



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

4 September 2026

Signature

Date

## THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C477/2023

In the matter between:

**GAVIN ADAMS**

**Applicant**

and

**GENERAL PUBLIC SERVICE SECTORAL  
BARGAINING COUNCIL**

**First Respondent**

**COMMISSIONER BURTON N.O.**

**Second Respondent**

**DEPARTMENT OF ECONOMIC DEVELOPMENT  
AND TOURISM**

**Third Respondent**

Heard: 2 September 2026

Delivered: 4 September 2026

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### JUDGMENT

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**DE KOCK, AJ**

#### Introduction

[1] Dr Gavin Adams applies to review and set aside a condonation ruling of the second respondent, Commissioner Adv C P Burton NO (the commissioner), issued under the auspices of the General Public Service Sectoral Bargaining

Council in case GPBC 1716/2022 on 15 May 2023. The ruling refused condonation for the late referral of an unfair labour practice dispute concerning promotion and shortlisting. The applicant appeared in person.

- [2] The first respondent is the General Public Service Sectoral Bargaining Council (the GPSSBC), under whose auspices the ruling was made. The second respondent is the commissioner whose ruling is impugned. Neither has taken part beyond the dispatch of the record. The third respondent is the Department of Economic Development and Tourism (the Department). It opposes the review. It filed an answering affidavit deposed to by Mr Philmacs Bopenhagen on 6 December 2023, and heads of argument, and was represented at the hearing by Mr Tsegare.
- [3] The notice of motion seeks the review of *'The GPSSBC Condonation and Rescission Ruling; the latter dated 30 August 2023'*. In the rescission ruling the commissioner set out s 144 of the Labour Relations Act (the LRA),<sup>1</sup> held that none of its four grounds was made out, recorded that he was *functus officio*, and told the applicant that his recourse lay in a review to this Court. At the hearing the Court put to the applicant that the two rulings are different rulings, and that the rescission ruling, on its face, correctly directed him to this Court. The applicant accepted that. He told the Court that he had regarded the two as *'inextricably linked'*, that the condonation ruling *'is actually the matter at hand'*, and that *'the review would then probably be focused on the condonation'*. The Court proceeds on that footing. The rescission ruling is not in issue, and nothing in this judgment disturbs it.
- [4] One further preliminary matter was raised by the Court. The condonation ruling issued on 15 May 2023. The notice of motion was signed on 19 September 2023, and the papers were delivered on 20 September 2023, some four months later. No application for condonation of the late launching of the review appears in the bundle. The applicant explained that he had calculated the time from the rescission ruling of 30 August 2023, the two rulings being linked in his mind. The Department, asked whether it took the

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<sup>1</sup> Act 66 of 1995, as amended.

point, said in terms that it did not: it would rather have the matter ventilated and finally decided than have it come back. The point is dealt with below, in the context of the Department's submission on the section under which the review is brought.

### Background

- [5] The dispute concerns the applicant's non-shortlisting for the post of Chief Director: Skills Development and Innovation in the Department, advertised in December 2019 with a closing date of 20 January 2020. The advertisement told candidates that if they had not heard from the Department within ten weeks of the closing date, they should consider their applications unsuccessful. The applicant says that the submission approving the shortlist was signed by the Head of Department on 28 February 2020. The Department says that the executive authority approved the shortlist on 4 March 2020, that interviews were held on 21 May 2020 and that the successful candidate was appointed on 1 December 2020. Nothing turns on the difference. The applicant was not shortlisted and was not told.
- [6] The applicant's case is that he learned that the post had been filled only on 29 August 2022, when he made contact with the Department and was told by email that the recruitment process had closed during 2020. The Department says that it informed him in writing, and the applicant's own chronology records the Department's first response as 7 September 2022. On 7 September 2022 he requested records under the Promotion of Access to Information Act, and on 15 November 2022 the Department gave him written reasons for his non-shortlisting: a score of 68% against a cut-off of 70%. On 7 November 2022 he referred an unfair labour practice dispute to the GPSSBC; the referral was received by the Department on 9 November 2022, a certificate of non-resolution issued on 25 November 2022, and the matter was referred to arbitration on 1 December 2022.
- [7] At the arbitration on 24 February 2023 Commissioner Slamang raised the lateness of the referral and directed that condonation be applied for. The condonation application was filed on 8 March 2023 and opposed on 24 March

2023. On 15 May 2023, on the papers, the commissioner refused condonation. The applicant applied for rescission in June 2023, and on 30 August 2023 the commissioner dismissed that application.

