THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable
Case no: PR 174/2023

In the matter between:

NELSON MANDELA BAY MUNICIPALITY **Applicant**

and

SAMWU obo MVULENI BUKULA **First Respondent**

SHARON MALGAS *N.O* **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Third Respondent**

Heard: **27 February 2025**

Delivered: **6 March 2025**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 6 March 2025.

JUDGMENT

PRINSLOO, J

Introduction

[1] The First Respondent (SAMWU or Respondent) represented its member, Mr Bukula, in the arbitration proceedings and the proceedings before this Court.

Background

[2] Mr Bukula has been employed by the Applicant since January 2000, and in 2003, he was appointed as the manager support services in the business unit: electricity and energy. In his appointment letter, Mr Bukula was advised that his position would in the future be subjected to the Tuned Assessment of Skills and Knowledge (TASK) job evaluation system in order to determine his appropriate grade.

[3] In November 2003, the bargaining council (SALGBC), together with the SALGA, IMATU and SAMWU, concluded the 'TASK Job Evaluation Collective Agreement' (the 2003 collective agreement) in terms of which the parties agreed to the implementation of the TASK job evaluation system and procedural manual. This agreement terminated on 30 June 2005, but it was extended from time to time.

[4] In 2007, the Applicant embarked upon a process of 'rationalisation of senior management structures' and as a result of this process, support services became retail and commercial management services and designations changed. Mr Bukula's designation of 'manager' changed to 'director' with effect from 12 April 2007, and he reported to the executive director. Mr Bukula served as a director on salary grade 18 from April 2007 until 2014.

[5] The 'Collective agreement on the implementation of the TASK final outcomes report in the modified classic model wage curve' (the 2013 collective agreement) was concluded between the same parties as the 2003 collective agreement and came into effect in December 2013. The purpose of the agreement was to achieve the operationalisation of the TASK grading system within the Municipality by implementing the TASK job evaluation results contained in the final outcomes report into the modified classic wage curve. All employees were informed of the TASK results for their post, the TASK grade,

salary range and designation and where applicable, their status in terms of 'contractual to holder' or 'subject to job evaluation in TASK maintenance phase'. On receipt of a grading outcome, an employee may have lodged a review application in writing within 30 days from the date of notification of the job evaluation results, which review was to be considered by the Job Evaluation Committee (JEC). If an employee was not satisfied with the outcome of the review conducted by the JEC, an appeal to the appeals committee was the next step.

[6] On 23 May 2014, Mr Bukula received a letter regarding the 'Implementation of TASK', which informed him as follows:

> 'I have pleasure in advising that on 1 December 2013 a Task agreement for NMBM was signed by the employer and both unions. In terms of this agreement the position you hold has been redesignated as deputy director support services. You are on task grade 16.
>
> As your present salary is greater that the evaluated task salary range, you will remain contractual to holder. Contractual to holder means that the employee retains his existing higher salary scale and benefits until he vacates the position for whatever reason and which at time the position should be filled using the task evaluated grade, therefore you remain on your present salary range and your present gross annual salary of R631 956 (R52 663 per month).
>
> …….
>
> Should you believe that the TASK system was inconsistently applied when your post was graded, you have the option to lodge a written review application via your Directorate representative(s) no later than 30 working days from the date of receipt of this letter. Note that should you do so, the onus shall be on you, the employee, to prove that the TASK system was inconsistently applied when the post was graded and your review application must be accompanied by written evidence.'

[7] After receiving the aforesaid letter, Mr Bukula filed a review application in respect of the outcome of the job evaluation, and he stated that the information in his letter was not correct because he was demoted. The review was, however, only filed on 19 April 2016 and not within 30 days from the date of

receipt of the letter. A review hearing was scheduled with the JEC for 29 September 2016 and Mr Bukula subsequently received a letter from the committee, dated 18 November 2016 wherein he was informed that *"your objection has been noted and it would have to be dealt with during the maintenance phase as the job content has changed, your job description has been placed on the list to be reviewed. Corporate services are in the process of planning the roll out of the maintenance phase throughout the Municipality. All employees will be informed via groupwise when the maintenance phase will commence and procedures to follow".*

[8] On 25 November 2016, Mr Bukula received another letter, and he was informed that: *"outcome of phase two: Task implementation objection. I refer to your phase one task implementation objection letter dated 18 November 2016 and advise that phase two of your directorate has been completed. Your objection as recorded when submitted received due consideration and it is conformed that your submission will be dealt with in the following manner: in view of the JEU committee specifically appointed for this process, your objection is not as a result of the TASK system being inconsistently applied when your post was graded. However, your objection has been noted and referred to corporate services for further investigation and action. You will be contacted in this regard in due course".*

[9] There are no facts placed before this Court to show what had happened subsequent to the aforementioned outcome letter in November 2016, and it seems like the objection was not further pursued.

[10] On 29 May 2019, corporate services issued communication regarding the 'submission of job descriptions for evaluation' wherein it was indicated *inter alia* that job evaluations would be undertaken as per the requests from the various directorates, including cases where a job description exists or the post has an existing TASK grade but where there are substantial changes to the post. It stipulated what documents must be included with job descriptions submitted for evaluation.

[11] On 28 June 2019, an application for job evaluation for the post of 'Deputy Director: Retail and Commercial Management' was submitted to corporate services for consideration. It was recorded that *"the reason for the request to evaluate the JD for Deputy Director: RCM is due to the changes in the subordinate structure of this position"* and because of three new added positions which were never taken into consideration during the TASK evaluation process, which has necessitated the need for the revision of the job description and its submission for evaluation.

[12] Corporate services responded to Mr Bukula on 26 September 2019 regarding his request for job evaluation, and he was informed that the job description must be evaluated from the bottom up and that all the subordinate job descriptions must be submitted together. Mr Bukula did not respond to the said correspondence from corporate services, and whilst his application for the re-evaluation of his post was pending, he lodged an internal grievance on 21 February 2020.

