



GENERAL PUBLIC SERVICE  
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# JURISDICTIONAL RULING

Panellist/s: Seretse Masete  
Case No.: GPBC302/2021  
Date of Award: 16/08/ 2021

**In the ARBITRATION between:**

**ALBERT MOGOLOLA** \_\_\_\_\_

(Union / Applicant)

and

**DEPARTMENT OF DEFENSE.** \_\_\_\_\_

(Respondent)

**Union/Applicant's representative:** Joel Ntwampe of PSA  
**Union/Applicant's address:** 563 Belvere Pretoria

**Telephone:** 0928837241

**Respondent's representative:** Mr LL Mdluli

**Respondent's address:** Amsocr Building Naso Boving road Erasmus kloof

**Telephone:** 0723273508

## Details of hearing and representation

1. The matter was held virtually on 16 August 2021 .
2. The Applicant Albert Mogolola ( **employee**), was represented by Joel Ntwampe of PSA and the respondent, **Department of Defense (employer)** was represented by its employee, **Mr . LL Mdluli**
3. The proceedings were in English and electronically recorded.
4. The employee submitted one bundle of documents **marked A1** and had one witness and the employer submitted 1 bundle of documents marked **E1** and had 3 witnesses.

## Issues to be decided

5. I have to decide whether or not the conduct of the employer by failing to pay the employee performance bonus from 2011 to 2019 constituted an unfair labour practice.
6. I must further determine the appropriate relief should I find that the employer acted unfairly to the employee.

## Background to the dispute

7. The employee was employed as a heavy duty driver since February 1982.
8. He submitted his reviews since 2011/2012 to 2018/2019 financial years but did not receive performance bonus.
9. He challenged the unfairness of the employer of failing to pay him performance bonuses and sought to be paid.
10. The employer representative rejected the employees' allegations and raised a point in limine. He said the debt by the employee has prescribed. Prescription Act provides that the debt prescribes after 3 years. Secondly, the 2019 phase was very old and the referral period expired. 2021 March was long after the arising of the dispute.

## The employer's submission on the jurisdictional point raised.

11. The employee, according to the referral form, signed the referral form on 19 February 2021 and the information on page 3 of E1 showed that he referred his matter for conciliation on 24 February 2021. He lodged a grievance on 08 January 2019 where he indicated that the omission occurred on 15 December 2018, but the referral form for conciliation indicates that the dispute arose on February 2021. This was puzzling because the employee was complaining about non-payment during the

financial years starting in 2011/12 financial year up to 2018/2019 financial year. December 2018 will therefore be taken as the date on which the dispute arose meaning the dispute was committed 8 years ago.

12. The Constitutional court in **FAWU obo Gaushubelwe vs Pieman's Patry (PTY)Ltd** held that the *prescription may be interrupted by the referral to conciliation. Section 11 of the Prescription Act 68 of 1969 (PA) as amended, provides in Subsection 11(d) that save where an act of Parliament provides otherwise, three (3) years in respect of any debt.* The date at which the application was served to the Council was therefore dead already.
13. The referral of the employee to the Council was 8 years old and therefore was also outside the 90 days' time frames as prescribed by **Section 191 (1)(b)(ii) of the Act** and the time frames of 90 days as provided for in this section of the Act, was echoed in **SABC vs CCMA and others**.

### **The employee's submission**

14. **December 2018 was the date on which the employee became aware** of the official act/omission. The matter has not prescribed and it was not outside the prescribed time frames of **Section 191** of the **Act** because payment of performance bonus for the performances cycles ranging between 2011 and 2019 was ongoing. There was no need for him to lodge a grievance for each performance cycle. In the matter of **SABC Ltd vs CCMA and others (2010) 3 BLLR 251 LAC**, it was held that the dispute does not have to coincide with the date upon which the unfair labour practice commenced because it is not a single act of discrimination/unfair labour practice but one which is repeated monthly. The dispute was therefore ongoing.
15. The employer through its letters never indicated that the matter has prescribed, he was informed that he would be provided with feedback not later than 6 March 2019. The employer accepted the grievance in January 2019 and never instructed him to apply for condonation. The employer failed to respond to the grievance and follow up letters were written on **October 2020, 15 and 22 February 2021** and the outcome of the grievance was never provided to him. The matter was therefore referred within the prescribed 90 days and the claim has not prescribed. The commissioner should dismiss the point in limine by the employer.

