REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2817/2009

In the matter between:

NUMSA obo NEDZAMBA THILIVALI **Applicant**

and

FRY'S METALS (A DIVISION OF ZIMCO GROUP) **First Respondent**

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL **Second Respondent**

THEMBEKILE NSIBANYONI N.O. **Third Respondent**

Heard: **15 January 2014**

Delivered: **27 March 2014**

Summary: **Condonation – late filing of review application – principles stated – no proper explanation for a material delay – condonation refused**

Determination of back pay and retrospectivity in the case of reinstatement – principles applicable – exercise of a discretion by arbitrator – no indication that

discretion not properly exercised

Peremption – acquiescence in the award followed by review application much later – peremption applicable – applicant prohibited from challenging award

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an application to partially review and set aside an award of an arbitrator of the MEIBC (the second respondent), which application has been brought in terms of Section 145 of the LRA,[1] as read with Section 158(1)(g). The review application only relates to the issue of a challenge by the applicant of the relief afforded to the individual applicant by the third respondent as arbitrator. In a nutshell, the applicant contends that the third respondent committed a reviewable irregularity by limiting the back pay due to be paid to the individual applicant after having found in favour of the individual applicant and having awarded him reinstatement, instead of making it retrospective to the date of the dismissal of the individual applicant. The review application was opposed by the first respondent. In addition, and because the applicant's review application was brought late, the applicant also applied for condonation for such late filing.

[2] The first respondent had dismissed the individual applicant on 21 October 2008, and this dismissal was then challenged as an unfair dismissal dispute to the MEIBC. The matter came before the third respondent for arbitration on 23 June 2009. Pursuant to these arbitration proceedings, the third respondent then indeed determined that the dismissal of the individual applicant by the first respondent was substantively and procedurally unfair. The third respondent then

[1] Act 66 of 1995.

determined that the individual applicant be afforded relief in the form of retrospective reinstatement without loss of benefits. The third respondent further determined that the back pay payable to the individual applicant pursuant to his award of reinstatement be limited to three months' salary, in the sum of R51 663.23. The individual applicant was directed to report for duty at the first respondent on 20 July 2009 in terms of the reinstatement award. As stated above, it is the back pay determination that forms the subject matter of the applicant's review application, which review application was only filed on 26 October 2009.

[3] As also touched on above, and because the review application was brought out of time, the issue of condonation also needs to be determined. Before specifically determining the issue of condonation, I will first set out the backgrounds facts as relevant to this review application, as these background facts are also important in considering the issue of condonation as well.

Background facts

[4] Because of the specific and limited scope of the review application, it is not necessary for me to set out in detail all the circumstances relating to the dismissal of the individual applicant and analyse the findings of the third respondent in this regard. There was no cross review filed by the first respondent and the first respondent actually contended that it acquiesced in the award.

[5] The first respondent conducts business in a working environment containing lead. Because of this, the first respondent entered into a collective agreement with the applicant union (NUMSA) in terms of which employees were regularly subjected to blood tests to ascertain the blood lead levels of the employees. Employees who were found to have blood lead levels of 45ug/100 ml and more, had their employment terminated by way of an agreed separation agreement and accompanying package. As stated, this process was actually contained in a

collective agreement.

[6] What happened following the conclusion of this collective agreement is that the first respondent wanted to reduce the blood lead level of employees to which the separation agreement and package would apply even further, to 40ug/100 ml. The union, however, did not agree to this.

[7] The individual applicant's blood lead level was found to be too high following testing. The final test prior to the termination of employment of the individual applicant showed a blood lead level of 44ug/100 ml. This was above the 40ug/100 ml the first respondent considered acceptable. For this reason alone, the employment of the individual applicant was then terminated by the first respondent by way of the implementation of the separation agreement and package in terms of the collective agreement.

