(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR1115/22

In the matter between:

SAMWU obo NYATHI & OTHERS **Applicant**

and

CITY OF EKURHULENI **First Respondent**

MABUSELA, TL *N.O.* **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC) **Third Respondent**

Heard: **19 March 2026**

Delivered: **30 March 2026**

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is 30 March 2026.

JUDGMENT

MAKHURA, J

Introduction

[1] This matter concerns an opposed review application brought in terms of section 145 of the Labour Relations Act[1] (LRA). The application seeks to challenge the arbitration award issued by the second respondent (commissioner) dated 4 May 2022 in terms of which the commissioner dismissed the applicant's (employees') claim in terms of section 186(1)(b)(ii) of the LRA.

[2] Before the Court can consider the merits of the review application, two preliminary issues must be addressed. The first is the employees' application for the reinstatement of the review application and condonation for the late filing of the record. The second is whether the review application is opposed, specifically, whether the answering affidavit and the condonation application for its late delivery are properly before this Court.

<u>Reinstatement and condonation for the late delivery of the record</u>

[3] The employees seek an order reinstating the review application, which had been deemed withdrawn, together with condonation for the late delivery of the record.[2] The reasons for the delay are fully set out in the supplementary affidavit. After the employees discovered that the record was incomplete, they requested the first respondent's consent to extend the 60-day period. Despite several follow-up communications, the first respondent did not respond.

[4] The delay arose primarily because the initial record filed by the South African Local Government Bargaining Council (SALGBC) was incomplete. This necessitated the employees seeking assistance from the SALGBC in filing the full record, which assistance was not forthcoming. The employees then launched an application compelling the SALGBC to file the complete record, which ultimately led to a reconstruction process. A reconstruction meeting was held on 29 June 2023. On 10 July 2023, the SALGBC issued and served a reconstruction ruling confirming that the record had been successfully reconstructed and would

[1] Act 66 of 1995, as amended.
[2] See item 11.2.2 and 11.2.3 of the Practice Manual of the Labour Court of South Africa, 2 April 2013 (repealed with effect from 17 July 2024).

LABOUR COURT

be filed. The record was indeed duly filed and uplifted by the employees for transcription.

[5] On 6 September 2023, the transcriber forwarded the record to the parties. On 14 October 2023, the employees' attorneys notified the parties of their intention to proceed with the review, and on 1 November 2023, the employees filed the rule 7A(8)[3] together with a supplementary affidavit. In the circumstances, the explanation for the delay is satisfactory, and the application for reinstatement and condonation ought to be granted.

<u>The *answering affidavit* and *condonation application*</u>

[6] As indicated above, the notice in terms of rule 7A(8) was filed on 1 November 2023. This notice and the supplementary affidavit were served on the first respondent on 31 October 2023. The first respondent was required to file its answering affidavit within 10 days of receipt of the supplementary affidavit, by 14 November 2023.

[7] The answering affidavit was deposed on 21 November 2024, and the filing notice signed on 26 November 2024. However, the first respondent's answering affidavit bears no Court stamp to prove that it was in fact filed, and the date when it was filed.

[8] Similarly, the notice of motion and supporting affidavit in the first respondent's condonation application also do not bear any Court stamp. The notice of motion is dated 6 October 2024, while the supporting affidavit is dated 6 November 2024, preceding the date of the answering affidavit.

[9] On 18 March 2026, the first respondent was directed to provide proof of filing of the answering affidavit and application for condonation. In response, the first respondent's attorneys acknowledged that the documents were not filed in November 2024. They stated that the documents were filed in January 2025.

[3] Rules for the conduct of proceedings in the Labour Court, GG17495 of 14 October 1996, repealed with effect from 17 July 2024.

LABOUR COURT

However, the documents bear no Court stamp, and this allegation cannot be correct. These documents were filed on the morning of 19 March 2026, before the start of the proceedings, with no condonation application. Having considered that the documents were filed for the first time on 19 March 2026 without a condonation application, I rejected them and found that they are not properly before Court and proceeded to deal with the matter on an unopposed basis.