#### The ruling

- [8] The condonation ruling runs to three pages, of which the analysis occupies five sentences. At paragraph 10 the commissioner records that he has considered the founding and answering affidavits and cannot accept the applicant's contention. At paragraph 11 he finds that *'the applicant's application is approximately twenty-five months (25) late'*; the word used is application, not referral. At paragraph 12 he holds that the delay is excessive and counts against the applicant; at paragraph 13, that the applicant did not explain the entire period of the delay; and at paragraph 14, that it has been established that the respondent will suffer prejudice if condonation is granted. He then refuses condonation.
- [9] The ruling makes no reference anywhere to the applicant's prospects of success.

#### The Department's objections to the review

- [10] The Department takes two points at the threshold. The first is that neither the condonation ruling nor the rescission ruling is an 'award' as contemplated in s 145 of the LRA, that neither is therefore reviewable under that section, and that no case has been made out under s 158. The second is that *'absent any condonation application in relation to the referral of the dispute, no matter for adjudication exists'*.
- [11] The second point can be disposed of shortly. A condonation application was made. It was opposed by the Department, and it was refused. That refusal is what the applicant seeks to review.
- [12] The first point does not assist the Department. Whether a ruling refusing condonation of a late referral is reviewable under s 145 or under s 158(1)(g) is a question on which this Court has not always spoken with one voice, and the

Court has not been referred to any decision of the Labour Appeal Court that settles it. What the Department's own authority, *NUMSA and Another v Voltex (Pty) Ltd t/a Electric Centre and Others (Voltex)*, held is that a commissioner's decision on a condonation application under s 191(2), taken on written submissions, 'was not a decision made within the context of "arbitration proceedings" as contemplated in section 145', with the consequence that the six-week period in s 145(1)(a) did not apply and that the ruling fell to be reviewed under s 158(1)(g), provided the review was brought within a reasonable time.<sup>2</sup> That is the approach this Court has continued to take to rulings of this kind: a rescission ruling under s 144 has been held not to be an award within s 145 and to be reviewable under s 158(1)(g) within a reasonable time (*Melomed Hospital Holdings (Pty) Ltd v Denosa obo Fourie and Others*),<sup>3</sup> and a condonation ruling has been reviewed under s 158(1)(g) on the same footing (*Mkhonza v Masenye NO and Others*).<sup>4</sup> Section 158(1)(g) empowers this Court, 'subject to section 145, [to] review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law',<sup>5</sup> and the determination of a condonation application under s 191(2) is such a function. *Voltex* therefore does not close the door to the applicant; it tells him which door to use.

- [13] The applicant's notice of motion invokes s 145. He is a lay litigant, and he told the Court that he learned of the distinction between the two sections only from the Department's heads of argument, filed days before the hearing. He asked, if the section were an obstacle, to be allowed to amend. Asked whether anything prevents the Court from treating the application as one under s 158(1)(g), Mr Tsegare said that it did not, but that the applicant must still make out his case. That is correct, and it is the footing on which the Court proceeds. The section number is wrong; the relief sought is clear; the Department has answered the review on its merits and has suggested no prejudice from the mislabelling. The Court treats the application as one under

<sup>2</sup> [2000] ZALC 6; [2000] 5 BLLR 619 (LC); (2000) 21 ILJ 1173 (LC). The judgment is not paragraphed.

<sup>3</sup> [2023] ZALCCT 31 (21 June 2023) at paras 4 to 6 and 9.

<sup>4</sup> [2024] ZALCJHB 14 (9 January 2024) at paras 1 and 2.

<sup>5</sup> Section 158(1)(g) of the LRA, as reproduced in *Olympic Park Trading 126 (Pty) Ltd t/a SKG Properties v Skhosana and Others* [2024] ZALCJHB 263 (28 June 2024) at para 3.

s 158(1)(g), no formal amendment being necessary, and turns to whether the case is made out.

- [14] On that footing the timing point raised by the Court at [4] is also answered. The six-week period in s 145(1)(a) does not apply to a ruling of this kind; the question is whether the review was brought within a reasonable time. The applicant received the condonation ruling on 15 May 2023, applied for rescission within about six weeks, was told by the commissioner on 30 August 2023 that his recourse lay in a review to this Court, and launched the review within three weeks of being told. The Department, which alone could claim prejudice, disclaims it and asks that the matter be decided. The Court holds that the review was brought within a reasonable time. Had s 145 applied, the position would have been different: the review would have been some ten weeks late and there is no application for condonation before the Court. It is not necessary to say more about that, because on the Department's own authority s 145 does not apply.