[8] The issue before the third respondent was a simple one. The union contended that the collective agreement between it and the first respondent prescribed a blood lead level of 45ug/100 ml for the separation agreement to apply, and it had never agreed to any other blood lead level. The first respondent contended that it tried to consult with the union about this and when it could not achieve agreement to lower this blood lead level, it unilaterally implemented the lower blood lead level requirement to 40ug/100 ml. Therefore, and simply, if the applicable blood lead level was 40ug/100 ml, the first respondent would have to accept that the termination of the individual applicant would be justified, but if the applicable blood lead level was 45ug / 100 ml and higher, it would not be justified.

[9] The third respondent found that the original collective agreement prescribing a blood lead level of 45ug/100 ml and higher was still valid and binding, and had never been changed. The third respondent found that the unilateral implementation of the reduced 40ug/100 ml level by the first respondent was of

no consequence. The third respondent concluded that because the blood lead level of the individual applicant was 44ug/100 ml, this was below 45ug/100ml and his dismissal was thus not justified, and as such, unfair.

[10] The third respondent then reinstated the individual applicant with three months' back pay and directed that he report to work by 20 July 2009. It was common cause that this award was received by NUMSA (the applicant union) on 14 July 2009. Significantly, that which the third respondent found in his award and directed must happen, then actually came to pass. The first respondent accepted the award and complied with the same. The individual applicant reported for work on 20 July 2009 and was reinstated in terms of the award. The individual applicant was also paid the prescribed back pay in terms of the award of R51 663.23. There was never any indication from either NUMSA or in the individual applicant that they were dissatisfied with the award in any way or that it would be challenged, upon these events taking place. The fact is that the arbitration award was given effect to on an unconditional and unchallenged basis.

[11] Then, and on 26 October 2009, being more than three months later, the applicant simply launched a review application, challenging only the three months' back pay part of the award and applying that this part of the award be reviewed and set aside and be substituted with an award that the individual applicant be paid back pay until the date of his dismissal on 21 October 2008. It is this review application that is now before me.

The relevant test for review

[12] I intend to make a few short comments about the appropriate test for review in the current matter. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa, AJ held that in the light of the constitutional requirement (in s 33

[2] (2007) 28 ILJ 2405 (CC).

(1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held:

> 'It is clear...that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[13] The *Sidumo* review test was applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[5] and the Court, as to what would be considered to be unreasonable for the purposes of this test, said:[6]

> '… It seems to me that… there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before

[3] Id at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.
[5] (2008) 29 ILJ 964 (LAC).
[6] Id at para 102.

him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[14] In applying this review test, the SCA in *Herholdt v Nedbank Ltd and Another*[7] concluded as follows:[8]

> 'In summary, the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

What the Court was saying, simply put, is that if the arbitrator ignored material evidence, and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.

[15] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has now in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[9] again interpreted and applied the *Sidumo* review test and held as follows:[10]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a

[7] 2013 (6) SA 224 (SCA) per Cachalia and Wallis JJA.
[8] Id at para 25.
[9] [2014] 1 BLLR 20 (LAC), per Waglay JP.
[10] Id at para 14.

> determination of the reasonableness of the decision arrived at by the arbitrator.… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

The Court concluded:[11]

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[16] Therefore, the first step in a review enquiry is to consider and determine if a material irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record and comparing this to the content of the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.

[17] Should the review court, however, conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a

[11] Id at para 16.

determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? The review court, in essence, at the second stage of the review test, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless reasonably be arrived at by another reasonable decision-maker, even if it is for different reasons. The end result always has to be an unreasonable outcome flowing from an irregularity, for a review to succeed.

The issue of condonation

[18] Dealing then with the substance of the applicant's application, the first issue to determine is condonation. The applicant's condonation application was very much opposed and, in my view, justifiably so, for the reasons as will be set out hereunder. In terms of the provisions of Section 145(1) of the LRA, an applicant for review has six weeks from the date upon which such applicant became aware of an arbitration award to serve and file a review application.

