DISPUTE MANAGEMENT COMMITTEE MEETING

15 JANUARY 2025

CASE LAW SCHEDULE – ISSUE 1 OF 2025

This document is developed to support and inform parties of recent case law that is relevant to the industry. This document will be circulated on PSCBC's website and social media channels.

DISCLAIMER: This document is purely PSCBC's brief commentary on case law that is considered relevant and DOES NOT have any evidentiary value.

TOPIC	CASE LAW COMMENTREY
When does the disciplinary hearing commence?	**Tshabalala v Moqhaka Local Municipality and Another (JA88/2024) [2024] ZALAC 60 (21 November 2024)** Does it commence when the employee is served with charges and notice of the disciplinary hearing or when the chairperson appointed to preside over the hearing convene a hearing, and charges are put to the employee by the evidence leader or employer representative? **Facts in brief** A municipal senior employee was put on pre-cautionary suspension on 01 March 2024, pending an investigation into allegation of misconduct. In terms of Municipal regulations applicable to senior employees, if an employee is suspended the disciplinary hearing must commence within three months of the date of suspension. On 31 May 2024, the employee was served with charges and notice of a disciplinary hearing. On 03 June 2024, the employee reported for work and

Public Service Bargaining Centre, 260 Basden Avenue, Lyttelton, Centurion, Pretoria, 0157
P.O. Box 3123, Lyttelton South, 0176
Tel: +27 (0)12 644 8100 • Fax: +27(0)12 664 5834
E-mail: info@pscbc.org.za • Website: www.pscbc.org.za

argued that her suspension had lapsed.

The employee and the employer could not agree if the suspension had lapsed.

Employee took the matter to the Labour Court contending that the continuation of her suspension beyond the period of three months was in breach of her contract of employment. She further argued that the regulation providing that upon suspension, the employer must convene a hearing within three months was incorporated into her contract of employment and therefore binding on the employer.

The Labour Court relying on previous judgment held that a disciplinary hearing commences upon service of charges and notice to attend a disciplinary hearing and as such, the three months was still intact.

Employee was not happy and took the matter on appeal to the Labour Appeal Court (LAC)

She argued on appeal that the LC failed to distinguish between the commencement of the hearing and the disciplinary proceedings.

The LAC agreed with her and held that whilst disciplinary proceedings start with the serving of charges and notice to attend the hearing, the regulations contained an internal definition of the point at which the disciplinary hearing commence.

The regulation provides that the disciplinary hearing commences with the reading of the charge to the employee.

The LAC ruled that the disciplinary hearing is convened by the presiding chairperson and commence with the reading of the charges to the employee charged with misconduct.

More importantly the LAC concluded that a disciplinary hearing is an integral part of the disciplinary process or proceedings, but it does not constitute the proceedings in themselves.

The LAC further held that the disciplinary hearing commences in the actual sitting when the presiding chairperson officiates over the proceedings or to

	use the court words, when the presiding chairperson takes the captainship and navigate the ship. The LAC remarked that the interpretation preferred by the municipality or employer will protract the periods of suspension where charges are served, and the convening of the disciplinary hearing is delayed. In conclusion the court held that the hearing did not commence within three months of the date of the suspension, which was 01 March 2024 and the suspension lapsed on 31 May 2024. The court granted the declaratory order and ordered the lifting of the suspension. **The take home from the judgement:** To avoid falling foul to the case law, upon putting an employee on pre-cautionary suspension, investigation must be expedited and disciplinary hearing convened as soon as investigation is concluded.
Can non-signatories to collective agreements refer disputes for arbitration under s24?	**South African Correctional Service Workers Union (SACOSWU) obo Brian Kasper v Minister of Justice and Correctional Services and others** The issue was whether only a party to the collective agreement has a right to refer a dispute of interpretation and application in terms of section 24 of the LRA. **Facts in brief:** SACOSWU on behalf of their member referred a dispute on interpretation and application to the GPSSBC. The dispute concerned interpretation of GPSSBC Resolution 2 of 2009, the Occupational Specific Dispensation (OSD) applicable to the employee. The employer at arbitration raised a preliminary issue that the GPSSBC had no jurisdiction to deal with the dispute of the applicant as the employee was not a member of the trade union party to the collective agreement. The arbitrator ruled that the Council had no jurisdiction because the trade union had no locus standi to refer the dispute as it was not party to the

