REPUBLIC OF SOUTH AFRICA

Of Interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 2007/09

In the matter between:

THE MINISTER OF LABOUR **Applicant**

and

PUBLIC SERVANTS ASSOCIATION OF SA obo MASHA & 33 OTHERS **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **Second Respondent**

ADV P H KIRSTEN (*N.O.*) **Third Respondent**

Heard: 16 September 2010; 7 December 2012

Delivered: 25 February 2014

Summary: (Review- condonation application – poor or non-existent explanation for significant delay – no prospects on the merits – power of arbitrator under unfair labour practice jurisdiction *sui generis* – variation application concerning alleged contradictions not falling within the grounds of variation mentioned in s 144 of the LRA – alleged contradictions not ambiguities requiring clarity).

JUDGMENT

LAGRANGE, J

Introduction

[1] When this matter was first set down for a hearing on 16 September 2010, I was compelled to raise two issues with the parties. Firstly, there was a pending appeal before the Labour Appeal Court which was obviously relevant to this matter because of the nature of the dispute, but had yet to be heard. Secondly, I had to advise the parties that I had been one of the counsel representing the appellants in that matter prior to leave to appeal been granted against the judgement of the Labour Court. Although I suggested that both parties might wish this matter to be heard by another judge because of my involvement as a representative of one of the parties in the earlier litigation, both parties were content for me to decide the matter, and to wait for the LAC judgment before this matter was heard. In consequence, and the matter was postponed by agreement, with costs being costs in the cause. After the LAC judgment[1] was handed down on 12 April 2012, this matter was eventually re-enrolled for hearing on 7 December 2012.

Background

[2] This is an application to review and set aside an arbitration award issued on 6 October 2008 by an arbitrator on the panel of the General Public Service Sectoral Bargaining Council (' GPSSBC'), the third respondent. The review application was only filed 9 September 2009, some 10 months late. Consequently, the applicant seeks condonation for the late filing of the application.

[1] Reported as ***Public Servants Association on behalf of PSA Members v National Prosecuting Authority & another*** **(2012) 33 *ILJ* 1831 (LAC)**.

Chronology

[3] During November 2006 the Department of Labour conducted a job evaluation for all assistant managers on SR9 and SR10 levels and managers on SR11 and SR12 levels. The admitted purpose of the evaluation was to upgrade the posts on those levels with effect from January 2007. The individual respondents were working at the office of the Unemployment Insurance Fund in the capacity of assistant managers or managers. Because the individual respondents reported to the Commissioner of the UIF and not to the Director-General of the Department, the applicant excluded them from the evaluation process.

[4] The Director-General as the Executing Authority of the Department approved the evaluation results in terms of the Public Service Regulations of 2001 and all those employees, whom the applicant claims fell within his authority and reported to him had their salaries upgraded with effect from 1 January 2007. Because of the applicant's differentiation between managers employed in the Department and managers employed in the UIF fund, the individual respondents did not benefit from the upgrading.

[5] It is common cause that employees working in the UIF had always been part of the Department of Labour, *albeit* that the UIF section was an agency. During a workshop conducted in August 2007 and in a written communiqué issued by the applicant, it was stated that the UIF office would no longer be an agency and that employment services inclusive of the UIF would be rendered in an integrated manner. It was only after this announcement that the Department engaged in a process of evaluating all the posts of assistant managers and managers in the UIF division, which was finalised in November 2007. The evaluations were approved by the director-general on 30 November 2007 and with effect from 1 December 2007. As a result, all the assistant manager and managers posts in the UIF division were upgraded from SR9 to SR10 and from SR11 to SR12, respectively.

[6] The individual respondents then lodged a grievance complaining that the failure of the Department to upgrade their posts simultaneously with other managers in the Department with effect from 1 January 2007 amounted to

an unfair labour practice relating to promotion and, or alternatively benefits.

[7] Clause 4.3 of PSCBC resolution number 3 of 1999 provides that:

4.3 If a job evaluation as provided under the Public Service Regulations indicates that a job has been undergraded, the employer shall either

a. within a reasonable period of time, endeavour to upgrade the position of an incumbent employee, or

b. with the agreement of the affected employee, restructure her or his duties to reflect the grade determined by the job evaluation.