[19] The applicant received the arbitration award on 14 July 2009, on its own version. That means that the applicant had to serve and file its review application on or before 26 August 2009. The review application was, however, only served and filed on 26 October 2009. The review application is thus some two months' out of time. A delay of two months, in the context of review applications, is a material delay, which in itself mitigates against the granting of condonation.[12] In fact and in *Academic and Professional Staff Association v Pretorius No and Others,*[13] even a three weeks' delay was found to be excessive when it comes to review applications. It is thus my view that a two month delay in a review application is

[12] See *Jayes v Radebe and Others* (2003) 24 ILJ 399 (LC); *National Education Health and Allied Workers Union on Behalf of Mofekeng and Others v Charlotte Theron Children's Home* (2003) 24 ILJ 1572 (LC); *Moolman Brothers v Gaylard NO and Others* (1998) 19 ILJ 150 (LC).
[13] (2008) 29 ILJ 318 (LC).

certainly material and requires, as will be discussed hereunder, an excellent explanation for the delay.

[20] The general principles applicable to condonation applications were set out in the case of *Melane v Santam Insurance Co Ltd*[14] where it was said*:*

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[21] In specifically dealing with an application for condonation for the late filing of a review application, the Labour Appeal Court in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[15] referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[16] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

[22] What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review

[14] 1962 (4) SA 531 (A) at 532C-E.
[15] (2002) 23 ILJ 1229 (LAC).
[16] (2000) 21 ILJ 166 (LAC).

condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.

[23] The Court, in *Academic and Professional Staff Association,*[17] said the following, also in the context of a matter concerning a condonation application for the late filing of a review application:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC). It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[24] As to how the explanation must be presented by an applicant in an application for condonation for the late filing of a review application, the Court in *Independent*

[17] *Academic and Professional Staff Association* (*supra*) at paras 17–18.

Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others[18] said the following:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[25] It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above.[19] There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with[20] and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.

[26] Now that I have set out the applicable principles in deciding whether the applicant has shown good cause for the granting of condonation, I firstly deal with the explanation provided by the applicant. On the face of it, the explanation

[18] (2010) 31 ILJ 1413 (LC) at para 13.
[19] See *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC); *Flexware (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 1149 (LC); *Zeuna-Starker Bop (Pty) Ltd v NUMSA* (1999) 20 ILJ 108 (LAC) at 108 - 109; *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (*supra*).
[20] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (*supra*); *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12–13.

is precisely just a list of events as criticised by the Court in *Zungu*[21] as an explanation, and as such is in itself deficient. However, and even in considering this chronology, the following is apparent:

26.1 Despite having received the award on 14 July 2009, it was only sent to NUMSA head office on 3 August 2009, some three weeks later, and after it had already been complied with and given effect to. This is no explanation why this took so long and why nothing had been done earlier;

26.2 Virtually the entire months of August and September 2009 was explained on the simple basis that the union official attending to the matter was too busy with other matters, including preparing for other arbitrations and conferences and Labour Court cases. For this entire period, there is not one shred of any indication that the matter in this instance was dealt with or received any attention of any kind whatsoever;

26.3 The same pattern of conduct then persisted in October 2009. The review application in another matter (Crabtree) was dealt with and consultations were held with employees to oppose a review brought by Rustenburg Platinum Mines. In fact, the matter *in casu* was first dealt with on 22 October 2009 and this was then this matter was first considered on the applicant's own version;

26.4 What is clear from the explanation actually provided (and to call it an explanation is generous), is that this matter was not dealt with in any way whatsoever, from the time when the award was sent to NUMSA at the beginning of August 2009, and until 22 October 2009 when it received its very first attention.

[21] Above n 18.

[27] From the above explanation or better described a complete lack of it, it is clear that the applicant has provided no explanation at all for the entire delay in this matter. Added to this, there is not a shred of any explanation as to what the individual applicant himself did to follow up on the matter after purportedly asking the union at the beginning of August 2009 to review the award. This kind of conduct in itself is grossly remiss and negligent. In this regard, the following *dictum* from the often quoted judgment in *Saloojee and Another NNO v Minister of Community Development*[22] is particularly apt where it was held as follows:

> 'If, as here, the stage is reached where it must become obvious also to layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he realises upon the aptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case.'