	collective agreement. The matter was taken on review to the Labour Court. It was argued by the applicant on review that the GPSSBC had jurisdiction and that the arbitrator incorrectly adopted the literal approach when he relied on **Arends v South African Local Government Bargaining Council**[1] and **South African Police Service v Du Preez**[2], which ruled that an employee is a mere beneficiary to the collective agreement and not a party to the agreement, and therefore cannot refer interpretation and application dispute. It was therefore, argued that the two judgments were wrongly decided. The Labour Court upheld the arbitrator's ruling and ruled that as the applicant was not party to the collective agreement, it had no locus standi to refer the dispute to the GPSSBC. The matter was taken on appeal to the Labour Appeal Court (LAC). On appeal the applicant argued that the issue who the party is to a dispute was answered by the usage of the words in section 24 (2) which says, "any party to the dispute". It was argued If the legislature wanted to restrict the right to refer a dispute only to a party to the collective agreement, it would have done so by using the words "any party to the collective agreement may refer the dispute". The LAC correctly identified that the issue was whether the GPSSBC had jurisdiction or not. The court noted that in Arends the Labour Court did not deal with the fact that while parties to a collective agreement are the parties that have concluded it, section 23 (1) (d) extends collective agreement beyond the parties to it. The LAC concluded that Kasper was covered by the collective agreement as he was employed in terms of Correctional Services Act The court further held that when all sections dealing with collective agreements in the LRA are considered, there is nothing that suggest that the legislature intended to exclude employees who happen to be members

[1] [2013] 5 BLLR 465 (LC)

[2] PR 157/17, P226/[2019 ZALCPE (LC)

	of non-party unions from accessing the dispute resolution created in the Act. This is a point also raised by the judge in the Skulpad judgment that we shared in the webinar. The court went further to say to prevent an interested or affected party from seeking to resolve the dispute through interpretation is a direct attach on section 34 of the constitution, which guarantees access to courts or other independent forums such as the bargaining council. Again, this point was raised sharply in the Skulpad judgment. The court held that the right of access to all lawful forms of dispute resolution should only be curtailed in the most extreme and deserving cases and with great reluctancy. The LAC concluded that section 24 does not prohibit an employee from accessing the dispute Resolution provided and that any party to the dispute may refer a dispute to the relevant forum for interpretation. **The take home from the judgment:** The LAC has spoken and the issue is settled, and there is now legal certainty that any party to the dispute on interpretation or application of the collective agreement may refer the dispute to the bargaining council, and not only parties to the collective agreement.
In enacting s24 of the LRA, did the legislature intend to divest an employee of her common law right to institute litigation?	**Skulpad and Another V Department of Health Eastern Cape and Others (PR139/21) [2024] ZALCPE 45 (30 October 2024)** In Skulpad & another v Department of Health, Eastern Cape & others (at 193) the Labour Court rejected the decisions in Arends & others v SA Local Government Bargaining Council & others (2013) 34 ILJ 2560 (LC) and SA Police Service v Du Preez & others: In re Du Preez v SA Police Service (PR157/17 and P226/17) [2019] ZALCPE 3 (8 March 2019) which were to the effect that employees had no locus standi to refer s24 disputes and that it was only unions that could do so. It found that individual employees with a direct and substantial interest in a dispute relating to the interpretation and application of a collective agreement had locus standi to refer a dispute in terms of s24 and that the bargaining council had jurisdiction where the