[8] The Department argued that no upgrading could be implemented prior to the job evaluation having been conducted and approved by the Director-General in terms of the Public Service Regulations. In particular, the department relied on regulation C7 part V of the public service regulations which states that:

> *"The absorption of the incumbent employee in the higher graded post as provided for in Regulation V, C6 shall take effect on the first day of the month following the month during which the executing authority approves that absorption."*

[9] Thus, according to the applicant the upgrades could not be implemented retrospectively but could only be implemented with effect from 1 December 2007.

[10] The learned arbitrator concluded:

> *"1. The respondent committed an unfair labour practice with regard to promotion in the failure to move the applicants on Assistant Manager level SR9 to SR 10 and the applicant's on a manager level SR 11 to SR 12 with effect from 1 January 2007.*
>
> *2. The respondent must pay the applicants compensation equal to the remuneration the applicants would have received if:*
>
> *2.1 The applicants on Assistant Manager level SR9 were moved to SR10 with effect from 1 January 2007;*

2.2 The applicant's on manager level SR11 were moved to SR12 with effect from 1 January 2007.

3. Compensation referred to in paragraph 2 must be paid by the respondent to the applicant's was in 30 (thirty) days after the date of this award. If the compensation amount needs to be quantified any of the parties can request the GPSSBC to set the matter down accordingly."

[11] Following receipt of the award, the employer applied to vary the award claiming it was ambiguous and contradictory. The nature of this application will be discussed in more detail below but for present purposes it is sufficient to say that the alleged contradiction complained of was that on the one hand the arbitrator found that there was no unfair labour practice relating to benefits but on the other hand that there was an unfair labour practice relating to promotion and that the calculation of the method of quantifying the award was unclear. The PSA and individual respondents disputed the contentions raised by the applicant in support of its application to vary the award. In any event, no variation of the award was issued despite requests by the applicant to the arbitrator to do so. However, it is also noteworthy that the applicant took no steps to compel the arbitrator to make a decision on the variation application as it was entitled to have done. The relevance of this outstanding issue will be addressed below.

[12] At the same time as the applicant sought to vary the award, the individual respondents applied for quantification of the award. As matters turned out, the parties agreed what the payments should be, if the award was to be implemented, even though the applicant did not concede the merits of the award.

The arbitration award

[13] Apart from a dispute whether or not an undertaking was given by the UIF Commissioner in a meeting to the effect that the upgrading of the

individual respondents would be effective from 1 January 2007, most of the material facts appear to be common cause.

[14] The arbitrator's reasoning on the claim that the failure to implement individual respondents upgrading to the new salary levels with effect from 1 January 2007 amounted to an unfair labour practice was crisp:

> *"It is common cause that the Director-General of the respondent proved the recommendations of the job evaluation panel committee in relation to the applicant's on 13 November 2007. According to the pre-scripts the upgrading correctly took effect from one December 2007. As a matter of law the applicant's are not entitled to what they now seek to be effective from 1 January 2007. Therefore the upgrading of the applicants with effect from 1 January 2007 does not constitute an unfair labour practice regarding a benefit. See* ***HOSPERSA & Another v Northern Cape Provincial Administration (2000) 21 ILJ (LAC)****. During the arbitration the applicants' representative conceded that the respondent must comply with the relevant prescripts. The only entitlement that the applicants may have to be upgraded with effect from 1 January 2007 is an equity entitlement based on an unfair labour practice regarding promotion (see section 186 (2) (a) of the LRA)."*

[15] The arbitrator's reasoning in respect of the unfair labour practice relating to promotion goes as follows:

> *"In the relevant staff communiqué issued by the Human Resource management the respondent confirmed the decision that all Assistant Managers and Managers should be paid equally. Staff communiqué further states that the respondent believes that the upgrading of posts will result in increase[d] productivity levels and staff retrenchment. The same mentioned value should be applicable to all employees of the respondent including the applicants. In the submission approved by the director-general on 30 November 2007 the financial implication of implementation with effect from January 2007 on the applicants was explained. It has*

further been noted in the submission that the UI F has funds available to implement the recommendation of the Job Evaluation Panel that includes the financial implications retrospective from 1 January 2007. The indication of the UIF acted as an agency and should conduct their own job evaluation was nullified by the respondent at the workshop held in August 2007. Masha testified that the Commissioner (Seruwe) confirmed that the implementation date for the applicants would be January 2007. The mentioned version of Masha was confirmed in an e-mail of Masha dated 7 December 2007. The content of the e-mail was at no stage denied by Seruwe. The respondents witness disputed the version of Masha regarding Seruwe, but Seruwe himself did not deny the content of the e-mail or testified at the arbitration.Masha further indicated that certain employees not employed that the UI F, but conducting UI F work or indeed upgraded with effect from 1 January 2007. Having regard to the above-mentioned issues there was an expectation created to be upgraded from 1 January 2007. An expectation does not create a substantive right but supports a moral and/or an equity entitlement. The upgrading of the applicant's posts and the subsequent placement of the applicants in the upgraded posts constitutes "promotion." See ***National Commissioner of the SA Police Service v Potterill NO & Others (2003) 24 ILJ 1984 (LC)*** *paras [11] – [22]. The relevant prescripts do not provide for the act that of an upgrade. An arbitrator must observe the limits and inclusions of the jurisdiction conferred by an agreement or by statute under which an arbitrator serves. I therefore do not propose that the applicants' upgrading be backdated but that they be compensated for the failure of the respondent to deal with the applicant's with effect from the same date as their colleagues who benefited under the initial job grading process."*

Grounds of review

[16] The applicant set out its grounds of review in the founding affidavit, which it did not supplement:

> *"29.1 The third respondent committed a gross irregularity when he found that the failure to move the employees to upgrade positions with effect from 1 January 2007 constituted an unfair labour practice and in ordering the applicant to pay remuneration to the employees with effect from the 1 January 2007 as such award is contrary to the Public Service Regulations, 2001 and therefore unlawful.*
>
> *29.2 The third respondent failed to take into account that it was common cause between the parties that the Director-General only approved the upgrading of the posts on 30 November 2007 and the employees were, therefore only entitled to be moved to the upgraded posts from the 1 December 2007.*
>
> *29.3 Alternatively, the third respondent failed to take into account the aforesaid relevant fact in making his award and considered irrelevant facts. The third respondent therefore committed a gross irregularity and his award is accordingly reviewable.*
>
> *29.4 The third respondent's award is contradictory and inconsistent with the evidence led. The award effectively backdated the upgrading of the post to the 1 January 2007 thus resulting in a situation where the upgrading of the posts took effect before the evaluation thereof, contrary to the provisions of the Public Service Act and the regulations promulgated there under."*

Evaluation

The Significance of the Variation Application

[17] The powers of arbitrators to alter their awards are set out in section 144 of the LRA:

"Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—

(a) erroneously sought or erroneously made in the absence of any party affected by that award;

(b) in which there is an <u>ambiguity</u>, or <u>an obvious error or omission</u>, but only to the extent of that ambiguity, error or omission; or

(c) granted as a result of a mistake common to the parties to the proceedings."

(emphasis added)

[18] In ***McDonalds SA (Pty) Ltd v CCMA & others*** **[2003] 10 BLLR 1020 (LC)** De Swardt, AJ made the following trenchant observations about the purpose of the provision, contextualising it in the parallel provisions of s 165 of the LRA pertaining to the powers of the Labour Court and Rule 42 of the Uniform Rules of the High Court:

"In dealing with an application for variation or rescission of a judgment or order, the general rule is that once a court has pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. It becomes functus officio; its jurisdiction in the case having been fully and finally exercised, its authority over the matter has ceased (see West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 176; Erasmus Superior Court Practice page B1-309; Brassey Commentary on the Labour Relations Act page A7:68A). Statutory bodies, such as the CCMA, are also subject to this general rule (see Mtshali v CCMA <u>[1999] 9 BLLR 961 (LC)</u> at <u>965G–I</u>).

In Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306G–307H the then Appellate Division held that there are a limited number of exceptions to this general rule. More particularly:

(1) the principal judgment or order <u>may be supplemented in respect of accessory or consequential matters</u> such as, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant;

(2) the court may clarify its judgment or order if, <u>on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order</u>;

(3) the court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance;

(4) where counsel has argued the merits of the case, but not the costs, and the court has made an order regarding costs, it may thereafter correct, alter or supplement that order.