[28] Considering the explanation the applicant sought to offer, the insurmountable problem the applicant has, in my view, is the fact that the Court has on numerous occasions made it clear that an individual applicant can simply not sit by without regularly following up on its litigation and the progress therein, even after tasking a representative to deal with the matter.[23] Specifically, the Court in *Superb Meat Supplies CC v Maritz*[24] held as follows:

> 'The case of appellant is firmly grounded in the delinquency of Majola and that is

[22] 1965 (2) SA 135 (A).
[23] See *Arnott v Kunene Solutions and Services (Pty) Ltd* (2002) 23 ILJ 1367 (LC); *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC); *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC); *GIWUSA obo Heynecke v Klein Karoo Kooperasie BPK* (2005) 26 ILJ 1083 (LC); *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 365; *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC).
[24] (2004) 25 ILJ 96 (LAC).

> manifest and self-evident... I also am of the judgement that the appellant through the agency of its member Schreiber was negligent in not monitoring progress of its case from the time of the service of the claim in August 1999 to the set down for the trial on 12 March 2001, a period of nearly 18 months. The appellant appointed new attorneys and the file was available to them and would have indicated what contact took place between Majola and Schreiber during that period. The court has not been informed of any communication and it can be inferred that the appellant took no active interest in its own litigation, a further reason to conclude that it was negligent.
>
> As I have indicated Trengove AJA held in the *De Wet* case that disinterest and failure to keep in touch with an attorney barred relief. Attorneys cannot be blamed and the appellants - as in this matter - were the authors of their own problems….'

The Court concluded:

> 'In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasized that the attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

In my view, the above *dictum* would find direct application in the current matter and the individual applicant must stand or fall by the conduct of NUMSA as his chosen representative.

[29] In effect, the basis of the explanation is to place all blame on the fact that the union official tasked with this matter was too busy with all kinds of other attendances to get to this matter and on this basis the individual applicant should be exonerated. The fact that this kind of explanation is simply not acceptable *per se* is already dealt with above but this matter has the added nuance that there is a complete absence of any explanation or even affidavit from the individual applicant himself as to what he himself did to pursue his own matter or follow up with his union. The judgment in *Zungu*[25] is, in my view, particularly apposite and also concerned a case where a trade union failed to process a review on behalf of its member timeously. The Court dealt specifically with the issue of there being no affidavit or explanation before the Court by the individual review applicant (union member) himself and said:[26]

> 'It appears that Mr Zungu was content with the applicant processing this matter. After his dismissal he returned to his homestead. There was an onus on him to enquire from his union what the review application entailed and what was required of him. It does not appear that he kept in contact with the applicant about his case…'

The Court concluded:[27]

> 'Trade unions exist for the very reason of looking after the interests of their members. When employees join a trade union they entrust responsibility for issues relating to their employment and the termination thereof to the trade union. In the circumstances of this relationship I believe that there is an even greater limit on the extent to which trade union members can escape the results of their trade union's lack of diligence. Trade unions have a vested interest in the processing and outcome of disputes referred on behalf of their members. Their very existence is about acting in the interests of their members. Members for their

[25] Above n 18
[26] Id at para 24
[27] Id at para 25

> part are happy to entrust their labour relations affairs to their union. This case is a good example of where the trade union has been involved with the dispute from the inception. It represented Mr Zungu at the arbitration and as the applicant in this matter has deposed to the affidavits in support thereof…. In these circumstances a member such as Mr Zungu would have to put up good reasons as to why he should be allowed to escape the consequences of the union's lack of diligence in launching the review application timeously. In this case there is no explanation at all before this court from Mr Zungu that would enable it to come to his assistance. The condonation application must according fail.'

I fully agree with the above reasoning, which I find directly applicable *in casu*.

[30] Something must be said about the substance of the applicant's explanation, even as it stands. As stated, what the applicant has done is to provide a blow by blow account of how busy the union official to whom this matter was handed to deal with, was. Details are given of all the other matters he dealt with which seemed to be more important than the current matter. In fact, and at its core, the explanation simply is that this matter was not as important as all the other matters and it just had to wait until the very busy union official could get to it. To call this explanation unacceptable is an understatement. It is in fact a kind of explanation which is not exonerating but is actually an indictment. There can be no justification at all to submit such a kind of explanation, especially for a trade union of the stature, size and experience of NUMSA, who in effect tells one member that his matter is just not as important as all the other matters it is attending to on behalf of all its other members. Although dealing with an attorney, a similar kind of explanation came before the Court in *SA Revenue Services v Ntshintshi and Others*[28] and the Court said:

> 'Seymour's actions — or rather his inaction — border on the unethical. He failed to provide a service to his client, instead leaving it to a paralegal — who proved

[28] (2014) 35 ILJ 255 (LC) at paras 18 – 19.