	applicants were individual employees. *Please see webinar recording available on PSCBC website for further discussion
Jurisdiction on preliminary issues at the conciliation stage	**Bombardier Transportation (Pty) Ltd v Mtiya and Others (JR 644/09) [2010] ZALC 34; (2010) 31 ILJ 2065 (LC); [2010] 8 BLLR 840 (LC) (11 March 2010)** "The only true jurisdictional questions that are likely to arise at the conciliation phase are whether the referring party referred the dispute within the time limit prescribed by section 191(1)(b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment-related matter at all."
Re-enrollment of matters 'struck off the roll'	**Solomons v Phokelo NO, the CCMA and Food Lovers Market Kempton Park (2021) JR99/2021** "The Court held that a commissioner may not dismiss such a matter, but instead, may make an administrative decision to remove the matter from the roll. In the circumstances, it was held that an applicant may request that the matter be re-enrolled, and rescission in terms of section 144 of the Labour Relations Act would not apply." **On 18 May 2023** in ***Mohube v CCMA & Others (JA18/2022), the LAC*** rejected the interpretation of section 138(5)(a) per *Solomons v Food Lovers Market, Kempton Park*. It was held that "instead of reviewing and setting aside the refusal by the commissioner to rescind the ruling, the Labour Court decided to interpret the word "*dismiss*" as set out in section 138(5) to "*mean struck off the roll*". The LAC confirmed that the commissioners have the power to dismiss matters, in a case whereby the referring party fails to appear. The commissioner may exercise his discretion, the dismissal should be the last resort and the commissioner must consider the matter carefully taking into consideration the need for finality for the respondent.
S188A LRA – protected disclosure	**Nxele v National Commissioner of Correctional Services and Others (2018) 39 ILJ 1799 (LC)** "The Labour Court has noted that the purpose of section 188A(11)[3] of the LRA 1995, is to avoid disputes where an employee claims that the holding

[3] Despite subsection (1), if the employee alleges in good faith that the holding of an enquiry contravenes the Protection Disclosure Act, 2000 – that the employee or employer may require that the enquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.

	of an enquiry into allegations of misconduct breaches the provisions of the Protected Disclosures Act 26 of 2000. The section permits either party to insist on an enquiry under section 188A, and, when an employee requests such an enquiry, the employer has no discretion to refuse to consent to the request." **In *Ramsammy v Wholesale & Retail Sector Education & Training Authority (*2009) 30 ILJ 1927 paragraph [53],** the LC explained the meaning of good faith in the context of disclosures to mean that the employee making the disclosure must reasonably believe that the information disclosed, and the allegations therein, are substantially true, and not made for the employee's gain. The phrase 'good faith', when used as a noun, means honesty and sincerity of intention. The jurisdictional requirements for the application of section 188A(11) were set out and clarified by the LC in ***Mamodupi v Property Practitioners Regulatory Authority and Another (J68/23) [2023] ZALCJHB 19 (13 February 2023).*** The employee approached the LC on an urgent basis seeking a declaratory order that her summary dismissal effected by the employer, the Property Practitioners Regulatory Authority (PPRA) be declared unlawful, invalid and of no force, and (b) in breach of section 188A of the LRA process. The court held that where an employee has been dismissed, the jurisdictional powers of the LC under section 77 (3) of the BCEA may not be invoked. Section 186 (1) (a) of the LRA provides that it is dismissal for an employer to terminate a contract of employment with or without notice. In as much as the applicant chose to label her case as one of breach of a contract, in truth this is a case of unfair dismissal. The applicant stated that her dismissal was unlawful and invalid. It is now settled law that the LRA does not know of an unlawful and or invalid dismissal. The jurisdictional requirements - – The employee must make a protected disclosure. – A request in terms of section 188A(11) of the LRA must be supplemented by proof of the protected disclosure made, preceding the charge sheet issued to the employee prior to a disciplinary action. – The employee who made the disclosure must have been subjected to an occupational detriment by the employer. The employee must establish a causal connection between his/her

