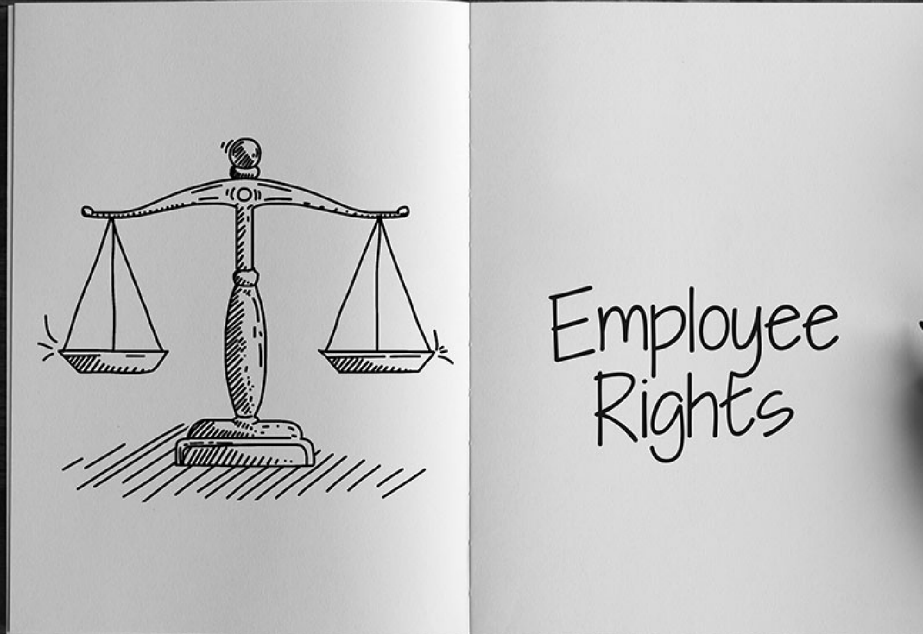




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Claims for Non-payment in terms of Section 73A of the Basic Conditions of Employment Act – An overview of recent cases

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In 2019, the jurisdiction of the Commission for Conciliation, Mediation and Arbitration ("CCMA") was expanded by the introduction of section 73A of the Basic Conditions of Employment Act, 1997 ("BCEA"). Essentially, section 73A entitles certain employees and workers – whose income does not exceed the prescribed earnings threshold, which is currently R254,371.67 per annum (or R21,197.64 per month) – to refer a dispute to the CCMA where an employer has failed to pay any amount owing to that employee or worker in terms of the BCEA, NMWA, an employment contract, a sectoral determination or a collective agreement. Any other claim for non-payment beyond those mentioned above, may not be dealt with as part of a section 73A dispute.

While employees or workers whose annual income exceeds the prescribed threshold are not permitted to refer claims in terms of section 73A to the CCMA, they are entitled to institute such claims in either the High Court or Labour Court, as well as the Magistrates Court or Small Claims Court, subject to the claimant meeting the jurisdictional thresholds for those courts.

When referring disputes in terms of section 73A, employees or workers must keep in mind three important factors. First, in terms of the CCMA Rules, no legal representation is allowed at the CCMA during proceedings brought in terms of section 73A, except in the limited circumstances described in Rule 25(1)(c) of those rules. Secondly, a claimant must be able to show that they are actually entitled to the

payment they allege is owed to them by an employer and must provide proof of that entitlement. Lastly, despite the fact that neither the BCEA nor the CCMA Rules specify a timeframe for section 73A referrals, each claim must be brought within three years from the date on which it became due and payable, failing which the claim may prescribe and consequently be rendered unenforceable.

Against this backdrop, the following is a brief overview of recent cases dealing with claims for non-payment in terms of section 73A.