#### The test on a jurisdictional review

- [15] The ruling under review is a jurisdictional ruling. By refusing condonation for the late referral, the commissioner determined that the council could not entertain the dispute unless the delay was condoned, a matter going to the council's jurisdiction to arbitrate.
- [16] A ruling of that kind is not reviewed against the reasonableness standard that governs the merits of an arbitration award. A bargaining council, like the CCMA, is a creature of statute and cannot decide its own jurisdiction; whether it has jurisdiction in a particular matter is a question for this Court, and the enquiry is whether, objectively, the facts which would give the council jurisdiction existed (*South African Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v South African Rugby Players Union and Another*).<sup>6</sup> The commissioner's view attracts no deference: either the referral was made within the period fixed by law or it was not, and that is a question of fact and law, not of impression. The Department's

<sup>6</sup> [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC) at paras 39 to 41.

submission, in its heads and again at the hearing, that the refusal of condonation ‘constituted a decision a reasonable commissioner would have made’ accordingly asks the wrong question. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*<sup>7</sup> and *Herholdt v Nedbank Ltd (Herholdt)*<sup>8</sup> govern the review of the merits of an award. They do not govern a ruling on jurisdiction.

- [17] Two consequences follow. The validity of proceedings before a statutory tribunal depends on the objective existence of the jurisdictional facts, not on any finding about them; a council may not grant itself a jurisdiction it does not have, nor deprive itself of one it has.<sup>9</sup> It follows that a party’s concession cannot supply what the facts do not: if the referral was in time, no estimate by the applicant of how late it was could make it late. And where a point of law is apparent on the papers and the parties have proceeded on a wrong perception of what the law is, a court is not merely entitled but obliged to raise it and require the parties to deal with it (*CUSA v Tao Ying Metal Industries and Others*)<sup>10</sup>. The Court did so at the hearing, and both parties addressed it. The point is not one pleaded in the founding affidavit, and Mr Tsegare rightly said that the founding affidavit is thin; but a point which the Court is obliged to raise of its own motion does not fail because a lay litigant did not plead it.

#### Section 191(1)(b)(ii) and the date the dispute arose

- [18] The date of the referral is not in doubt. The Department’s own answering affidavit in the condonation application records that the referral was signed on 7 November 2022 and received on 9 November 2022, that a certificate issued on 25 November 2022, and that the matter was referred to arbitration on 1 December 2022. The condonation application itself was filed on 8 March 2023. The statement in the rescission ruling that the dispute was referred on 3

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<sup>7</sup> 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] ZACC 22 at para 110.

<sup>8</sup> (2013) 34 ILJ 2795 (SCA); [2013] ZASCA 97 at para 25.

<sup>9</sup> *SA Rugby*, id fn 6, at para 40, applying *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO and Others* (1994) 15 ILJ 801 (LAC) at 804C–D.

<sup>10</sup> 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC); [2008] ZACC 15 at para 67.

May 2023 is contradicted by every other document in the record and must be treated as an error.

- [19] What was genuinely in dispute was a different question: the date on which the dispute arose. Section 191(1)(b)(ii) of the LRA requires an unfair labour practice dispute to be referred within 90 days of the act or omission complained of *or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.*<sup>11</sup>
- [20] The applicant's referral gave 29 August 2022 as the date the dispute arose, that being the day on which he made contact with the Department and was told that the post had been filled in 2020. If that is correct, the referral on 7 November 2022 was made on day 70, was within time, and no condonation was required. The same is true if the operative date is 7 September 2022, the date his own chronology gives for the Department's first response.
- [21] The Department joined issue with that squarely. It recorded the applicant's reliance on 29 August 2022, set out s 191(1)(b)(ii) and the 90-day period, and stated in terms that it *'disputes the fact that the dispute arose on 29 August 2022'*. It relied on the advertisement, which closed on 20 January 2020 and told candidates:
- 'Therefore, should you not hear from us within 10 weeks from close of advert please consider your application as unsuccessful.'*
- [22] On that footing it contended that the dispute arose on or about 1 April 2020, making the referral about 32 months and nine days late; alternatively, that the successful candidate was appointed on 1 December 2020, making the referral about 24 months and nine days late, which, it said, *'confirms the Applicant's admission at paragraph 3.1 of the Applicant's affidavit'*, that is, the applicant's own estimate of 25 months. At the hearing Mr Tsegare put the Department's case in the same way: on the applicant's own version the dispute arose on 29

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<sup>11</sup> The italicised words are the statutory language, reproduced in *City of Cape Town v Nevin and Others* [2022] ZALCCT 29; [2022] 11 BLLR 1016 (LC) at para 59. *Nevin*, itself an unfair labour practice dispute, emphasises that the trigger is the employee's own awareness, and that a dispute founded on a single act or omission arises at inception rather than through its continuing effects: at para 56.