[13] Mr Bukula submitted a grievance form and the nature of the grievance was recorded as *"unfair labour practice – demotion through unfair grading and outcome of grading resulting in demotion in that the Nelson Mandela Bay Municipality (employer) has wilfully and deliberately and without good cause changed the designation of the employee outside the organogram and beyond the collective agreement".*

[14] Mr Bukula recorded the desired outcome as *"to start the evaluation process afresh through the development of necessary job description for the position of Head of Sub-Directorate, Retail and Commercial Management for re-evaluation in terms of Collective Agreement and other regulating policies, the outcome of such re-evaluation to rectify the loss suffered and be compensated retrospectively".*

[15] The grievance was dealt with in accordance with the prescribed steps, and on 9 September 2020, the grievance was finalised, and the results of the grievance investigation and the decision of the City Manager or nominee were recorded as follows: *"Result of your objection is that post must be regraded. It will be your*

responsibility to submit correct job description approved by your ED as well as job descriptions for your sub-ordinates to JE committee and get written confirmation that it was received. The committee will then regrade the post".

[16] SAMWU, acting on behalf of Mr Bukula, subsequently referred an unfair labour practice dispute to the Third Respondent (SALGBC) on 11 September 2020. The nature of the dispute was recorded as an unfair labour practice – demotion, and the facts were summarised as *"was appointed on 1/1/2000 as manager reporting directly to the HOD and demoted on (sic) 2014 as deputy director".*

[17] The result required was *"reinstatement to original position as it was when I was appointed and all damages be paid retrospectively".* According to the referral form, the dispute arose on 11 September 2020.

[18] The dispute was unsuccessfully conciliated on 2 October 2020, and it was referred for arbitration. Mr Bukula recorded on the referral form that the issue in dispute was *"I was appointed on 1/1/2000 as a manager reporting directly to the HOD and demoted on (sic) 2014 as a deputy director".* The outcome he wanted was *"reinstatement to original position as it was when I was appointed and all damages be paid retrospectively".*

[19] On 6 October 2020, Mr Bukula complied with the request from corporate services, and he submitted all the job descriptions of the posts reporting to the deputy director: retail and commercial management services.

[20] On 13 October 2020, SAMWU requested that the unfair labour practice dispute be set down for arbitration, and it was so set down for 4 December 2020. The Applicant, however, raised jurisdictional points, first that the dispute referred was an unfair labour practice demotion dispute, which demotion took place in 2014, yet the dispute was only referred for arbitration in October 2020. The Applicant's case was that the dispute was referred six years after the date of the alleged demotion and, as such, an application for condonation should have been made. The SALGBC had no jurisdiction to arbitrate the dispute without condonation being sought and granted.

[21] The other point was that the process to re-evaluate Mr Bukula's post was ongoing, and a date for the JEC to evaluate his post was already determined. As the evaluation of Mr Bukula's job was not completed, his referral of a dispute was premature, and therefore, the SALGBC did not have jurisdiction to arbitrate the dispute. The Second Respondent (arbitrator) postponed the issue for oral argument to 4 February 2021.

[22] The arbitrator considered the jurisdictional challenge and subsequently issued a jurisdictional ruling. The Applicant's case was that Mr Bukula's unfair labour practice dispute related to his demotion to deputy director in 2014, but the matter was only referred for arbitration in October 2020, more than six years after the alleged demotion and if the late referral was not condoned, the SALGBC had no jurisdiction to adjudicate the dispute.

[23] The arbitrator recorded Mr Bukula's case as that he was demoted subsequent to the TASK evaluation process and that such demotion constituted an unfair labour practice. Mr Bukula was notified during March 2014 about the outcome of his evaluation, which effectively demoted him to the position of deputy director, he was dissatisfied with the outcome and raised an objection in terms of the Task Evaluation Dispute procedures. Despite raising the objection in 2014, he only received a response to his objection in November 2016, which was as follows: *"[d]ue to the uncertainty whether the job description was correct, your evaluation shall be referred to Corporate Services for a re-evaluation".*

[24] The arbitrator recorded that it was *"trite that an aggrieved employee should preferably utilize all available dispute resolution mechanisms available to him before proceeding to a forum such as the Bargaining Council".* She recorded that Mr Bukula lodged a grievance regarding his demotion, which grievance escalated to stage 3 and remained unresolved; as such, the *"grievance have (sic) not been adequately dealt with internally and he subsequently referred the matter to the Bargaining Council".*

[25] The arbitrator was of the view that the grievance took four years and was still not finalised and that the Respondent delayed the addressing of Mr Bukula's grievance, coupled with the fact that the re-evaluation process has not yielded

any response and that it left Mr Bukula "*with no alternative but to refer the matter to the Bargaining Council. The Applicant's referral is not late and no application for condonation is required".*

[26] The arbitrator considered that the Applicant *"has not taken steps to finalise the grievance process which reached stage 3 and which grievance hearing took place on 1 September 2020. The Applicant (Mr Bukula) referred his matter on 13 October 2020 which was within the 90 days of the grievance hearing".*

[27] In her analysis, the arbitrator recorded that the dispute was an unfair labour practice dispute relating to demotion and she referred to the provisions of section 191(1) of the Labour Relations Act[1] (LRA) which provides that an unfair labour practice dispute must be referred to the Bargaining Council within 90 days of the act or omission which allegedly constitutes the unfair labour practice or if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. The arbitrator accepted that it was common cause that Mr Bukula was notified during March 2014 that his position had been re-designated in terms of the TASK job evaluation process, and she accepted that March 2014 was *"the initial date of the act which allegedly constituted the alleged unfair labour practice. However section 191(1)(b)(ii) of the LRA makes provision for a later date where an employee may refer his dispute within 90 days of the date when the employee became aware of the act. To date the Applicant has not been made aware of the outcome of the re-evaluation process".*

[28] The arbitrator found that Mr Bukula *"believe (sic) that the Job Evaluation results has (sic) demoted him and he objected against such results"* and that his claim of demotion is linked to the job evaluation results and his job evaluation results will be re-evaluated and the re-evaluation process will start on 18 February 2021. To the arbitrator, this meant that he was not yet made aware of the outcome of the re-evaluation process because that process was not yet finalised. As a result, the arbitrator found that *"the referral is not late because the re-evaluation process which is linked to the alleged claim of demotion is not*

[1] Act 66 of 1995, as amended.

finalised" and that Mr Bukula could not wait indefinitely for the Applicant to finalise its internal procedures, as he already waited four years.