> to be incompetent — to draft and deliver affidavits on behalf of his client. Instead of attending to his client's needs — for which he was being paid by her trade union — he attended a soccer tournament. That is simply inexcusable….
>
> This court has held on numerous occasions that there is a limit beyond which a litigant cannot escape the dilatoriness of her chosen representatives...'

The above reasoning, surely, can equally apply to the explanation submitted in this matter.

[31] As far as it concerns the issue of the situation of NUMSA as a long standing and experienced union, I need only refer to the following *dictum* from the judgment in *National Education Health and Allied Workers Union and Others v Vanderbijlpark Society for the Aged,*[29] which I fully agree with:

> 'The LRA has been in existence for more than 15 years, and the time-limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of their members and to adapt their internal procedures to accommodate those time-limits, not vice versa. The scale of an organization cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organizations, be they trade unions or businesses, ought to be able to see to it that they are organized to deal with disputes of this nature in a systematic manner to ensure that they do not fall foul of the time-limits in the LRA. Where handling such disputes is a core function of the organization, this should go without saying.'

[32] In the end, and considering that NUMSA, as stated, is a trade union, the fact remains that what it does, its members do. In effect, this means that the individual applicant is even more bound, for the want of a better description, to the conduct of NUMSA as his chosen union. In *Seatlolo and Others v*

[29] (2011) 32 ILJ 1959 (LC) at para 9.

Entertainment Logistics Service (A Division of Gallo Africa Ltd),[30] the Court said:

> 'Indeed a trade union is not an independent legal representative acting as an agent to the detriment of a client. It is a collective embodiment of its members and is akin to a curator at litem in civil proceedings - in other words, it is 'the institutional embodiment of the several members involved in the dispute'…. The trade union is its members and thus the applicants cannot escape the consequences of their decision to be members of SACCAWU….'

[33] Therefore, it is my view that the explanation submitted is one that confirms that NUMSA and with it the individual applicant were grossly remiss and negligent, and thus the consequence of this has to be that as set out in *National Union Of Metalworkers of SA on behalf of Nkuna and Others v Wilson Drills-Bore (Pty) Ltd t/a A and G Electrical,*[31] where the Court said the following:

> 'In *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D), the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.'

[34] The manner in which the applicant deals with the issue of prejudice also leaves much to be desired. The applicant has to show the potential of a miscarriage of justice, where it comes to the issue of prejudice. Instead, all the applicant says is that the nine months unpaid period will lead to the individual applicant "seriously suffering" and that he has lost a "vast amount" of household appliances and is on the verge of losing his house. These statements are not confirmed by any confirmatory affidavit by the individual applicant himself. The manner in which

[30] (2011) 32 ILJ 2206 (LC) at para 27.
[31] (2007) 28 ILJ 2030 (LC).

prejudice is dealt with is in my view nothing more than emotive and unsubstantiated contentions and what is ignored is that the award has actually been complied with and the individual applicant was reinstated.

[35] In the end, the applicant has thus provided no explanation at all for what is a material delay. The applicant has not demonstrated proper prejudice in support of its application. This should be the end of the matter for the applicant without even considering the requirement of prospects of success. It was said in *Mziya v Putco Ltd*[32] that 'there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial'. Also in *NUM v Council for Mineral Technology,*[33] it was said that 'there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial'. Finally and in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home,*[34] the Court held that 'this court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial'.

[36] In my view, the approach of the applicant in the condonation application is that condonation was there for the asking. This is simply not so. In this regard, I can do little better than to refer what was said in *Seatlolo*[35] where the Court held:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

[32] (1999) 3 BLLR 103 (LAC).
[33] (1999) 3 BLLR 209 (LAC) at 211G-H.
[34] (2004) 25 ILJ 2195 (LAC).
[35] Id at para 27.