<u>The review application</u>

Material facts

[10] The employees were employed on fixed term contracts from 1 December 2017 to 28 February 2018. On 25 January 2018, the first respondent issued an internal memorandum recommending that the employees' fixed-term contracts be renewed on a month-to-month basis until 30 June 2018. The memorandum recorded that the Waste Management Division was experiencing a high vacancy rate and was unable to fill positions due to a moratorium on appointments. The month-to-month renewals were therefore intended to ensure operational continuity until the moratorium was lifted. The employees' contracts were ultimately extended for four months, ending on 30 June 2018.

[11] When the employees reported for duty on 2 July 2018, they were instructed to return home as their fixed-term contracts had not been renewed or further extended. They subsequently referred a dispute to the SALGBC in terms of section 186(1)(b)(ii) of the LRA, alleging that they reasonably expected to be retained in employment on a permanent or indefinite basis. They sought to be permanently appointed.

The employees' claim

[12] The employees based their claim of a reasonable expectation of permanent employment on several factors. First, although engaged as relief workers, they continued performing duties alongside permanent employees even after the December/January and Easter holiday periods. They argued that the work

LABOUR COURT

remained ongoing, that their work was critical and budgeted for and that the first respondent chose to utilise subcontractors rather than appoint them.

[13] Second, during their period of employment, several permanent posts became vacant due to retirements, dismissals, deaths, and other causes. Third, the employees were issued work uniforms shortly before their contracts expired and were never asked to return them. Fourth, the extension of their contracts beyond the initial three-month period reinforced their reasonable expectation that they would be permanently absorbed. For this, they relied on the content of the first respondent's memorandum dated 25 January 2018.

[14] Fifth, they were not issued with notices of termination, despite their contracts expressly providing for such notice. Finally, they relied on the alleged long-standing practice of the first respondent first employing the workers on a fixed term contract, extending the contracts and later absorbing the employees. They referred to instances of permanent absorption in 2005/06, 2013/14, and 2016.

The first respondent's opposition

[15] The first respondent disputed the employees' claims. It maintained that the employees were appointed strictly as relief workers and that the municipal council had not approved any permanent appointments. It disputed that the 25 January 2018 memorandum could have created any reasonable expectation. The first respondent also explained that subcontractors were used only on an *ad hoc* basis and noted that it had advertised fewer than 100 posts, none of which the employees applied for. With respect to uniforms, the first respondent argued that uniforms are replaced as needed, may be delivered late, and are not returned at the end of employment for hygiene reasons. In addition to the fact that the contracts had start and end dates, the first respondent further relied on an exit process conducted on 13 June 2018, evidenced by clearance certificates issued to the employees, as notice that their contracts would end on 30 June 2018. It also emphasised that the 2016 absorption relied on by the employees

LABOUR COURT

resulted from an arbitration award issued under section 198B of the LRA, not from an internal practice or policy.

The commissioner's award

[16] The commissioner found that the employees failed to prove that they had been appointed to structured, permanent positions. Although they performed duties associated with positions in the organisational structure, the first respondent demonstrated, through position numbers, that the employees were appointed as relief workers, not as general workers or drivers, as claimed. The position numbers for relief workers differ from those of permanent posts, and the employees were unable to dispute this evidence.

[17] The commissioner accepted the first respondent's submission that performing duties aligned to structured posts did not entitle the employees to permanent appointment. The normal recruitment processes had to be followed, and after the moratorium on appointments was lifted, the posts were advertised and filled through that recruitment process. The employees elected not to apply for the advertised positions, and since fewer than 100 posts were advertised out of more than 500 fixed-term employees, their failure to apply could not be attributed to the first respondent.

[18] The commissioner rejected the employees' contention that they were not given reasons for the non-renewal of their contracts. The appointment letters dated 27 February 2018, signed by the employees, expressly recorded that they were appointed as relief workers to meet the increased operational demand during the March/April Easter period. The commissioner was satisfied that the respondent clearly set out the reasons for the fixed-term appointment and its extension.

[19] The employees had relied on an internal memorandum authored by the Waste Management Head of Department recommending their appointment. The first respondent adduced evidence that this was a confidential internal document that the employees were not supposed to have access to. The first respondent

LABOUR COURT

explained that the memorandum constituted only a recommendation by the HOD, which was any event not approved by the City Manager. The commissioner held that the employees could not rely on this internal memorandum to establish a reasonable expectation of permanent employment. It was neither addressed to them nor communicated to them, and there was no evidence that it conveyed any promise of appointment. The absence of approval by the City Manager, concluded the commissioner, further undermined its relevance to their claim.

