



(1) Reportable: NO
(2) Of interest to other Judges: Yes

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D140/2025

In the matter between:

LUNGELO AARON MBILI

Applicant

and

DEPARTMENT OF EDUCATION

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

COMMISSIONER M N MASETLA N.O.

Third Respondent

COMMISSIONER P JAIRAJH N.O.

Fourth Respondent

Heard: 03 March 2026

Delivered: 06 March 2026

JUDGMENT

HARVEY J

Introduction

- [1] This is an application to review and set aside two rulings issued under the auspices of the Education Labour Relations Council. The first is a jurisdictional ruling dated 12 December 2024 in it the bargaining council held that it lacked jurisdiction because the dispute was referred outside of the prescribed time limits without an application for condonation. The second is a ruling dated 20 February 2025 in which condonation for the late referral was refused.

Facts

- [2] The material facts are common cause. The applicant was promoted with effect from 2 January 2010 to the position of principal. His salary level ought to have moved from level 8 to level 9, but remained at level 8.
- [3] On 1 June 2015 the applicant was again promoted, this time to a post at salary level 10.
- [4] On 1 July 2024 he referred an unfair labour practice dispute to the bargaining council in which he claimed that the failure to pay him correctly amounted to a demotion and was accordingly an unfair labour practice. He claimed outstanding salary payment for the period 2 January 2010 to 1 June 2015.

The impugned rulings

The ruling on jurisdiction

- [5] At arbitration on 25 October 2024, which was held virtually, the employer party was not present. The fourth respondent commissioner raised the concern that the dispute had not been referred within the 90-day time period provided for in section 191(5)(b)(ii) of the LRA. She invited the applicant, who was legally represented, to make submissions concerning whether the bargaining council had jurisdiction.
- [6] The applicant, through his legal representative, made the submissions requested. In oral argument at the hearing, and subsequently in written heads of argument, the applicant contended that there was no need for condonation because the dispute was continuous and repetitive. Reliance was placed on

the Labour Appeal Court's judgment in *SABC v CCMA and others*¹ to argue that the unfair labour practice complained of was a 'continuing wrong' in that a fresh demotion occurred each month his salary was short-paid.²

[7] In her ruling dated 12 December 2024, the commissioner engaged with the *SABC v CCMA* judgment but held that the applicant:

7.1 was aware of the act/omission (being paid on the incorrect salary level, which he characterises as a demotion) in January 2010;

7.2 was promoted in June 2015 at salary level 10; and

7.3 should have referred his dispute before June 2015 if he regarded it as continuous.

[8] The commissioner concluded that, as the matter was only referred on 1 July 2024 (and thus not within 90 days), the bargaining council lacked jurisdiction. She ruled that if the applicant wished to pursue the matter, he would have to apply for condonation.

The ruling on condonation

[9] The applicant then applied for condonation. In that application, he persisted in his contention that the alleged unfair labour practice was continuous and repetitive in nature, that a new cause of action arose each time he was paid at the incorrect level, and that the referral was accordingly not referred late.

[10] The applicant's condonation application rested solely on the contention that the bargaining council had jurisdiction and that no condonation application was required. As a result, he provided no explanation for having failed to refer the dispute at any time during the period of under-payment, being January 2010 to June 2015, nor did he explain the further delay between June 2015 (when the repeated non-payment characterised as a demotion ceased) and the referral in July 2024.

[11] The condonation application came before the third respondent commissioner. On 20 February 2025 the commissioner refused to grant condonation. In his

¹ *SABC v CCMA and others* (2010) BLLR 251 (LAC)

² The written submissions have not been placed before this Court. The Court was also informed that no recording of the virtual hearing is in existence.

ruling the commissioner refers to the Labour Court's decision in *City of Cape Town v Nevin and others*³ in which the court distinguished between the act or omission said to be unfair, and its ongoing consequences.

- [12] The commissioner held that the act or omission had occurred in January or February 2010, and that the applicant's justification for the delay rested solely on the contention that the dispute was ongoing. This, held the commissioner, amounted to no explanation at all. The application for condonation was refused.

The Test on Review

- [13] The test on review as to whether or not a tribunal has jurisdiction is correctness. This test applies to the first ruling, in which it was held that the referral was out of time. This court must decide whether that finding was right or wrong.

- [14] The test on review of the ruling refusing condonation is reasonableness. A commissioner deciding whether or not to grant condonation exercises a (true) discretion. A decision involving a discretion can never be clearly right or wrong. Where the court is asked to review a decision taken in the exercise of a discretion, it will not interfere unless the decision-maker failed to exercise the discretion judicially, or arrived at a decision to which a reasonable decision maker could not come.

Review Grounds

- [15] The applicant contends that the jurisdictional ruling was incorrect and that, had the commissioner properly dealt with the substantial merits of the dispute, she would have concluded that the unfair labour practice was continuing and repetitive.
- [16] The applicant further contends that the decision refusing condonation ruling was not one that a reasonable decision-maker would have reached. In his affidavits, he contends that the commissioner ignored relevant evidence, mis-applied the law, and failed to consider the interrelated nature of the traditional condonation factors, including the interests of justice.