[37] For the above reasons alone, it is my view that the applicant's condonation application must fail and, consequently, its review application as well, without even having to consider the prospects of success in its review application. However, and for the sake of completeness, I will nonetheless shortly deal with the merits of the applicant's review application.

The issue of peremption

[38] Even if the merits of the applicant's review application are considered, I am of the view that the applicant's review application must fail for the simple reason of the application of the principle of peremption.

[39] As regards the issue of peremption, the following facts are pertinent: (1) The first respondent never challenged the arbitration award; (2) the arbitration award stipulated a date for compliance, being 20 July 2009, and this was adhered to; (3) the individual applicant reported for work on 20 July 2009, and was reinstated and the back pay awarded in the award paid to him, without reservation or challenge at the time; (4) it was never indicated prior to, at the time or immediately after the individual applicant reporting for work and being paid his back pay that he was in any way dissatisfied with the award; (5) the documentary evidence shows that NUMSA expressed it dissatisfaction with the award, internally, in August 2009, but never sought to engage the first respondent on this, or record any reservation of rights relating to potential challenge of the award to the first respondent; and (6) the status quo, so to speak, with regard to compliance with the award, endured for more than three months without any contradiction until the review application was simply finally filed.

[40] The principle relating to preemption was defined in *Dabner v SA Railways and Harbours*[36] as thus:

[36] 1920 AD 583 per Innes CJ.

> 'The Rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced to it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.'

[41] In the context of employment law, the former LAC also specifically dealt with preemption in the judgment of *National Union of Metalworkers of SA and Others v Fast Freeze*[37]. As to the concept of peremption, Mullins J said the following:[38]

> 'If a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it. Peremption also includes elements of the principles of waiver and estoppel.'

The Court then analysed all the authorities relating to this issue and held as follows as to the applicable principles that must be considered in order to determine if peremption exists:[39]

> 'From the above authorities it seems to me that the relevant principles can be summarized as follows:
>
> (a) Where a right to appeal exists, the party desiring to appeal loses the right to appeal where he has acquiesced in the judgment.
>
> (b) Such acquiescence may be express, or implied from the conduct of such party.

[37] (1992) 13 ILJ 963 (LAC).
[38] Id at 969I – 970A.
[39] Id at 973F – 974C.

(c) Acquiescence by conduct requires an overt act by such party, ie conduct which conveys outwardly to the other party his attitude towards the judgment.

(d) The overt act must be consistent with an intention to abide by the judgment, and inconsistent with an intention to appeal against such judgment.

(e) The test is objective. It is the outward manifestation of such party's attitude in relation to the judgment that must be looked at, not his subjective state of mind or intention.

(f) Where there is such overt conduct, a mental reservation or resolve not to acquiesce in the judgment will not avail the party who by his conduct evinces an intention to abide by the judgment.

(g) The state of mind of the party mentally reserving his right to appeal must yield to his conduct which plainly contradicts such an intention.

(h) The court must be satisfied that the conduct in question, when fairly construed, necessarily leads to the conclusion that the party intends abiding by the judgment.

(i) If more than one inference may fairly be drawn from the conduct in question, this will not be sufficient to prove renunciation. The conduct must be unequivocal.

(j) The onus of proving that a party has renounced his right to appeal rests on the party alleging such renunciation.

(k) Voluntary payment, or acceptance of payment, as the case may be, in terms of a judgment, will usually be sufficient to satisfy a court that the party has acquiesced in the judgment.'

Further in *Fast Freeze*, the Court then applied these principles to the facts of that matter. The Court concluded as follows, which I consider to have several material comparisons to the matter before me *in casu*:[40]

> '…. Appellants knew their rights. They knew they had the right to appeal. This is common cause on the papers. They knew they had the right to receive payment in terms of the judgment, and they did so receive payment. What they did not know, or may not have realized, was the legal effect of exercising one of these two options. But that is the situation that arises in every case where it is alleged that a right of appeal has been renounced.'