<u>Grounds of review</u>

[20] The employees contend that the commissioner committed gross irregularities and failed to determine the true issue before him. They argue that the presence of a non-renewal clause in their contracts did not preclude the creation of a reasonable expectation of renewal, nor was it decisive in resolving the dispute.

[21] They further argue that the commissioner ignored material evidence demonstrating that they continued working alongside permanent employees after the December and Easter periods, that they were issued new uniforms only days before the expiry of their contracts, and that they reported for duty on 2 July 2018 and signed the attendance register before being turned away. The employees submit that the commissioner failed to consider the cumulative effect of all relevant factors - the continuous nature of their work, the critical importance of their roles, the first respondent's reliance on subcontractors despite the availability of posts, and the absence of termination notices. They also assert that inconsistencies in the first respondent's evidence should have been treated as indicative of a reasonable expectation of continued employment.

[22] The employees additionally allege that the commissioner committed misconduct by failing to engage with applicable case law and the correct legal test. They argue that the commissioner failed to consider the relevance of sections 186(1)(b)(ii) and 198B of the LRA, and that he ought to have enquired into whether the fixed-term contracts, as extended, contravened section 198B. According to the employees, their primary claim concerned the non-renewal of

LABOUR COURT

their fixed-term contracts, with permanent appointment raised only as alternative relief where section 198B factors were present.

<u>Analysis</u>

[23] The employees review the award based on the reasonableness test.[4] The dispute before the commissioner was one of reasonable expectation in terms of which the employees bear the onus of proving that they were dismissed despite the expiry of their fixed term contracts. The commissioner found that they failed to establish a reasonable expectation of permanent employment at the end of their fixed term contracts. The effect of that finding is that the employees were not dismissed within the meaning of section 186(1) and therefore the SALGBC had no jurisdiction over the dispute.

[24] Because the commissioner's ruling turns on whether a dismissal occurred, it amounts to a jurisdictional decision. Such decisions are reviewed on the correctness standard, or on objectively justifiable grounds, as set out in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*.[5] The question is therefore not whether the decision was reasonable, but whether it was correct when assessed objectively.

The consequence of pleading an incorrect test

[25] The issue that arises is whether the review application should be dismissed solely because the employees pleaded the incorrect review test – reasonableness - rather than correctness. This question must be considered in circumstances where commissioners make jurisdictional rulings for convenience,

LABOUR COURT

[4] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

[5] (2008) 29 ILJ 2218 (LAC); [2008] ZALAC 3 at paras 39 – 41; see also: *Zeuna – Starker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC); (1999) 20 ILJ 108 (LAC) at para 6, where the LAC found that *"[t]he commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justifiable grounds"*; see further: *De Milander v MEC for the Department of Finance: Eastern Cape and Others* [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 2; *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others* [2015] ZALAC 26; [2015] 9 BLLR 894 (LAC) at para 20; *Ukweza Holdings (Pty) Ltd v Nyondo NO & others* (2020) 41 ILJ 1354 (LAC); [2020] ZALAC 7 at para 12.

and where such rulings may still be reviewed on objectively justifiable grounds. This Court has delivered differing judgments on whether the use of the incorrect test should automatically result in the dismissal of the application.

[26] In *NUMSA obo Zahela and Others v Volkswagen SA (Pty) Ltd and Others (Volkswagen)*,[6] *Johnson v Rajah NO and Others (Johnson)*,[7] *SA Post Office v Commission for Conciliation, Mediation & Arbitration & others (SA Post Office)*[8] *and Motlaase v Commission for Conciliation, Mediation and Arbitration and Others (Motlaase)*,[9] this Court adopted the view that where an applicant relies on the reasonableness standard in circumstances where the correctness test applies, the application must fail on that basis alone. The Court in *Volkswagen* said the following:

> 'It follows that in a matter such as the present, where the proper right of review is one based on correctness, that is the case that must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator's decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant sought intervention on a basis that was incorrect. He requested the court to postpone the matter and grant the applicant leave to file amended papers in order to address the error.'[10]

[27] Following the same approach above, the Court in *Johnson*[11] dismissed the review application after finding that the grounds relied upon were formulated on the reasonableness test rather than the correctness test. This line of authority confirms that an applicant who pleads the wrong test effectively fails to sustain a proper case for review.