In <u>section 144</u> of the Act the Legislature has conferred certain powers on a commissioner of the CCMA to vary or rescind an arbitration award. In terms of the section, a commissioner may, on his/her own accord, or on application of any affected party, vary or rescind an arbitration award or ruling:

"(a) erroneously sought or erroneously made in the absence of any party affected by that award;

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) granted as a result of a mistake common to the parties to the proceedings."

The provisions of <u>section 144</u> of the Act which apply to the CCMA, are repeated in <u>section 165</u> of the Act with reference to the power of this Court to vary or rescind its orders. The provisions so *enacted in sections 144 and 165 of the Act in turn correspond with the provisions of rule 42 of the Uniform Rules of the High Court."*[2]

(emphasis added)

[19] Bearing in mind this summary of the circumstances in which an order may be altered, it is apparent that any attempt to alter the substantive import of an award cannot be achieved using the provisions of section 144 of the LRA.

[20] In the application for variation, the essential complaints of the applicant were that -

20.1 Having found that the applicant could not be held to have committed an unfair labour practice regarding a benefit by failing to retrospectively implement the upgrading of the individual respondents to 1 January 2007 because that was something they were not entitled to as a matter of law, the arbitrator contradicted himself by then finding that the applicant had committed an unfair labour practice regarding promotion in failing to promote the individual respondents to the new salary levels for managers and assistant managers with effect from 1 January 2007.

20.2 Secondly, the award effectively grants the individual respondents the same financial relief in the form of compensation which the arbitrator found they were not entitled to on the basis that their posts could not be retrospectively upgraded to 1 January 2007.

20.3 Lastly, it is somewhat vaguely claimed that it was unclear from the award how the applicant was supposed to quantify the compensation payable.

[21] The last complaint does not warrant further consideration as the quantification of the compensation was determined jointly by the parties and endorsed by the arbitrator in his ruling of 24 April 2009. The applicant claims that it only became aware of this ruling on 12 June 2009.

[22] Both of the other complaints mentioned in paragraphs 20.1 and 20.2 above, which the applicant raised under the guise of the variation

[2] At 1022-1023.

application have little, if anything, to do with the variation of an award as envisaged by section 144 of the LRA. They both concern alleged contradictions in the award. The applicant alleges the award contains contradictory findings on the existence of an unfair labour practice and also awards relief apparently contrary to another finding that it would be unlawful to make an award of financially equivalent relief. These are not complaints about ambiguities or uncertainties in the award, but complaints about ostensibly clear contradictions. As such they are implicit complaints about the irrationality of the arbitrator's reasoning and not requests for clarification about what the arbitrator meant to say, backed failed to articulate clearly enough.

[23] Moreover, it must be said that only the shallowest reading of the award could result in perplexity about what it meant. It is clear that the arbitrator found that the respondents had failed to establish an unfair labour practice committed by the applicant regarding a benefit, but that the same facts was sufficient to prove that the applicant had committed an unfair labour practice regarding promotion. Similarly, although the arbitrator was precluded from making a finding that the individual respondents should be upgraded with is retrospective effect to 1 January 2007, he found he was able to award financially equivalent relief in the form of compensation.

[24] As such, the issues raised by the applicant under the variation application not ones that are capable of any resolution by way of a variation of the order was in the prescripts of section 144. Accordingly, nothing hangs on the determination of a variation application that is stillborn, and I agree with the respondents that it has no real bearing on the subject matter of the review.

The Condonation Application

The degree of lateness and the explanation therefor

[25] As mentioned above, the review application is approximately 10 months late. The period of the delay itself is about seven times longer than the normal six-week period within which review applications have to be filed.

The main explanation for the delay appears to relate to the applicant's failure to get an answer from the arbitrator to its application to vary the original award. Although the applicant does not say precisely when it launched its application to vary the award, which it did by way of an affidavit, it appears that the affidavit was signed on 25 November 2008.