August 2022, but the applicant ought to have regarded himself as unsuccessful ten weeks after the closing date, the website on which he relied was but one means of finding out, and nothing prevented him from telephoning or emailing the Department in 2020, as he eventually did in 2022. That is an argument about when the applicant '*became aware*' for the purposes of s 191(1)(b)(ii); whether actual knowledge is required, or whether it is enough that he ought to have known and it is a real argument. It is also one that the commissioner never addressed.

[23] Both parties thus placed the very question posed by s 191(1)(b)(ii) directly before the commissioner, and they placed it on competing factual footings. The commissioner resolved none of that competition. He did decide that the referral was late; that much is implicit in his refusal of condonation, but he did so by adopting '*approximately twenty-five months*', the applicant's own rough estimate. It may be said for the ruling that 25 months is within three weeks of the Department's alternative case, and that the commissioner must be taken to have adopted 1 December 2020 as the date on which the dispute arose. The Court is unable to read the ruling in that way. It nowhere mentions 1 December 2020, or 1 April 2020, or 29 August 2022. It nowhere mentions s 191(1)(b)(ii), or the date on which the applicant became aware of the act complained of. It does not say that the applicant's date is rejected, or why. A finding on the one question the parties had squarely joined cannot be supplied by arithmetic. The commissioner proceeded as though the fact of the delay, and its extent, were common cause, when they were the heart of what was in dispute. Mr Tsegare, fairly, accepted at the hearing that the commissioner '*was not very clear as to when exactly the dispute arose*'.

[24] That is the difficulty at the heart of the ruling, and it is prior to everything else. If the dispute arose on 29 August 2022, the council always had jurisdiction and the condonation enquiry did not arise at all. If it arose in April or December 2020, the delay was materially longer than the commissioner found, and the weighing he did undertake was done on the wrong figure. Either way, he was required to decide between the competing dates, and he did not.

- [25] The applicant's own concessions cannot cure the defect. He estimated the delay at 25 months in his condonation affidavit, and his heads of argument in this Court say that *'[b]ecause the referral occurred outside the prescribed time period, condonation was required'*. But the estimate was made, on his own account, *'in the absence of clarity regarding the precise date of the appointment'*, and it sits in the same papers as the referral form which gives 29 August 2022 as the date the dispute arose and which the Department expressly disputed. A lay litigant's estimate is not a determination of the trigger date, and jurisdiction is not established by a party's concession. The commissioner was obliged to determine the date for himself.
- [26] A ruling that fixes the extent of the delay at a figure taken from one party's estimate, and that never decides when the dispute arose, cannot stand, whether the vice is characterised as a failure to apply the mind to the question the commissioner was required to answer or as a decision reached on a wrong premise. On the correctness standard the ruling is wrong, and it falls to be set aside on this ground.

The failure to consider the prospects of success

- [27] The ruling is open to a further, independent objection. The condonation affidavit that served before the commissioner dealt expressly with the applicant's prospects of success, under its own heading: the absence of minutes of the shortlisting, the alleged failure of the Department to give specific reasons for the non-shortlisting, the two comparator curricula vitae obtained under the Promotion of Access to Information Act, and the alleged departures from the Public Service Commission guidelines and the Department's own recruitment policy. The Court records that the Department did give a reason, on 15 November 2022, and that it is in the bundle; whether it was an adequate reason is a matter for the merits. The point for present purposes is that the ruling does not mention any of it. It is likewise silent on the recruitment website and on the advertisement's statement that candidates should presume finality after ten weeks. The applicant put it accurately at the

hearing: the ruling does not deal with the reason for the lateness or with prospects.

- [28] On *Melane v Santam Insurance Co Ltd* (Melane) the factors relevant to condonation are interrelated and must be weighed together, a good explanation compensating for weaker prospects and the converse.<sup>12</sup> A ruling that weighs the extent of the delay, the explanation for it and prejudice, but says nothing at all about the applicant's prospects, has not conducted the weighing the enquiry requires. It may be said, on *NUM v Council for Mineral Technology*, that without a reasonable and acceptable explanation for the delay the prospects of success are immaterial;<sup>13</sup> but that answer presupposes a finding on the trigger date and on the adequacy of the explanation which the commissioner never made.
- [29] The Court does not, however, accept one subsidiary criticism the applicant advances. The heads contend that the ruling both recorded the delay as 25 months and faulted the applicant for failing to indicate its extent, and that the inconsistency shows the affidavit was not engaged. The ruling bears no such reading: paragraph 13 states that the applicant '*did not explain the entire period for the delay*', which is a complaint about the completeness of the explanation, not about a failure to state the duration of the delay. There is no inconsistency of the kind alleged.