[29] The arbitrator found that it was improper and unacceptable that the re-evaluation process was still pending since November 2016 and she concluded that *"considering the undue, unreasonable, unwarranted and unjustified delay by the Respondent in finalising the re-evaluation process, I find that the Bargaining (sic) has jurisdiction to arbitrate the Applicant's dispute".*

[30] The matter was arbitrated, and it is evident from the documents filed in this review application that the evidence adduced was voluminous and lengthy. The review application comprises 14 lever arch files.

[31] Ultimately, the arbitrator found that the Applicant committed an unfair labour practice by demoting Mr Bukula from director to deputy director, that he should be reinstated to the position of senior director on salary grade 20, with effect from May 2014, that he is entitled to all benefits associated with the position of senior director, including notch increases, scarce skills allowances and pension fund contribution, retrospectively from May 2014. The arbitrator also ordered the Applicant to pay Mr Bukula R 500 000 as compensation for unfair conduct.

[32] The Applicant filed a review application on 16 August 2023, seeking to review and set aside the arbitration award, jurisdictional rulings and recusal rulings. The Applicant seeks to substitute the arbitrator's rulings with a ruling that the SALGBC and the arbitrator lacked the necessary jurisdiction to adjudicate on the merits of the matter, alternatively, that the Applicant did not commit an unfair labour practice.

[33] Before I deal with the grounds for review and the merits of this case, there are other issues raised to be considered, and I will deal with them in turn.

Authority to act

[34] The Applicant filed a review application on 16 August 2023 and the Respondent filed a Rule 7 notice on 15 September 2023, disputing the authority of Ncumisa Portia Gongo (the deponent to the Applicant's affidavits in the review

application) to institute legal proceedings on behalf of the Applicant as well as challenging the mandate of Rushmere Noach Inc. attorneys to act on behalf of the Applicant.

[35] Rule 7(1) of the Uniform Rules of Court provides that:

> 'Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[36] The First Respondent became aware of the identity of the Applicant's legal representatives, acting on its behalf, on 16 August 2023 when the review application was delivered. Applying the provisions of Rule 7(1), their authority to act had to be challenged by 30 August 2023, but the Rule 7(1) notice was only delivered on 15 September 2023. Mr Bukula's legal representative, Bukky Olowookorun Attorneys (BOA) did not seek leave from this Court, on good cause shown, to dispute the authority of the Applicant's attorneys or Ms Gongo to act on behalf of the Municipality.

[37] On 21 September 2023, the Applicant filed a notice to remove a cause of complaint relating to an irregular step. The Applicant's case was that the Respondent's Rule 7 notice was irregular for two reasons. First, it was delivered substantially outside of the stipulated 10-day period and was not accompanied by a condonation application. Second, the Respondent disputed the authority of Ms Gongo to institute legal proceedings on behalf of the Applicant when there is no provision in Rule 7 to challenge the authority of a deponent to an affidavit to institute legal proceedings.

[38] The Applicant submitted that the Respondent's Rule 7 notice was not properly before Court and that it was prejudiced in that it had to provide proof of authority in respect of Ms Gongo where there is no obligation to provide such proof in terms of Rule 7(1). The Respondent was afforded 10 days to remove the cause

of complaint, failing which an application would be made to have it set aside as an irregular step.

[39] On 19 October 2023, the Applicant filed an application to set aside the Respondent's notice of 15 September 2023 as an irregular step. The application was opposed, and it is evident from the opposing affidavit that BOA's understanding of Rule 7(1) is that such a challenge can be raised at any point prior to judgment, provided that same is done with the leave of Court. BOA submitted that the Applicant's case was that a challenge to authority must be made within 10 days from the *"date of notice, failing which it cannot be raised at any point thereafter",* and BOA submitted that this interpretation was wrong.

[40] It is evident that BOA either did not understand the provisions of Rule 7(1) or did not comprehend the point taken by the Applicant. The position is this: the authority of anyone acting on behalf of a party may be disputed within 10 days after it has come to the notice of a party that such person is so acting. Such authority may also be challenged at any time before judgment, but in this instance, it has to be done with the leave of the court and on good cause shown. *In casu,* the Respondent did not challenge the authority within 10 days after it became aware of the attorneys acting on behalf of the Municipality, and to proceed with such a challenge, the Respondent had to seek the leave of the Court and had to show good cause by way of an application for condonation. The Respondent sought neither leave from this Court, nor did it file a condonation application, and that was the point taken by the Applicant.

[41] On 14 December 2023, the Applicant delivered its supplementary affidavit in the review application and its attorneys addressed a letter to BOA on 15 December 2023, indicating that the Respondent's opposing affidavit is due by 3 January 2024, if Mr Bukula intended to oppose the review application and recognising that due to the December/January shut down period, it might be difficult to deliver Mr Bukula's opposition, if any, by the said date. The Applicant's attorneys Rushmere Noach Incorporated (RN) requested BOA to indicate if the review application would be opposed, and if so, an extension was granted to deliver the answering affidavit by 31 January 2024 and that a replying affidavit be delivered by 6 March 2024.

[42] BOA responded as follows on 5 January 2024:

> 'Your correspondence dated 15 December 2023 refers.
>
> Please note that our instructions are that our client does intend to oppose your client's review application.
>
> Please note further that our instructions are that our client consents to the timeframes for filing of further papers proposed in your aforementioned correspondence.'

[43] No opposing papers were filed as per the aforementioned agreement between the legal representatives. In a letter from SAMWU to the Acting City Manager on 4 October 2024, it was recorded that *"SAMWU's attorneys have been instructed to hold off on filing opposing papers while the SAMWU explores the internal avenues to resolve the matter".*

[44] RN wrote to SAMWU on instruction of the Applicant to request that SAMWU should refrain from communicating and/or engaging directly with the Municipality as both parties are legally represented and communication should be exchanged between the parties' legal representatives. RN also conveyed that the Applicant did not see any prospect of a settlement. On 25 October 2024, BOA confirmed that they were instructed *"to hold the matter in abeyance because of the discussions that was (sic) ongoing between the Municipality and SAMWU".*

[45] RN responded on 1 November 2024 to BOA and placed on record that it was astounded that the Respondent instructed their legal representative to "*hold the matter in abeyance"* as the Applicant's instructions *"have at all material times been to prosecute the review application to finality".* It was further recorded that BOA represented that answering papers would be delivered by 31 January 2024, and at no stage was it communicated that the litigation was held at abeyance and that the position, therefore, was that the review application was unopposed and would be heard on that basis.