³ *City of Cape Town v Nevin and others* (2022) 11 BLLR 1016 (LC) at par 56.

[17] In Court, however, the applicant's legal representative submitted that, unless the Court were to hold that the dispute in question did indeed concern a 'continuing wrong' and that condonation was not required, the condonation ruling would not be reviewable. In other words, to the extent that condonation was indeed required, it was conceded that the referral was out of time and that the Court was unlikely to interfere with the exercise of the commissioner's discretion.

[18] The applicant asks that the two rulings be set aside, and that the dispute be enrolled for arbitration.

Evaluation

The Jurisdictional Ruling

[19] On the first ruling, the question is whether the commissioner was correct when he found that the bargaining council lacked jurisdiction over the unfair labour practice dispute.

[20] The unfair labour practice complained of was a demotion, which consisted in the applicant being paid at salary level 8 instead of 9 from January 2010 to June 2015. Whether or not the demotion was a 'continuing wrong', it did not persist beyond June 2015, when the applicant was promoted to a post at salary level 10 and remunerated at that level.

[21] The applicant's legal representative nevertheless submitted that the unfair labour practice continued beyond 2015, because the earlier underpayment had knock-on effects in relation to benefits and pension calculations. The applicant continued to rely heavily on *SABC v CCMA*⁴ in which the Labour Appeal Court recognised as a 'continuing wrong' a pay disparity based on race, where each differential payment perpetuated unfair discrimination. The present matter is distinguishable on the facts, as no discrimination was alleged.

[22] Inasmuch as the earlier failure to pay the applicant at the correct salary level impacted on his subsequent benefits and pension, the Labour Appeal Court in *Amalungelo Workers Union*⁵ the court between the act or omission complained

⁴ Note 1 above.

⁵ *Amalungelo Workers Union obo Mayisela and others v CCMA and others* (2022) 34 ILJ 600 (LAC).

of which is said to constitute the unfair labour practice, and the consequences that flow from the unfair labour practice.⁶ The demotion ceased when the applicant was promoted in June 2015 and any ongoing financial impact of that alleged historic underpayment cannot be said to be a demotion. Rather, the impact is a consequence of the alleged demotion.

- [23] The referral of the dispute in July 2024 was thus well outside the 90-day period. The bargaining council accordingly lacked jurisdiction in the absence of condonation, and the jurisdictional ruling was correct.

The Condonation Ruling

- [24] Despite the concession made by the applicant's legal representative, I will consider the question in respect of the ruling refusing condonation, which is whether the third respondent commissioner properly exercised his discretion and whether he reached a decision that a reasonable decision-maker could reach.
- [25] The commissioner considering the condonation application rejected the contention that the dispute was continuous, holding that the cause of action, being the underpayment of salary, was known to the applicant in early 2010. He found that the delay was excessive. The explanation that the applicant regarded the matter as ongoing did not justify the delay and amounted to no reason at all, and he refused to grant condonation for the late referral.
- [26] This is, in my view, a reasonable decision. On the undisputed facts, the unfair conduct complained of ceased in June 2015 when the applicant was again promoted and began to be paid on salary level 10. Even if the latest possible date of the alleged unfair demotion is taken to be June 2015, the applicant provided no explanation for the nine-year delay thereafter in referring the matter. His application for condonation simply reiterated his disagreement with the conclusion reached by the commissioner who issued the jurisdictional ruling, in that he persisted in his view that the referral was not late.

⁶ See also *National Education Health and Allied Workers Union obo Makhubele and Others v Ramalatso N.O* (JR642/20) [2025] ZALCJHB 162; (2025) 46 ILJ 1980 (LC) (13 May 2025).

[27] In all the circumstances I am satisfied that the commissioner's decision to refuse condonation was made in the judicial exercise of his discretion and that it is a decision which a reasonable decision-maker could reach.

Costs

[28] In their papers, both parties requested costs, but neither addressed the issue in argument. In response to the Court's query, counsel for the first respondent submitted that an order for costs would be justified because the applicant's conduct (in making an extremely late referral and in persisting in a meritless argument that condonation was not required) constituted an abuse of process.

[29] In considering costs, I must have regard to the requirements of law and fairness, and to the conduct of the parties.⁷ It is well-established that, in labour matters, costs do not automatically follow the result.

[30] In this case, while the applicant ultimately pursued a meritless argument, I do not find his conduct to have been frivolous or abusive. The applicant is an individual educator, who remains in employment, and who seeks to vindicate his rights in respect of his employer, a government department. Balancing the law and fairness, I make no order as to costs.

Order

[1] The application to review and set aside the jurisdictional and condonation rulings is dismissed.

[2] There is no order as to costs.

SJ Harvey

Judge of the Labour Court of South Africa

⁷ Section 162 of the LRA.

Appearances:

For the Applicant: Mr Hlongwane of Mhlanga Incorporated

For the First Respondent: Adv T Khuzwayo instructed by the State Attorney