[42] There have since been several instances of the application of the principles set out in *Fast Freeze* by the Labour Court. I intend to deal with those judgments that can serve as an appropriate basis of comparison to the matter *in casu*. Firstly, and in *National Education Health and Allied Workers Union on behalf of Tumana v Commission for Conciliation, Mediation and Arbitration and Others,*[41] the Court said:

> 'In this case the applicant expressed its intention to challenge the arbitration award by launching a review application. However, three days after an order dismissing the applicant's claim owing to the delay in its prosecution was granted, Maseti addressed a letter to Kirchmann telling him to instruct his client to comply with the arbitration award by paying the applicant the amount of R95,401 that the third respondent was ordered to pay by the second respondent. In the letter it is unequivocally stated that the matter was finalized by the Labour Court on 3 March 2011. By accepting that the matter was finalized on 3 March 2011 the applicant expressly communicated an intention not to contest the decision of 3 March 2011. Having accepted that the matter was finalized the applicant is precluded from changing its mind and seeking to note an appeal. When a matter is finalized it comes to an end and may therefore not be pursued.'

[40] Id at 974J – 975B.
[41] (2012) 33 ILJ 666 (LC) at para 10.

[43] In dealing with an application for a cross review, the Court in *Jusayo v Mudau NO and Others*[42] said the following in dismissing the cross review:

> '…. Its indicated and unreserved intention to comply with the order against it to pay the calculated amount of compensation to the applicant in compliance with the first respondent's order, precluded absolutely its right subsequently to contest the award in terms of which that order was made.'

[44] The Court in *Balasana v Motor Bargaining Council and Others*[43] specifically dealt with peremption in the case of a review application. The Court accepted that the principle applied to review applications and said:[44]

> 'As a general rule a party that perempts the arbitration award would not be entitled subsequently to challenge that arbitration award. The basic requirement, however, to sustain a claim of peremption entails having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal.'

The Court in *Balasana* concluded that peremption was not shown to exist in that matter. It is, however, important to consider the factual considerations in the judgment of *Balasana* where the Court held as follows,[45] which I consider as an appropriate comparison to the contrary, so to speak, in respect of the matter *in casu*:

> 'As indicated earlier in this judgment the arbitration award was issued on 5 June 2009. The payment in compliance with the terms of the arbitration award seems to have been made on 10 June 2009. The review application was filed on 13 July 2009, which was within the time frame prescribed in terms of s 145 of the LRA. There is no evidence as to when after accepting the payment from the respondent the applicant approached Legal Aid SA for assistance to challenge

[42] (2008) 29 ILJ 2953 (LC) at para 17.
[43] (2011) 32 ILJ 297 (LC).
[44] Id at para 11.
[45] Id at paras 17 – 18.

the arbitration award. However, what is clear is that it must have been some time before 13 July 2009. It has also to be noted that the amount was not given to the applicant in hand but deposited into his bank account. There is also no evidence that he acknowledged to the respondent receipt of the money. There is therefore no evidence of the subjective state of mind of the applicant at the time he decided to accept the money which evidence could have assisted me as to the factors in determining whether it could be said that the applicant had objectively elected to comply with the arbitration award.

Thus, regard being had to the time period within which the applicant filed his review application and the earlier period of consultation with his attorney to have the award reviewed, it cannot be said that the objective facts support the view that he accepted the money unconditionally and without reservation of his right to challenge the arbitration award on review.'

[45] The judgment in *Venture Otto SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[46] also dealt with peremption in the case of a review application and said the following in finding that there was indeed peremption established:

'*In casu*, and given the applicant's undertaking to comply with the second respondent's award, the indulgence which it subsequently sought, the third respondent's positive response thereto and the coalescence of it all by way of the conclusion of the written agreement, proclaims in my judgment that the threshold has been satisfied. The circumstances which I have outlined point 'indubitably and necessarily' to the conclusion that the applicant wholly accepted the second respondent's award. In short, the facts unequivocally proclaim that the applicant had fully acquiesced in the award without the slightest intention of impeaching it. What it thereafter did was to repudiate an agreement which was seriously and deliberately entered into. And it only did so when the applicant's managing

[46] (2005) 26 ILJ 349 (LC) at 352.

director had some misgivings and thereafter sought legal advice. By then, it was all too late.'