[46] The Registrar of this Court sent out a notice of set down on 20 December 2024, informing the parties that the opposed interlocutory and unopposed review applications were set down for hearing on 27 February 2025.

[47] On 20 January 2025, RN filed a notice to the effect that the Applicant withdrew the interlocutory irregular step application and that only the review application would proceed on 27 February 2025. The Applicant also filed an affidavit to explain why the interlocutory application was withdrawn. The reasons provided were *inter alia* that it was overtaken by subsequent events and that the issue about authority to act became moot or had been abandoned. This was so because, although BOA indicated that Mr Bukula would oppose the review application, he never did, and an agreement was reached, contrary to the Rule 7(1) notice that the Municipality could file further papers in the review application. After reconsideration and on reflection, the Applicant decided to withdraw the irregular step application and to file the requisite authority, notwithstanding the fact that the Rule 7(1) notice is patently flawed and had become academic, in order to deal with the review application set down for hearing on 27 February 2025.

[48] On 26 February 2025, BOA filed another Rule 7(1) notice disputing the authority of Ncumisa Portia Gongo to institute legal proceedings on behalf of the Applicant as well as challenging the mandate of RN to act on behalf of the Applicant. In this notice, issue is taken with the affidavit which was filed on 21 January 2025, dealing with authority. BOA submitted that if the authority is found to be sufficient, it was not executed as instructed by the 'authorised personnel and/or official'. BOA submitted that *"the dependent (deponent?) was specifically excluded by the alleged authority that was filed in Court. Alternatively, that the authority that was purportedly given was not exercised according to the mandate of the erstwhile City Manager".* The Respondent required that *"the deponent furnishes to the Court the original written proof of delegated authority to institute legal proceedings on behalf of the Applicant, in the form of a Council Resolution, confirming the authority of the deponent as well as the attorney's proof of mandate".*

[49] Ms Olowookorun, for the Respondent, argued that BOA's intimation to file answering papers did not take away the challenge to authority and, according to her, the issue must still be decided.

[50] In my view, there are a number of difficulties with the Rule 7(1) notices filed by BOA on behalf of the Respondent.

[51] First (and fatal) is that both notices were filed outside of the prescribed 10-day time period and there is not an application to seek the leave of the Court to dispute the authority to act outside of the prescribed period and no good cause had been shown by way of an application for condonation in respect of any of the notices. As such, the Respondent's challenge to authority to act, as per the Rule 7(1) notices of 15 September 2024 and 26 February 2025, is not properly before this Court and therefore need not be considered.

[52] Having said that, and even if the said challenges were to be considered, they are without merit. It is clear that the Respondent and/or BOA is misguided in what can be challenged in terms of Rule 7(1). This is evident from the fact that in both Rule 7(1) notices filed, the Respondent disputed the authority of Ms Gongo (the deponent) to institute legal proceedings on behalf of the Applicant. The Respondent, in raising such challenge, lost sight of the applicable authorities where the Courts have made it clear that the deponent to an affidavit need not be authorised.

[53] In *Ganes and Another v Telecom Namibia Ltd*[2] *(Ganes),* the Supreme Court of Appeal (SCA) held that:

> 'The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized.'

[54] In *Eskom v Soweto City Council*[3] *(Eskom),* the Court has held that:

> 'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried

[2] [2003] ZASCA 123; (2004) 25 ILJ 995 (SCA) at para 19.
[3] 1992 (2) SA 703 (W) at 705D - H.

> on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. …
>
> The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.
>
> As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants…'

[55] The Respondent's notion that a deponent must have authority to depose to an affidavit is without merit. All that is required in terms of Rule 7(1) is that the legal representatives be authorised to institute the litigation. Ms Gongo was the ideal person to depose to the affidavit as she was the one representing the Municipality in the arbitration proceedings. Ms Gongo's authority cannot be challenged by way of a Rule 7(1) notice as it is the attorney that must be authorised to bring an application on behalf of an applicant and there is no need that any other person, including a deponent, should additionally be authorised.

[56] Furthermore, to include in a Rule 7(1) notice issues such as that "*the authority that was purportedly given was not exercised according to the mandate of the erstwhile City Manager"* with reference to Ms Gongo as the deponent is opportunistic and displays a lack of understanding of the law. This has nothing to do with the authority of the legal representatives, but concerns the circumstance that Ms Gongo deposed to an affidavit allegedly contrary to the instructions of the Municipal Manager.

[57] This Court is concerned only with whether the legal representatives are properly authorised and not any of the other issues raised in the second Rule 7(1) notice.

[58] In any event, in the papers before this Court, it is explained that the Municipal Manager has delegated powers to institute the review application in terms of the 'Municipality's Systems of Delegation of Powers', more specifically clause 6.1.17 thereof which provides that the Municipal Manager has:

> 'The power to institute and defend any legal action on behalf of the Municipality.'

[59] The City Manager resolved to review the jurisdictional ruling, the recusal ruling and the arbitration award in case number ECD092003 and to institute any related legal proceedings in the Labour Court or in any other appropriate forum on 17 July 2023. In terms of the resolution, the director legal services was authorised to take the necessary steps on behalf of the Municipality to further such proceedings and to instruct an external legal representative to give effect to this authority.

[60] In *Moila v University of the North and Others*[4], the Labour Appeal Court (LAC) held that while it was desirable for the resolution of the board of directors of a company, authorising the litigation, to be annexed to and proved by the founding affidavits, if this was not done, the existence or absence of authority had to be determined on the probabilities.

[61] In *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*[5], authority to institute proceedings was considered, and it was held that:

> 'Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. …'

[4] [2005] 5 BLLR 465 (LAC) at para 24.
[5] 1957 (2) SA 347 at 352A.

[62] In *Unlawful Occupiers of the School Site v City of Johannesburg*[6], the SCA further held that:

> 'After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, only be answered in the negative.'