[28] In *SA Post Office*, the Court concluded:

[6] [2016] ZALCPE 26.
[7] [2017] ZALCJHB 25.
[8] (2018) 39 ILJ 1350 (LC).
[9] [2020] ZALCJHB 186.
[10] *Volkswagen* at para 7.
[11] *Johnson* at paras 15 – 19.

LABOUR COURT

> 'I reiterate: reasonableness has no place in a review such as this one and the grounds for review relating to reasonableness cannot be considered. The applicant has failed to make allegations to sustain its application as it clearly approached this court on the basis of the incorrect test. This is fatal to the applicant's case and cannot be cured with submissions from the bar, introducing a case that was not pleaded. On this ground alone the application should be dismissed.'[12] (Own emphasis)

[29] In *Motlaase*, delivered on 18 June 2020, the Court endorsed the same approach, holding that a review application pleaded on the wrong test must fail on that basis alone. However, shortly thereafter, in *Gold One Ltd v Madalani & others*[13] *(Gold One)*, handed down on 9 September 2020, the Court adopted a different stance. While acknowledging that the correctness standard governs reviews of jurisdictional rulings, the Court declined to dismiss the application solely because the founding papers relied on the reasonableness test.

[30] The Court in *Gold One* emphasised that questions of jurisdiction must be determined *de novo* by the Labour Court, irrespective of how the review grounds were framed. On that basis, the Court proceeded to consider the merits, ultimately reviewing and setting aside the ruling, and substituting it with a finding that the employee had failed to prove a dismissal.

[31] If the approach in *Volkswagen*, *SA Post Office*, *Johnson*, and *Motlaase* were to be followed, the review application would have to be dismissed solely because the employees pleaded their case on the incorrect test. However, it is trite that the CCMA and bargaining councils cannot determine their own jurisdiction and that any jurisdictional ruling issued by these bodies is merely for convenience. The rulings are reviewable, in *de novo* proceedings before this Court, on objectively justifiable grounds.[14] This Court therefore determines, based on the facts, whether a dismissal occurred and whether the SALGBC had jurisdiction,

LABOUR COURT

---

[12] *SA Post Office* at para 31; See also *Motlaase* at para 63.
[13] (2020) 41 ILJ 2832 (LC); [2021] 2 BLLR 198 (LC).
[14] *SA Rugby Players Association* (fn 5 above*); HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2019] ZALCJHB 275; [2020] 3 BLLR 280 (LC).

irrespective of how the employees said the applicable test is. This principle was in my view properly recognised and applied in *Gold One*. This Court must resolve the jurisdictional question afresh and on its own accord and is not confined to the applicant's formulation of the legal test. Accordingly, I am not persuaded that a mis-pleaded legal test is fatal to the application.

[32] Although *Gold One* expressed the view that an applicant should ordinarily be afforded an opportunity to amend its papers, the Court nevertheless decided the matter on the review grounds as they were pleaded, without requiring an amendment. I have difficulty agreeing that the applicant must be provided an opportunity to amend the papers. In my view, it would not be appropriate, particularly in motion proceedings, to require amendments where the rules do not expressly provide for such a process, nor do they contemplate a second supplementary affidavit. More importantly, given the *de novo* nature of a jurisdictional inquiry, it is neither necessary nor useful to insist on amended papers merely because the incorrect review test was invoked. The Court may, and must, determine the issue on the facts, regardless of how the applicant framed the test.

[33] For the above reasons, I proceed to deal with the grounds for review.

The merits of the application

[34] Mr Naudé, who appeared for the employees, submitted that four considerations, viewed cumulatively, gave rise to a reasonable expectation of permanent employment. These were the internal memorandum dated 25 January 2018, the issuing of new uniforms shortly before the expiry of the fixed-term contracts, the absence of notices of termination, and the fact that the employees presented themselves for work on 2 July 2018.