- The plaintiff in ***Kgasane v MEC Department of Health: Free State and Another*** (2025) 46 ILJ 359 (LC) was a retired employee who claimed that his former employer had failed to pay him out for his accrued leave days. He approached the Labour Court because his salary (at the time that he was employed) exceeded the earnings threshold. His former employer argued that the Labour Court did not have jurisdiction to hear the matter as the plaintiff's claim was based on a provision in a collective agreement concluded at a bargaining council, which in their view could only be enforced through arbitration at the relevant bargaining council. However, the judge held that the Labour Court had jurisdiction to determine the plaintiff's claim because a plain reading of section 73A permits employees to bring claims for non-payment based on collective agreement.
- In ***Safeguard Chemicals t/a Maris Polymers South Africa v Frydas and Others*** (JR631/20) [2022] ZALCJHB 359 a dismissed employee approached the CCMA seeking compensation for his alleged unfair dismissal. Together with his dismissal dispute he claimed that his employer had also failed to pay him outstanding salaries, a 13th cheque and a 20% profit share ("additional claims"). The CCMA found that his dismissal was unfair and awarded him compensation which included the additional claims. However, when the matter was taken on review in the Labour Court, the judge found that the CCMA had no jurisdiction to award the additional claims (as the dismissed employee's salary exceeded the earnings threshold), nor any amounts relating to an alleged breach of contract.
- Similarly, in ***Adapt (Pty) Ltd v Maseko and Others*** [2023] JOL 57378 (LC) the Labour Court found that the CCMA had exceeded its jurisdiction by dealing with contractual claims. The employee had approached the CCMA alleging that she had been subjected to an unfair labour practice in that she had not been given a performance appraisal, a salary increase, and a bonus. The CCMA found that she had been unfairly deprived of a performance appraisal (which constituted an unfair labour practice) and awarded her two months' compensation, as well as the salary increase and bonus she should have received. The employer approached the Labour Court to review and set aside the CCMA's arbitration award, arguing that the employer had not committed an unfair labour practice as the employee was not entitled to a performance appraisal because she was on a performance improvement plan (based on her poor work performance). The employer also argued that the CCMA did not have jurisdiction to award the employee a salary increase and bonus. The Labour Court found that the employer had indeed committed an unfair labour practice by not giving the employee a performance appraisal, even if it would not have resulted in her receiving an increase; she was at least entitled to a meeting to inform her of the reasons that she was ineligible for an increase and bonus. However, the judge reduced the amount of compensation that the employee should receive because the CCMA had not taken into account that the employee had in fact been performing poorly. On the question of jurisdiction, the judge held that the CCMA did not have jurisdiction to award the employee with a salary increase and bonus, as these were contractual claims that fell outside the CCMA's jurisdiction. It therefore set aside these aspects of the arbitration award.
- In ***Ademulegun v Monothendre (Pty) Ltd t/a GFT Group Fiveways Superspar*** [2024] JOL 63624 (LC) the applicant instituted action against his former employer for unpaid remuneration – such as underpayment of wages, non-payment of overtime and family responsibility leave, and not paying him the agreed amounts for working on Sundays and holidays – over a period of 8 years. The employer raised a special plea that some of the claims had prescribed. In considering the matter, the court observed that a debt becomes due when the debtor is obliged to make payment; therefore, each month constituted a new and separate debt. The court upheld the special plea in part as it found that the applicant's claims that arose more than three years before the claim was initially instituted had prescribed.
- The applicant in ***Danster v Department of Education: Eastern Cape*** [2021] JOL 51199 (ELRC) was a teacher who had not received her salary since the date of her employment – a period of 9 months and 2 weeks. She referred a dispute to the Education Labour Relations Council ("ELRC"). The employer alleged that her salary was blocked on the PERSAL system, but no explanation for the blockage was ever provided to her. During the hearing she led evidence that at the school where she was previously employed, she was never dismissed, nor were charges of misconduct ever presented to her. The ELRC ordered the employer to pay the applicant the full remuneration to which she was entitled for the period since she had been employed.
- In ***Hollywood Sportsbook Gauteng v CCMA and Others*** [2023] JOL 60561 (LC) the employer sought to review and set aside an arbitration award by the CCMA. The CCMA had ordered the employer to pay the employee an outstanding portion of his salary for the last month of his employment. The Labour Court set aside the arbitration award, reasoning that the commissioner had disregarded relevant evidence and made a decision that was disconnected from the evidence placed before him. The evidence before the CCMA showed that there had been overpayments to the employee in the months leading up to the termination of his employment. Additionally, the amount withheld from the employee's salary was not lawfully due to him as he had not worked the full month in his last month of employment.