	protected disclosure and the occupational detriment.
Rule 15 - Conciliation proceedings may not be disclosed	**September & Others v CMI Business Enterprise CC [2018]** “The Constitutional Court considered the interpretation and application of rule 16 of the CCMA (prior to the 2015 amendment) in the context of the Labour Relations Act, No 66 of 1995’s purpose as a whole. In so doing, the majority held that rule 16 serves to facilitate the process of effective dispute resolution. It provides parties with a safe harbor to negotiate resolutions of disputes without the fear that what they say will be used against them. Discussions at conciliation that seek to resolve the dispute are private and privileged from disclosure. However, this does not mean that everything that is discussed at conciliation is inadmissible in subsequent proceedings. Evidence as to the nature of the dispute is not privileged as it does not relate to the substance of the dispute - it is merely descriptive. To interpret rule 16 as providing a blanket ban of everything discussed at conciliation does not serve to promote its purpose.”
Interpretation and application disputes (S24 LRA)	**HOSPERSA obo Tshambi v Department of Health** “The court in *Health and Other Services Personnel Trade Union of SA obo Tshambi v Department of Health, KZN (2016) 37 ILJ 1839 (LAC)* stated "what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA; not from civil litigation. In true labour disputes, the provisions of s 191(1) of the LRA are a more obvious general yardstick to test what is reasonable for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, the expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. The appropriate enquiry is into the history of the engagement between the parties about the controversy, and the elapse of time since engagement to resolve the controversy ceased. Self-evidently, the ultimate decision on reasonableness has to be fact-specific”. However, it is generally accepted, in practice, that a reasonable time amounts to ninety days. Further, where a repudiation of a contract happens, the aggrieved party has an election to make. The available remedies depend on the election the aggrieved party makes. If a party elects to accept the repudiation and cancel the contract, that party may sue for damages. If the party does not accept the repudiation, he or she may insist on the performance of the contractual terms in a specific format. Should the aggressor refuse to

	perform, the aggrieved party may approach a Court with competent jurisdiction and seek specific performance as a relief.
Evidence not led and no stated case submitted by parties	**JR1075/18 – PSA obo WC Gernandt vs. Department of Justice and Constitutional Development** "The court held that the award was reviewed and set aside, no evidence was led, and no stated case was submitted by parties". **JR1832/19 - Fetakgomo Greater Tubatse Local Municipality v SALGBC and Others (JR 1832/19) [2022] ZALCMPP** An alleged unfair dismissal dispute was referred to the Council. The first commissioner issued an award based on the written submission. The award was set aside by the LC and remitted to the Council. At the second arbitration, the second arbitrator chose not to arbitrate the matter and instead, he again issued his award based on the written submissions. The parties agreed that there was no need for oral evidence. The court shared the same as in the above matter. The CCMA must consider exercising its powers in terms of section 130 of the LRA. Section 127 (1) (b) of the LRA empowers the governing body to accredit any council to perform the function of the arbitration of disputes if the LRA requires arbitration. Section 130 endows the governing body with facultative powers to withdraw accreditation if a failure to comply, to a material extent, with the terms of the accreditation emerges. Failure to arbitrate must be a material non-compliance with the terms of the accreditation. Given the fact that this dispute makes a second sojourn in this court, it is befitting that the governing body must be directed to conduct investigations aimed at withdrawing the accreditation to arbitrate. The court stated that SALGBC must consider recouping the fees it paid to the arbitrator in respect of this arbitration since the arbitrator failed to conduct arbitration. In other words, the arbitrator is unduly enriched at the expense of the bargaining council. The court relied on its judgement in *MEC: Public Works and Infrastructure Free State Provincial Government v GPSSBC and Others (JR857/2017) [2018] ZALCJHB 164 (8 May 2018)*. In that matter, the commissioner issued an award in an alleged unfair dismissal dispute without hearing oral evidence. **The court went further and directed the following -**

	a) The Director of the CCMA in conjunction with the Secretary of the SALGBC to urgently identify a senior arbitrator who should properly arbitrate the dispute which had been set aside twice by the courts on the same basis. b) The governing body of the CCMA to investigate whether the terms of the accreditation had not been breached by this apparent failure to arbitrate the dispute referred. c) The SALBC is to consider recouping the arbitration fees paid to the arbitrator. A copy of this judgment must be placed before the governing body of the CCMA, the director of the CCMA and the secretary of the SALGBC for note-taking purposes and where necessary to take appropriate action.
Rule 29 – Non attendance at Conciliation	**Premier Gauteng & another v Ramabulana N.O & others (2008) 29 ILJ 1099 (LAC)** “the Act does not anywhere confer on the CCMA or a bargaining council power to dismiss an employee’s referral of a dismissal dispute simply because he failed to attend the conciliation meeting… … in terms of sec 191(4) of the Act a party to a dispute who refers a dispute to the CCMA or a bargaining council for conciliation has a right, once a period of 30 days from the date when the CCMA or a bargaining council received the referral has lapsed, to have his dismissal dispute arbitrated if he so requests or has a right to refer it to the Labour Court for adjudication, without such party having done anything after referring the d) dispute for conciliation. The CCMA Rules cannot take that right away.”