[35] The memorandum of 25 January 2018 motivated for the extension of the employees' fixed term contracts for a further four months. It expressly recorded that a moratorium on appointments prevented the filling of permanent positions

LABOUR COURT

and recommended month-to-month extensions only until the moratorium was lifted at the end of June 2018. It is difficult to understand how this memorandum could reasonably be interpreted as creating an expectation of employment beyond the four-month extension it proposed. It is common cause that once the moratorium was lifted, fewer than 100 positions were advertised and that the employees did not apply for these posts, believing instead that they were entitled to appointment outside the ordinary recruitment process. The first respondent denied that it outsourced the employees' work to subcontractors and explained that subcontractors were engaged only on an *ad hoc* basis. The commissioner correctly rejected this factor as giving rise to any reasonable expectation of permanent employment.

[36] With regard to the issuing of uniforms, the employees failed to establish how this factor could support their claim. They did not indicate how many of them were issued with new uniforms, nor did they place evidence before the commissioner demonstrating that the issuing of such uniforms was linked to any expectation of the continued and permanent employment. The first respondent's explanation was that uniforms are issued as and when required, including where existing uniforms are no longer usable, and that delays in procurement may result in uniforms being issued late in the contract period. In the absence of evidence demonstrating that uniforms were issued as part of, or in anticipation of, permanent appointment, this factor could not reasonably sustain an expectation of continued or permanent employment.

[37] As to the alleged absence of notices of termination, the employees were at all material times aware of the commencement and expiry dates of their fixed term contracts. The contracts, as extended, clearly stipulated their termination dates. In circumstances where the parties had agreed to a fixed duration, the first respondent was under no obligation to issue a notice of termination or any reminder of the expiry date of the contract. There was no contractual or statutory requirement to do so. The reliance placed on section 37 of the Basic Conditions

LABOUR COURT

of Employment Act[15] (BCEA) is misplaced, as that provision governs notice in respect of contracts of indefinite duration and does not apply where the termination date is determined in advance by agreement.

[38] The employees' contention that their attendance at work on 2 July 2018 gave rise to a reasonable expectation of permanent employment is wholly untenable. They were aware that their contracts had expired on 30 June 2018 and were not instructed or authorised to report for duty thereafter. The employees' own version was that those who reported for duty on 2 July 2018 were informed that their contracts had expired and were instructed to return home. Their unilateral decision to attend at the workplace after the lapse of their contracts could not, in itself, found any expectation of any form of continued employment.

[39] The employees had also sought to rely on another consideration, which Mr Naudé did not pursue nor abandon during the hearing, which is the first respondent's alleged policy or practice of absorbing fixed term contract employees. The employees had criticised the commissioner for placing more weight on the non-renewal clause contained in the contracts. Further, they argued in their papers that the commissioner failed to engage the case law and the correct legal test.

[40] Whilst the commissioner considered a non-renewal clause in the employees' fixed term contracts, this was in no way decisive of the dispute. It is evident from the award that the commissioner applied himself to all the factors raised by the employees and correctly rejected them.

[41] In relation to the alleged practice of absorbing employees initially engaged on fixed term contracts, the first respondent explained that the employees who were absorbed in 2016 were appointed pursuant to an arbitration award issued under section 198B of the LRA, and not as a result of any internal policy or practice. The dispute before the commissioner was confined to section 186(1)(b)(ii) of the

[15] Act 75 of 1997.

LABOUR COURT

LRA, not section 198B. These are distinct causes of action, involving different factual and legal enquiries.

[42] The employees' submission that the commissioner failed to consider the relevance of sections 186(1)(b)(ii) and 198B of the LRA, and that permanent appointment was merely alternative relief, is inconsistent with the case they advanced before the commissioner. Their claim was unequivocally grounded in section 186(1)(b)(ii). The commissioner was therefore correct to confine the enquiry to that issue and not to embark on an investigation into section 198B, which was not an issue before him.

[43] In conclusion, none of the factors relied upon by the employees, whether considered individually or cumulatively, were capable of establishing a reasonable expectation of permanent employment. The commissioner's conclusion that no dismissal occurred was correct. Accordingly, the employees have failed to make out a case for the review and setting aside of the award. Their review application stands to be dismissed.

[44] In the premises, the following order is made:

<u>Order</u>

1. The review application is reinstated, and the late delivery of the record is condoned.

2. The first respondent's filing of an answering affidavit on 19 March 2026 is rejected, and the review application is determined on an unopposed basis.

3. The review application is dismissed.

M. Makhura

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicants: Mr C.P. Naudé

Instructed by: Isaac Teke Mothibe Attorneys

LABOUR COURT