[26] The applicant participated in determining the quantification of the award by way of an agreement concluded between the parties on 3 April 2009. On 24 April 2009, the arbitrator made the agreement an arbitration award in terms of section 142 A of the LRA. He appears to have been of the view that this was tantamount to making a settlement agreement an arbitration award, whereas in truth it was part of the unfinished business of the original award in which the question of quantification had been deferred for later determination.

[27] In any event, there is no real dispute about the status of this quantification order, on the common understanding that it is ancillary to, and contingent on, the arbitrator's findings on the merits of the claim. Even if the date of the quantification order is taken to be the final date of the award for the purposes of the condonation application, the applicant still took seven weeks longer than it should have to launch the review application, meaning it took about thirteen weeks from the time it knew of the quantification of the award to galvanise itself. No explanation at all is provided for this.

[28] In conclusion, the applicant delayed considerably in initiating these proceedings and its explanation for the delay is weak and in parts non-existent. I would be inclined to dismiss the condonation application on grounds of the failure to explain the delay particularly after it was aware of the quantification ruling, apart from its failure to take issue with the merits of the arbitration award, when it became aware of them.

The prospects of success

[29] The applicant's first ground of review is that the arbitrator committed a gross irregularity when he found that the failure to move the employees to upgrade positions with effect from 1 January 2007 constituted an unfair labour practice regarding promotion and ordering the applicant to pay

compensation to the individual respondents equivalent to the remuneration they would have received had they been upgraded because such compensation is in conflict with the Public Service Regulations, which only permit the prospective implementation of upgrading. The second ground of review relating to the arbitrator's alleged failure to consider that upgrading was only permissible after the director-general approved the same is simply an elaboration of the first ground of review.

[30] Closely linked to the second ground is the alternative claim that the arbitrator failed to take account of the statutory limitations on the retrospective implementation of upgrading when deciding that the individual respondents were entitled to compensation having the same financial effect.

[31] The last ground of review is foreshadowed to some extent by the argument emerging from the variation application. What it effectively suggests is that the award is contradictory, and presumably therefore irrational and unreasonable because it has the effect of backdating the upgrading of posts prior to the evaluation contrary to the order of implementing upgrading laid down in the Public Service Regulations.

[32] Although not specifically pleaded, the applicant sought in argument to extend its grounds of review central to include the contention that the arbitrator had acted beyond his powers in making an award in conflict with the provisions of the Public Service Regulations governing job evaluation and upgrading.

[33] The respondent's retort to these challenges is that the arbitrator was effectively exercising the powers available to him as an arbitrator determining an unfair labour practice claim relating to promotion and that even if the award he made had a similar financial effect to the retrospective implementation of salary upgrades of the respondents to 1 January 2007, that was well within his competence in performing that function. On their argument, his award did not flout the provisions of the public service regulations which only provide for the prospective upgrading of posts once approved by the executing authority. According to the respondents, the arbitrator was making a determination based on what

was equitable and was not required to decide if the upgrading, as such, should be retrospectively implemented.

[34] In this respect, the decision of the LAC in the *NPA* matter is of some relevance. In that matter, a job evaluation and upgrading exercise had been conducted for various posts in the National Prosecution Authority. However, as insufficient funds had been voted in the budget to implement all the salary upgrades with effect from the same date, the implementation of upgrading of some posts was postponed. The PSA was also a party in that dispute and declared a dispute of mutual interest over the failure to implement upgrading simultaneously for all posts that had been evaluated. As the employees in question were engaged in an essential service the matter was referred to compulsory arbitration. The arbitrator concluded that the matter was a mutual interest dispute and that the applicant's had a moral or equitable entitlement to the relief sought.[3]

[35] The LAC summarised the thrust of the respective arguments of the parties on the powers of the arbitrator to make an award compensating the employees for the lack of simultaneous upgrading of their posts, which he found they were entitled to.