#### The reassignment of the commissioner

- [30] The applicant's supplementary affidavit complains that Commissioner Slamang was originally seized with the condonation application, that the GPSSBC never determined a recusal application of 2 May 2023, gave no notice, and never explained how the commissioner came to be seized, and that the substitution was *ultra vires*. The Department answers that the founding affidavit's statement that the recusal application '*has since failed and does not form part of this Application*' disposes of the point, that the

<sup>12</sup> 1962 (4) SA 531 (A), as quoted in *NUM v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) at para 10.

<sup>13</sup> *Id* fn 12, at para 10 ([1999] 3 BLLR 209 (LAC) at 211G–H).

supplementary affidavit is an impermissible change of tack, and that the GPSSBC is in any event free to assign any available commissioner. At the hearing the applicant explained that Commissioner Slamang raised the lateness at the arbitration and directed him to apply for condonation, and that the ruling arrived some months later from a different commissioner. On that account, which is the applicant's own, Commissioner Slamang made a ruling that condonation was required; he was never seized with the condonation application itself, and nothing in the record suggests that the council allocated it to him. There was accordingly nothing irregular in the council placing the application, once the affidavits were in, before an available commissioner. The Court put that to the applicant, who did not contest it and did not return to the point. The ground fails.

### Conclusion

- [31] The condonation ruling of 15 May 2023 turned on a jurisdictional question, namely whether the referral was made within the period fixed by s 191(1)(b)(ii), which the commissioner was required to decide and did not; judged on the correctness standard, it is wrong. It also weighed the factors relevant to condonation while saying nothing about the applicant's prospects of success. The ruling falls to be reviewed and set aside.
- [32] The applicant asked the Court to substitute its own decision rather than remit, pointing to the time that has passed since 2022. The Department, for its part, submitted that remittal would serve no purpose and that the application should simply be dismissed. The Court has considered whether it can itself determine the date on which the dispute arose. It cannot properly do so on this record. The answer turns on whether s 191(1)(b)(ii) is satisfied only by actual knowledge, or also by knowledge the employee ought reasonably to have had (the Department's ten-week argument), and neither party addressed the Court on that question with reference to authority. It is a question that the council must answer in the first instance, on the competing cases both parties have already put up, and the Department is entitled to be heard on it on a complete record. Nor can the Court substitute a decision on condonation itself; the

weighing of explanation, prejudice and prospects is one for the commissioner. The appropriate order is to set the ruling aside and to remit the matter to the council to be determined afresh by a commissioner other than Commissioners Slamang and Burton, who must first determine the date on which the dispute arose and, only if the referral was late, decide the application for condonation. Given the age of the matter, the council is directed to do so expeditiously and to afford both parties the opportunity to present their respective cases in person before a commissioner.

### Costs

[33] Costs in this Court do not follow the result, and s 162 of the LRA requires the Court to have regard to the requirements of the law and of fairness. The applicant sought costs only in the event of opposition; the Department opposed and asks for costs against him. The applicant is a lay litigant who has pursued this matter since 2022, and he has succeeded. The Department's opposition was not unreasonable, and it should not be mulcted in costs for defending a ruling in its favour. The requirements of law and fairness are best met by making no order as to costs.

[34] In the result, the following order is made:

### Order

1. The application is treated as one under s 158(1)(g) of the LRA.
2. The condonation ruling of the second respondent dated 15 May 2023 under case GPBC 1716/2022 is reviewed and set aside.
3. The applicant's application for condonation is remitted to the first respondent to be determined afresh by a commissioner other than Commissioners Slamang and Burton. Both parties must be afforded the opportunity to present their respective versions to the commissioner in person and the commissioner is directed to first determine the date on which the dispute arose for purposes of s 191(1)(b)(ii) of the LRA and, only if the referral of 7 November 2022

was made outside the period prescribed, the application for condonation.

4. The first respondent is directed to enrol the matter for those purposes within 30 days of the date of this order.
5. There is no order as to costs.



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C de Kock  
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Third Respondent: C Tsegare

Instructed by: State Attorney, Cape Town