- In ***Mathubela v Bidvest Protea Coin and Others*** [2023] JOL 65839 (LC) the applicant had previously referred an unfair dismissal dispute to the CCMA where his dismissal was found to be substantively unfair. Consequently, the employer was ordered to reinstate the applicant and pay him backpay. The employer paid the backpay. However, the applicant instituted contempt of court proceedings in the Labour Court on the basis that his former employer failed to reinstate him. Subsequently, the applicant referred a section 73A dispute to the CCMA for the outstanding backpay. The CCMA held that they did not have jurisdiction over disputes relating to breach of contract. The applicant brought a review in the Labour Court to challenge the CCMA ruling. However, the Labour Court dismissed the applicant's review, reasoning that the applicant had provided no proof that he had tendered services to his former employer following the order for his reinstatement. The judge reasoned that the employee's tender of services was necessary and must have been accompanied by an acceptance of the tender by his former employer for the employment contract to be revived. Accordingly, no contract existed on which he could allege a breach of contract occurred. Therefore, the CCMA had no jurisdiction to deal with the section 73A dispute.
- The applicant in ***Nieftagodien v Yikusasa Building Contractors (Pty) Ltd*** [2024] JOL 63745 (LC) brought a claim in the Labour Court for arrear salaries accumulated over several months. The respondent disputed that the applicant was its employee. The applicant alleged that his employment contract had been transferred to the respondent (from his initial employer) in accordance with section 197 of the Labour Relations Act, 1995. However, the Labour Court disagreed, finding that there was no agreement in terms of section 197 and the respondent had, amongst other things, not taken over the initial employer's employees, nor did it take over its customers and equipment. Therefore, the applicant failed to prove that he is an employee of the respondent. Accordingly, the Labour Court held that it lacked jurisdiction to deal with the applicant's claim and dismissed it on that basis.
- In ***Nxazonke v CCMA and Others*** [2022] JOL 57984 (LC) the applicant brought an urgent application for numerous claims including, amongst others, claims for recovery of remuneration and deductions from his salary. The Labour Court confirmed that while it had jurisdiction to deal with claims of this nature, it is only in exceptional circumstances that financial hardship would justify a court intervening on an urgent basis. The judge held that the applicant had failed to establish grounds for the claims to be dealt with on an urgent basis and that he was therefore required to invoke the remedies available to him in the ordinary course. The applicant's claims were therefore struck off the roll for lack of urgency.
- In ***Prestige Campworld (Pty) Ltd t/a Comet Caravans v Botha and Others*** [2022] JOL 56284 (LC) the applicant brought a review application in the Labour Court to review and set aside a decision of the CCMA in terms of which a former employee had been awarded arrear salary, commission and leave pay. The applicant argued that the CCMA lacked jurisdiction to determine the dispute as the former employee's monthly income (which was comprised of a "fixed salary", as well as "commission") exceeded the earnings threshold. The Labour Court agreed and held that in considering the former employee's salary the CCMA should have included commission in its calculation of his earnings. Accordingly, the Labour Court reviewed and set aside the arbitration award.

The above cases highlight the varying complexities that may arise in claims for non-payment in terms of section 73A. Employers and employees alike would do well to consider these (and other) cases to guide them on how to address such disputes, if they arise.



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