[63] The same question arises *in casu.* Is it conceivable that an application, such as the present one, which comprises 14 lever arch files, could have been launched without the knowledge of the Applicant and without RN being properly authorised?

[64] The answer has to be no.

[65] Ultimately, this Court must decide whether enough has been placed before it to warrant the conclusion that it is, indeed, the Applicant which is litigating and not some unauthorised person on its behalf. *In casu,* enough has been placed before the Court to accept that the institution of the proceedings was duly authorised and that it is indeed the Applicant which is litigating.

Postponement

[66] I cannot but find that the filing of a second Rule 7(1) notice on 26 February 2025, a day before the hearing of the review application, was nothing but a stratagem to stall the proceedings and to delay the hearing of the matter. Unfortunately for Mr Bukula, the strategy adopted was not well thought through, and it was not sound in law.

[67] Not surprising that when the strategy taken failed, Ms Olowookorun argued for a postponement. She sought a postponement on two grounds. First, it is the Respondent's version that the parties are in the process of settling the matter,

[6] [2005] ZASCA 7; [2005] 2 All SA 108 (SCA) at para 16.

and as such, the hearing of the application should be delayed. Second, the Respondent seeks an opportunity to file opposing papers. I will deal with these in turn, notwithstanding the fact that there was no proper application for a postponement, under oath, before this Court.

[68] The Applicant disputed that there is a process of settlement ongoing. In fact, the Applicant's case is that there is no prospect of a settlement. This Court is confronted with two conflicting positions – one party claiming that a settlement is in the process of being reached and the other disputing any prospect of a settlement. There is, however, nothing under oath to support either version, and this is not an issue this Court can decide on nothing more than submissions from the bar. Ms Olowookorun was unable to explain why these facts were not set out in an affidavit by Mr Bukula, having been aware that the issue would be raised in Court as a reason for postponement. This Court's overall impression was that the Respondent or its legal representatives were wholly unprepared in respect of the proceedings before Court, and this was a strategy to avoid having to engage with the substantive merits of the case.

[69] The second argument is that Mr Bukula should be afforded an opportunity to file opposing papers in this matter, and if the postponement is refused, his constitutional right, in terms of section 34 of the Constitution to have his case heard, is taken away.

[70] There is no merit in this argument. SAMWU and Mr Bukula were cited as respondents in the review application as far back as August 2023. On 15 December 2023, RN requested BOA to indicate if the review application would be opposed and if so, an extension was granted to deliver the answering affidavit by 31 January 2024. BOA responded on 5 January 2024 that their instructions were to oppose the review application and that "*our client consents to the timeframes for filing of further papers proposed in your aforementioned correspondence".*

[71] Notwithstanding the agreement to file opposing papers by 31 January 2024, opposing papers were not filed. Instead, in a letter from SAMWU dated 4 October 2024, it was recorded that *"SAMWU's attorneys have been instructed*

to hold off on filing opposing papers while the SAMWU explores the internal avenues to resolve the matter". On 25 October 2024, BOA confirmed that they were instructed *"to hold the matter in abeyance because of the discussions that was (sic) ongoing between the Municipality and SAMWU".*

[72] It is evident that the Respondent was granted ample opportunity to file opposing papers, and up to the hearing of this matter in February 2025, there was no effort made to place opposing papers before this Court. Instead, a strategy was adopted to delay the hearing of the matter. The failure to file an opposing affidavit is clearly the result of SAMWU's decision and instruction to BOA to hold the matter in abeyance.

[73] The notion that litigants will be denied access to a court to ventilate their case cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made, or the consequences of inaction and tardiness, are that opportunities to pursue the matter are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes, and it is no failure of justice if their journey culminates in a dead end.[7]

[74] It is unfortunate that Mr Bukula's version is not placed before this Court, but that is the result of a decision taken by SAMWU and the fact that the instruction to BOA to 'hold the matter in abeyance' culminated in a dead end, is not a failure of justice, but the result of an election made.

[75] The review application proceeded on an unopposed basis.

The review application

[76] The Applicant raised a number of grounds for review in its founding and supplementary affidavits, including that the SALGBC lacked jurisdiction to

[7] See: *Edcon Ltd v Steenkamp and Others* [2017] ZALAC 81; (2018) 39 ILJ 531 (LAC) at para 34.

adjudicate the dispute. In my view, the question of jurisdiction raised by the Applicant is material and would dispose of the entire application.

[77] Jurisdictional facts must always be in existence for the CCMA or relevant bargaining council to have jurisdiction to adjudicate a dispute, and the CCMA or bargaining council must have jurisdiction in relation to the territory, the persons concerned, the cause of action or matter in dispute and the period of time involved.

[78] In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others*[8], the LAC held that:

> 'Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)*(b)* involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.'

[79] The test on review is correctness. The absence of jurisdiction can be raised at any time – it can even be raised *mero motu* by the Court on review, even if it was not pleaded as a ground for review.

[80] This was confirmed by the LAC in *Independent Municipal And Allied Trade Union and Another v City of Johannesburg Metropolitan Municipality and Others*[9], where it was held:

> 'Although the lack of jurisdiction was not one of the municipality's grounds of review, the court *a quo* was entitled to consider this issue *mero motu*. The

[8] [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 24.
[9] [2014] ZALAC 3; [2014] 6 BLLR 545 (LAC) at para 26.

court *a quo* had to be satisfied that on the objective facts, the second respondent had jurisdiction to adjudicate the matter. The second respondent had or it did not have jurisdiction, as a matter of law, to adjudicate the dispute. …'

[81] In *Eskom v Marshall and Others*[10], it was held that:

'[4] …

In *Legal Aid Board v John NO* (1998) 19 ILJ 851 (LC); [1998] 4 BLLR 400 (LC), the applicant on review, raised for the first time the issue of the arbitrator's jurisdiction to decide a matter under item 2(1)*(b)* of schedule 7. The court held that although the matter was not pertinently raised before the arbitration as it was an issue of jurisdiction, it did not preclude the applicant from raising the issue at the stage it reached the Labour Court.

