case in *Mandla Lionel Mngadi v Garth Jenkin No and Others [2020] LAC (DA7/2019)* was in relation to a unfair discrimination dispute referred in terms of the Employment Equity Act in terms of section 10 of the Act alleging discrimination on an arbitrary ground. He claimed that he was discriminated against as he was paid less than his subordinates and does not qualify for certain benefits since his promotion in 2008. He only referred the dispute in 2016. The Applicant in this matter again with approval referred to the case of **SABC Ltd v CCMA and Others** and stated that there was no need for condonation as the matter related to remuneration and benefits and was ongoing. The Labour Court and Commissioner held that condonation was required for the late referral of a dispute, but the Court disagreed as it was of the view that both had failed to appreciate the Applicant's argument that the dispute was ongoing or repetitive and found having regard to the mater of **SABC Ltd v CCMA and others** that the dispute was ongoing and or repetitive at least in relation to the payment of his salaries.
37. Having regard to the above, I subsequently find that the Applicant's dispute is similar in nature as the cases referred to above as it relates to the failure of the Respondent to remunerate the Applicant on the correct salary level and as such it is ongoing or repetitive in nature for as long as the Respondent continues to pay he Applicant on the wrong or incorrect salary level and as such find that there is no need for condonation and as a consequence that the Bargaining Council does have the required jurisdiction to determine the dispute.

## **Ruling**

38. The Bargaining Council does have the jurisdiction to determine the Dispute.
39. The Bargaining Council to reschedule the matter for arbitration.

Signed and dated at **Emalahleni** on this the **19<sup>TH</sup>** day of **April 2021**.

A handwritten signature in black ink, appearing to be 'L. van Leeuwen', enclosed within a large, loopy oval shape.

**Leonard van Leeuwen**

**Panelist**