### **Analysis of the evidence and arguments**

16. This dispute is about performance agreement which is regulated by a performance policy. Every year, employees are assessed for that particular year to check if they are performing according to the set standards. Performance agreements with a start date and an end date, eg Start 1<sup>st</sup> April 2021 and end 31<sup>st</sup> March 2022 is signed between the employee and the employer. Employees

would be assessed for that particular year and given a rating eg of 3 which is satisfactory for that year or 4 which is more than satisfactory. Should an employee be rated 3, he would get one notch up provided he had not reached the final leg of his/her notch. Should an employee be rated 4, she or he would be given a notch or two up plus a once off performance bonus. These incentives are applicable in a particular financial year. The following financial year, a new contract generally called Performance Instrument (PI) and or performance agreement (PA) would be signed between the employer and the employee. This agreement is not a continuation of the previous contract; it is a new one altogether where even the KRA's might have changed and differ with the previous ones. Should an employee be rated an unsatisfactory score, the Performance policy has a provision of dispute resolution where an employee could follow to lodge a grievance in that particular financial year. It will not be proper for an employee to wait for another dispute to occur in the subsequent financial years and then lodge an accumulated dispute on performance management. Performance agreement disputes where an employee was not paid a cash bonus differ from a discrimination dispute. The **SABC vs CCMA and Others** case, was mainly dealing with a discrimination dispute, **Section 6 (4) of the employment Equity Act (EEA)**. In that matter, the employees were aggrieved by the employer who promoted other employees and left others who were having the same or even better qualification and also doing the same and or similar work of equal value. This kind of a dispute is ongoing because the aggrieved employees will remain disadvantaged while their counterpart continue to be advantaged. My take is that a performance management dispute is not an ongoing dispute, performance management and assessments are structured between a 12 months' period and it ends up there. New contracts are signed every financial year.

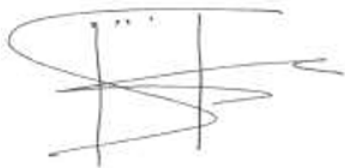
17. The employee referred the dispute which he became aware in December 2018 to the Council and signed the referral on 19 February 2021. The argument of the employee was that the payment of performance bonus is ongoing. My take is that payment of performance bonus, depended on the employee having submitted his or her performance review, secondly whether the employee qualified to be paid performance bonus or not, it therefore cannot be ongoing. It depends on circumstances and compliances to the performance agreement policy for each financial year. *In Fawu obo Gaoshubelwe vs Piaman Pantry Pty Ltd 2018 (5) BCLR 527 (CC)*, it was held that *when dealing with prescription within employment law, consider the referral/ pre-hearing phase and post hearing phase (review of award)*. In casu, the employee lodged a grievance in 2018 arguing that it was a matter that has been ongoing since 2011. I agree with the employee that conciliation interrupts the prescription. If the employee's dispute was about failure by the employer to pay him bonus for the financial year 2018/2019, it would be something else. **Section 11 of the Prescription Act 68 of 1969** (PA) as amended provides in **Section 11(d)** that prescription is 3 years in respect of any debt. In casu,

the employee alleged not to have been paid cash bonus since 2011/2012 and he only became aware in December 2018. My take is that the debt has prescribed.

18. The employee submitted that he became aware of the dispute in December 2018 but referred the matter in February 2021. The matter was referred as a **Section 186(2)(a) of the Act**, unfair labour practice pertaining to benefits. **Section (191(1)(b))ii) of the Act** provides that *ULP dispute may be referred in writing within 90 days of the date of commission or omission to act by the employer or within 90 days of the date the employee became aware of the act happening.* In terms of this provision, the referral of the dispute to the Council by the employee was outside the prescribed timeframes.

### **Ruling**

- 19. The debt against the employee has prescribed.
- 20. The referral of the employee to the Council was outside the prescribed timeframes of the Act.
- 21. The Council does not have jurisdiction to listen to the main dispute.
- 22. The employer's jurisdictional point (point in limine) is upheld.
- 23. There is no order as to cost.



Seretse Masete

Date 29/08/ 2021

**GPSSBC Panellist**