[5] It follows that Eskom is entitled to raise the jurisdictional point, in the review application, or as a separate self-standing application. The authorities are trite that a court of law or a tribunal that issues an order where it has no jurisdiction to do so, acts ultra vires. The result is that the order is a nullity. See *Immelman v Keller* 1903 20 SC 623 and *Visser v Van den Heever* 1934 CPD 315.

[6] If I find that the commissioner lacked jurisdiction to determine the dispute, the award that he rendered is a nullity and Eskom would be entitled to the relief sought. The commissioner viewed the dispute as one relating to a benefit. The commissioner concluded that the failure of Eskom to pay or afford Dr Marshall a separation package was unfair.'

[82] *In casu,* the Applicant took issue with jurisdiction and submitted that an issue to be decided is whether Mr Bukula's dispute should have been entertained by the arbitrator in the first place, *inter alia* on the ground that the dispute was referred out of time.

[83] It is further trite that the Applicant is entitled to raise a jurisdictional point on review because if the arbitration award was issued when the SALGBC did not

[10] (2002) 23 ILJ 2251 (LC) at paras 4 – 6.

have jurisdiction, the arbitrator acted *ultra vires,* which renders the subsequent proceedings invalid and the award she issued absent the necessary jurisdiction, a nullity.

[84] This Court is not bound by the record that served before the CCMA and may admit extrinsic evidence on review with a view to determining *de novo* the correctness of the CCMA's or the bargaining council's assumption of jurisdiction.[11] This was confirmed in *City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council and Others*[12], where it was held that:

> 'This court's task is thus to determine whether, on an assessment of the facts and relevant considerations, the commissioner had jurisdiction to arbitrate the dismissal dispute. In undertaking this enquiry, I intend to have regard to the record of both the first and second stages of the arbitration, as opposed to confining myself to the record of the first stage. In this regard, it warrants mention that, in deciding whether a commissioner has exceeded his jurisdiction in making an award, the reviewing court is not necessarily confined to the record of the arbitration proceedings and may admit extrinsic evidence (ie evidence outside of the record) regarding the true facts.'

[85] The correctness of the arbitrator's finding that the SALGBC had the necessary jurisdiction to adjudicate Mr Bukula's unfair labour practice dispute must be decided by this Court *de novo.*

The facts

[86] Mr Bukula's case, as was apparent from his referral form, was an unfair labour practice dispute in respect of a demotion which took place in May 2014. The Applicant challenged the SALGBC's jurisdiction to adjudicate on the dispute as it was referred out of time.

[87] The Applicant's case was that Mr Bukula's unfair labour practice dispute related to his demotion to deputy director in 2014, but the matter was only referred for arbitration in October 2020, more than six years after the alleged demotion and

[11] A Myburgh, C Bosch, 'Reviews in the Labour Courts', LexisNexis, at p 114 - 116.
[12] (2012) 33 ILJ 191 (LC) at para 5.

if the late referral was not condoned, the SALGBC had no jurisdiction to adjudicate the dispute.

[88] The arbitrator recorded Mr Bukula's case as that he was demoted subsequent to the TASK evaluation process and that such demotion constituted an unfair labour practice and she accepted that he was notified during March 2014 about the outcome of his evaluation, which effectively demoted him to the position of deputy director.

[89] In her analysis, the arbitrator recorded that the dispute was an unfair labour practice dispute relating to demotion, and she referred to the provisions of section 191(1) of the LRA, which provides for the timeframes within which an unfair labour practice dispute must be referred to the Bargaining Council. The arbitrator accepted that March 2014 was *"the initial date of the act which allegedly constituted the alleged unfair labour practice. However section 191(1)(b)(ii) of the LRA makes provision for a later date where an employee may refer his dispute within 90 days of the date when the employee became aware of the act. To date the Applicant has not been made aware of the outcome of the re-evaluation process".* To the arbitrator, this meant that he was not yet made aware of the outcome of the re-evaluation process, because that process was not yet finalised and as a result, she found that *"the referral is not late because the re-evaluation process which is linked to the alleged claim of demotion is not finalised"* and that Mr Bukula could not wait indefinitely for the Applicant to finalise its internal procedures, as he already waited four years.

[90] The arbitrator concluded that *"considering the undue, unreasonable, unwarranted and unjustified delay by the Respondent in finalising the re-evaluation process, I find that the Bargaining (sic) has jurisdiction to arbitrate the Applicant's dispute".*

<u>The Applicant's challenge</u>

[91] The Applicant's case is that in terms of section 191(1)(b) of the LRA, Mr Bukula had 90 days within which to refer his dispute to the Bargaining Council. The relevant sections of the LRA provide as follows:

'…

(b) A referral in terms of paragraph (a) must be made within –

…

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.'

[92] The immediate difficulty confronting Mr Bukula was that it was common cause that (even on his own version) his dispute arose when he was allegedly demoted to deputy director in May of 2014. In other words, he became aware of the unfair labour practice in May of 2014.

[93] The arbitrator, in considering the jurisdictional challenge, found that Mr Bukula was demoted in 2014 and that despite raising an objection against his demotion in 2014, he only received a response to his objection in November 2016, that it was *"trite that an aggrieved employee should preferably utilize all available dispute resolution mechanisms available to him before proceeding to a forum such as the Bargaining Council",* that Mr Bukula lodged a grievance regarding his demotion, which grievance escalated to stage 3 and remained unresolved and that that the grievance took four years and was still not finalised.

[94] The arbitrator found that the Applicant delayed the addressing of Mr Bukula's grievance and that it left him "*with no alternative but to refer the matter to the Bargaining Council. The Applicant's referral is not late and no application for condonation is required".* She also considered that the Applicant has not taken steps to finalise the grievance process and that Mr Bukula referred his matter on 13 October 2020, which was within the 90 days of the grievance hearing.

[95] The findings of the arbitrator were not only wrong on the facts but also on the law.

[96] The correct facts were that Mr Bukula received a letter regarding the 'Implementation of TASK' in May 2014, and he filed a review application in

respect of the outcome of the job evaluation only on 19 April 2016. He received an outcome on 25 November 2016, and there are no facts placed before this Court to show what further steps were taken subsequent to the aforementioned outcome letter in November 2016. What is, however, evident is that Mr Bukula did not actively pursue the matter after November 2016.