> *"[25] The appellants contended on appeal that the Labour Court erred in rejecting the findings made by the arbitrator, that he could issue an award regarding unbudgeted funds. They also contended that the Labour Court failed to appreciate the arbitrator's reasoning regarding the applicability of s 74. <u>It was submitted in this regard that the court had failed to appreciate that an arbitrator, acting in terms of s 74, exercises a different power to that of an executing authority in observing budgetary constraints</u>.*
>
> *[26] On the other hand, <u>the respondents</u>, supporting the Labour Court's reasoning, <u>argued that the arbitrator did indeed misconceive his powers in the context of s 74. Their further submissions went along the following lines: the regulations, the validity of which was never challenged, properly understood</u>*

[3] See in this regard the judgment of the court *a quo* in **National Prosecuting Authority & others v Public Servants Association & others (2009) 30 *ILJ* 1613 (LC)** at 1615-1616, par [18]

> *<u>disempowered the arbitrator from undoing the fiscal control mechanism found in the promulgated requirement contained in regulation 5 in particular; that treasury, having rejected a request for an additional allocation, effectively ended the appellants' options of having the upgrades effected simultaneously</u>; that it was not open to the arbitrator to second-guess treasury's decision as to how the national revenue was to be spent and that <u>the arbitrator had been misdirected in regarding the regulation as not binding on him, seeing that these had been put in place as a deliberate 'control mechanism and defined pertinent rights'</u>."*

(emphasis added)

[36] Although the regulatory impediment relied on by the NPA as a limitation on the arbitrator's powers was a fiscal one rather than a procedural one as in this instance, the argument is analogous in principle to the argument advanced by the applicant in this matter. In essence, the contention is that, the arbitrator could not have made an order which had the effect of circumventing the limitations on the retrospective implementation of a salary upgrade because that amounted to an effective breach of those regulations, which had to be complied with to give effect to any upgrade whether determined by the relevant executing authority or by the arbitrator.

[37] Mlambo, JP writing for the court held that:

> *"[35] The respondents' arguments are to my mind <u>premised on a clear misconception of the regulations vis-à-vis the powers of the arbitrator</u> when viewed in the context of s 74...*
>
> *[37] Considered properly, the regulations and the unavailability of funds presented no impediment to the arbitrator making an award in the terms he made. <u>The regulations were put as a controlling measure against executing authorities</u>."*[4]

(emphasis added)

[4] At 1844-1845

[38] Despite the fact that the context of that dispute was that it concerned a mutual interest dispute subject to compulsory arbitration under section 74 of the LRA, there is an obvious parallel with the dispute in this matter in which the central pillar of the applicant's argument on review is that the arbitrator's award had the effect of unlawfully breaching the public service regulations preventing the retrospective implementation of salary upgrades. In this matter the powers exercised by the arbitrator concerned his authority to determine an unfair labour practice dispute. Section 193(4) of the LRA states:

> *"An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, <u>on terms that the arbitrator deems reasonable</u>, <u>which may include</u> ordering reinstatement, re-employment or <u>compensation</u>."*

[39] The nature of the power exercised by an arbitrator is one of making a moral or value judgment.[5] Moreover, the remedial power of compensation is derived from the provisions of s 193(4), and is a *sui generis* remedy originating in the LRA. It is not derived from remunerative entitlements originating in and subject to pre-requisites being met, such as those governing the implementation of salary upgrades. The fact that the arbitrator's award of compensation placed the individual respondents in a similar financial position to what they would have been in if their upgrades had been retrospectively implemented is a consequence of the arbitrator exercising the remedial power afforded by s 193(4) of the LRA, and is not contingent on compliance with the regulations governing upgrading in the public service.

[40] In the circumstances, I am satisfied not only that the applicant has poor prospects of success, but that it would in fact fail on the merits. The issues are crisp enough and well defined enough for this to be obvious.

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[5] See *Engen Petroleum Ltd v CCMA* [2007] 8 BLLR 707 (LAC) at par [77], and subsequently in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) at pars [73]–[79].

Prejudice

[41] In this case the prejudice to both applicant's and respondent's is financial but in view of my assessment of the merits, there is nothing beneficial the review would yield for the applicant in any event, so this factor is of little or no significance in the matter.

Conclusion

[42] On the above analysis, the applicant's condonation application for the late filing of its review application must fail. Consequently, it is not necessary to deal with the merits of the review as such.

<u>Order</u>

[43] The applicant's condonation application for the late filing of its review application is dismissed and accordingly the review application is also dismissed

[44] The applicant must pay the respondents' costs.

R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Adv Z Z Matebese instructed by the State Attorney
FIRST RESPONDENT:	Adv F Van der Merwe instructed by Bouwers (Roodepoort) Inc.