[97] On 29 May 2019, corporate services issued communication on job evaluations to be done on request and Mr Bukula submitted an application for job evaluation for the post of Deputy Director: Retail and Commercial Management on 28 June 2019. The reason for the request was due to the changes in the subordinate structure and the adding of more positions, which were not previously taken into consideration and which necessitated the need for the revision of the job description. This process was separate and different from the review process that happened in 2016, and Mr Bukula requested for his post to be re-evaluated because of changes to the position.

[98] Whilst Mr Bukula's application for the re-evaluation of his post was pending, he lodged an internal grievance on 21 February 2020. The grievance was dealt with in accordance with the prescribed steps, and on 9 September 2020, the grievance was finalised, and the results of the grievance investigation and decision of the City Manager or nominee was recorded.

[99] On the facts, the arbitrator was wrong to find that, despite raising an objection against his demotion in 2014, Mr Bukula only received a response to his objection in November 2016. Mr Bukula only filed his review on 19 April 2016, and there is nothing to show that he had pursued this beyond November 2016.

[100] The arbitrator was also wrong to find that Applicant has not taken steps to finalise the grievance process, as it is evident that the grievance was indeed finalised. The arbitrator misdirected herself when she found that the grievance had taken four years and was still not finalised. The arbitrator's findings are wrong and disconnected from the facts and the actual sequence of events.

[101] The arbitrator also got it wrong on the law. First, she found that it was *"trite that an aggrieved employee should preferably utilize all available dispute resolution*

mechanisms available to him before proceeding to a forum such as the Bargaining Council".

[102] The wording of section 191 is clear: the 90-day period starts running from the date that the employee becomes aware of the alleged unfair labour practice. The following of an internal dispute resolution mechanism does not in any way suspend the time period. Internal dispute processes had been considered by the Court in *NTEU obo Moeketsi v CCMA and Others*[13] *(Moeketsi)* as follows:

> '[22] *In casu*, Moeketsi was not compelled to refer a dispute involving an unfair labour practice to the internal grievance process. Within 90 days of the dispute, Moeketsi was not gaged to refer the dispute to the CCMA. If Moeketsi saw benefits in the grievance processes, he could have engaged that within the prescribed 90 days. The grievance procedure anticipates a grievance to be resolved in a matter of weeks. It remained unexplained as to why Moeketsi took two months after the discovery to engage the internal grievance process. ...
>
> [23] Therefore, in my view, the fact that internal remedies have not been exhausted does not mean that a dispute cannot exist. Internal remedies are aimed at resolving an existing dispute/grievance. Logically, existentially, a dispute predates invocation of internal remedies. …
>
> [24] Thus, it is wrong in my view to suggest that before exhaustion of the internal remedies, an employee is not entitled to refer a dispute to the CCMA or the bargaining council for resolution. The time periods for referral exist for a reason. Labour disputes require speedy resolution. Could it have been the intention of the drafters of the current LRA that a party is excused from the prescription period for as long as that party is still exhausting internal remedies? In my view that could not have been the intention of the drafters of the LRA, regard being had to section 1 of the LRA. The time frames must be adhered to and if a party wishes to exhaust the conciliation/mediation process to the fullest, it can do so intra the LRA dispute resolution mechanism.'

[13] (JR1157/20) [2022] ZALCJHB 226 (16 August 2022).

[103] Second, *in casu,* it was common cause that Mr Bukula became aware of the act which gave rise to the alleged unfair labour practice in May 2014. The arbitrator's statement that section 191 makes provision for a later date where an employee may refer the dispute within 90 days of the date when the employee became aware of the act finds no application. It was not Mr Bukula's case that he was unaware of the fact that he had been demoted in May 2014 and that he only became aware of this fact at a later stage. In fact, the arbitrator accepted that Mr Bukula was 'effectively demoted' in 2014. In *Moeketsi,* the Court held that:

> '[16] That notwithstanding, section 191(1)(b)(ii) reckons the 90 days from two different points. The first is from the date of the act or omission. The second is from the date on which an employee becomes aware of the act or omission. If Moeketsi's case is that the act or omission is the failure to shortlist him. It is unclear from the papers as to when the TUT shortlisted employees for the Pretoria campus post. The second part of the section is worded similar to the provisions of section 12 (2) of the Prescription Act, which states that prescription shall not commence to run until the creditor becomes aware of the existence of the debt. It must follow that the Prescription Act is a statute *in pari materia*. The Constitutional Court in *Links v MEC: Department of Health, Northern Cape Province*, stated that acquiring knowledge means being in possession of sufficient facts to suspect that there is fault. It must follow that the *becoming aware* phrase, as employed in section 191 (1) (b) (ii) of the LRA, should as a matter of course include deemed knowledge or awareness.'

[104] Third, the arbitrator found that it was improper and unacceptable that the re-evaluation process was still pending since November 2016 (which finding is factually wrong) and she concluded that *"considering the undue, unreasonable, unwarranted and unjustified delay by the Respondent in finalising the re-evaluation process, I find that the Bargaining (sic) has jurisdiction to arbitrate the Applicant's dispute".*

[105] Section 191(1)(b)(ii) of the LRA is clear: Mr Bukula had 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice within which to refer his dispute to the SALGBC.

[106] The common cause facts are that Mr Bukula was aware of his demotion on 14 May 2014, and in accordance with the provisions of section 191(1)(b)(ii), he had to refer his dispute within 90 days from this date, thus by 12 August 2014. Mr Bukula only referred his unfair labour practice dispute to the SALGBC on 11 September 2020, more than six years after the expiry of the 90-day period.

[107] Mr Bukula did not become aware of his alleged demotion on 11 September 2020, which is, according to the referral form, the date the dispute arose. No unfair labour practice dispute relating to Mr Bukula's demotion arose on 11 September 2020, and this date is of no relevance or significance for purposes of his unfair labour practice dispute.

[108] The arbitrator failed to understand or apply the provisions of section 191 of the LRA when she effectively found that a delay in an internal process could found jurisdiction, irrespective of the provisions of the LRA and the clear timeframes set out therein.

[109] Fourth and most astounding is the arbitrator finding that the *"grievance hearing took place on 1 September 2020. The Applicant (Mr Bukula) referred his matter on 13 October 2020 which was within the 90 days of the grievance hearing".*

[110] As already alluded to, the provisions of section 191(1)(b)(ii) of the LRA is clear: Mr Bukula had 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice within which to refer his dispute to the SALGBC. The 90-day period is not to be calculated from the date of a grievance hearing.

[111] The arbitrator's finding that the dispute was not referred late and that there was no need to apply for condonation was wrong – the need to apply for condonation was obvious, and she should have found that without an application for condonation, the SALGBC did not have jurisdiction to adjudicate Mr Bukula's dispute.

[112] Given that the statutory jurisdictional prerequisites for a timeous referral were not met, the SALGBC had no jurisdiction to consider the dispute. The effect of this has been considered and is as set out below.

[113] In *Pick 'n Pay Supermarkets, Northern Transvaal (A Division of Pick 'n Pay Retailers (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration and Others*[14], it was held that:

> 'In fact in an affidavit filed on behalf of third respondent it is common cause that there was a late referral. It follows therefore on the undisputed facts before this court that there was a late referral. It is now settled law that unless there was condonation granted, any dispute referred out of time is invalid and renders subsequent proceedings invalid.'

[114] In *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others*[15], the LAC held that:

> '[49] The appellant was, consequently, required to refer his unfair dismissal dispute to arbitration within 90 days of 12 March 2003, which was no later than 10 June 2003. The appellant, however, only referred his unfair dismissal dispute to arbitration more than 12 months after the referral was due on 24 June 2004, but failed to seek condonation from the bargaining council for this inordinate delay. The arbitrator, accordingly, erred in finding that the bargaining council had jurisdiction to arbitrate the dispute. I, accordingly, consider the setting aside of the arbitration award by the Labour Court to have been properly and correctly made, on the grounds that the referral to arbitration was lodged substantially more than 90 days after the lapse of 30 days from the date on which the bargaining council had received the referral for conciliation, and in the absence of an order condoning the delay, the bargaining council had no jurisdiction to arbitrate the dispute.
>
> [50] The finding of this court on the jurisdictional issue is dispositive of the issues on appeal and cross-appeal. Accordingly, the Labour Court did not err in failing to decide the remaining issues in the review. For the

[14] (2000) 21 ILJ 234 (LC) at para 30.
[15] [2015] ZALAC 26; (2015) 36 ILJ 2581 (LAC) at paras 49 – 50.

> same reason, it is not necessary for this court to determine the issues in the cross-appeal. In the premises, I find that the arbitration award was correctly reviewed and set aside by the Labour Court. The appeal, therefore, falls to be dismissed.'

[115] In short, it is trite that once an employee becomes aware of an unfair labour practice, such must be referred within 90 days from the date on which the employee became aware thereof. In the event that the employee only refers the alleged unfair labour practice after the prescribed 90 days have lapsed, it is necessary to simultaneously lodge an application for condonation. The failure to lodge an application for condonation results therein that the bargaining council or the CCMA shall lack the necessary jurisdiction to entertain the dispute.

[116] In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[16], the Court has held that:

> 'Where the non-compliance relates to a statutory provision, ie as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time-limits relate to jurisdiction) an application must be made to court to condone the non-compliance. In circumstances where the time-limit is prescribed by the *rules*, this court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time-limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court.'

[117] The late referral of an unfair labour practice dispute constitutes a failure to comply with a statutory provision.

[118] In *SA Transport and Allied Workers Union v Tokiso Dispute Settlement and others*[17], the LAC confirmed that where a party is out of time (even where an application is filed one day late) and has to take the jurisdictional step to apply for condonation but failed to do so, a court cannot come to the party's assistance. The LAC held that in the absence of an application for condonation,

[16] (2002) 23 ILJ 1282 (LC) at para 13.
[17] [2015] ZALAC 12; (2015) 36 ILJ 1841 (LAC).

the Court cannot assist the party. The same principle applies *in casu,* where the reality is that Mr Bukula had to apply for condonation for his failure to comply with a statutory time period, and he failed to do that.

[119] Absent an application for condonation, the arbitrator should have found that Mr Bukula's dispute was referred out of the prescribed statutory period, and if he wanted to pursue the dispute, he had to apply for condonation.

[120] The Constitutional Court, in the opening paragraph of *Toyota SA Motors (Pty) Ltd v CCMA and others*[18]*,* held that:

> 'Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.'

[121] The legislative objective of expediting the resolution of employment disputes through the effective and timeous utilisation of the dispute-resolution machinery created by the LRA has been emphasized by the Courts and is an important objective that is to be applied in all dispute resolution fora. The arbitrator *in casu* ignored not only the facts and the provisions of section 191, but she disregarded the objective of expeditious resolution of labour disputes.

[122] Timeframes in the LRA are there for a reason, and they are to be complied with for good reason. It is not open to an employee to wait for more than six years after becoming aware of an alleged unfair labour practice to refer such a dispute

[18] [2015] ZACC 40; (2016) 37 ILJ 313 (CC) at para 1.

for adjudication without an application for condonation and a comprehensive and compelling explanation for such delay.

Costs

[123] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[124] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[19], the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[125] This is a matter where the arbitrator ultimately got it wrong, and her wrong decision had far-reaching consequences and cost implications for the parties. The arbitrator's lack of understanding of the law and her inability to apply it correctly resulted in lengthy arbitration proceedings and, eventually, a review application to this Court. The arbitrator did not do justice to any of the parties, and both parties are victims of her poor judgment and lack of understanding of the law and the basic principles applicable to the disputes she was mandated to adjudicate.

[126] In my view, this is a case where the interest of justice will be best served by making no order as to costs.

[127] In the premises, I make the following order:

[19] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

Order

1. The arbitration award issued on 7 July 2023 under case no: ECD 092003 is reviewed and set aside;

2. The second respondent's ruling is substituted with the following ruling:

> "The SALGBC and the arbitrator lacked the necessary jurisdiction to adjudicate Mr Bukula's unfair labour practice dispute".

3. There is no order as to costs.

_____

Connie Prinsloo
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate P Kroon SC
Instructed by:	Rushmere Noach Inc Attorneys
For the First Respondent:	Ms Olowookorun from Bukky Olowookorun Attorneys