[46] Based on all of the above legal principles, and the pertinent factual context referred to above, I have little hesitation in concluding that the required threshold in establishing the existence of peremption has been satisfied *in casu*. The fact is that the applicant party, which includes a well established and experienced trade union, knew what its rights were. Whatever its subjective intentions may have been, this is simply irrelevant as these intentions were never conveyed to the first respondent until long after the award had unconditionally been complied with. Without any challenge or reservation of rights being recorded beforehand, the individual applicant accepted reinstatement and the compensation payment in terms of the award. As stated, the first respondent fully complied with the award without condition. All of this is followed by a review application that is not even brought in time, but some two months after being due. Accordingly, the challenge to the award by the applicant came too late. The award had been acquiesced in. The benefits in terms of the award had been accepted without reservation. There is simply nothing in the conduct of the applicant union and the individual applicant which could feasibly indicate any other intention than acquiescing in the award.

[47] Accordingly, I conclude that on the basis of the application of the principle of peremption, the applicant's review application must fail and stands to be dismissed.

<u>The merits of the review</u>

[48] Finally and for the same of completeness, I will make some short comments about the merits of the applicant's review application, since it really concerns a crisp legal point. This point is simply whether the determination by the third respondent to limit the back pay to three months was a reasonable outcome.

[49] Now it is trite that since the judgment of the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[47] and where it comes to the retrospectivity of any award of reinstatement and/or any back relating to such an award of reinstatement, the arbitrator or the Judge hearing the matter exercises a discretion in terms of Section 193(1). The Court in *Equity Aviation* said:[48]

> 'The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)*(a)* indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal.' (emphasis added)

As to the exercise of this discretion, the Court said:[49]

> 'It is trite law that the power to grant a remedy in s 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion....'

[50] Following on and in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others,*[50] the Constitutional Court dealt with the judgment in *Equity Aviation* and held:[51]

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[47] (2008) 29 ILJ 2507 (CC).
[48] Id at para 36.
[49] Id at para 48.
[50] (2010) 31 ILJ 273 (CC).
[51] Id at para 39.

> '…. In discussing the discretion that a commissioner or court has to exercise in terms of s 193, Nkabinde J stated that the period between the dismissal and the trial as well as the fact that the dismissed employee was without an income during the period of dismissal should be taken into consideration in such a manner that 'an employer is not unjustly burdened if retrospective reinstatement is ordered or awarded'.'

The Court concluded:[52]

> 'The remedies awarded in terms of the provisions of s 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation*. That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an enquiry into fairness with notions of a legal onus.'

[52] The actual exercise of such a discretion in limiting the retrospectivity of reinstatement and the award of back pay does feature in several judgments of the Labour Appeal Court and the Labour Court. The LAC in *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others*[53] dealt with the issue and said:

> 'However, the only issue for critical consideration is the extent of retrospectivity of the employees' reinstatement. This is a matter in respect of which I am not convinced that the Labour Court gave due and sufficient regard to, particularly given, amongst others, the above-quoted observation made by the Labour Court itself on the obvious and objective dire financial straits of the appellant currently, as well as at the time of the dismissals. On this basis, therefore, the pronouncement by the Labour Court (at para 57) that '[w]hatever challenges come the way of the respondent, it should be able to comply with the order of reinstatement which the applicants have shown an entitlement to' is, with respect, neither consistent with the court's own factual finding aforesaid on the appellant's

[52] Id at para 42.
[53] (2012) 33 ILJ 160 (LAC) at para 43

financial capacity nor the principle that 'fairness ought to be assessed objectively on the facts of each case'. In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*, the Appellate Division (as it was then known) stated as follows:

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances *(NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."'

The Court in *Mediterranean Textile Mills* in the end, and after considering the conduct of the employees as well, concluded that the retrospective reinstatement order issued by the Labour Court entitling the employees to full backpay had the effect of 'unjustly financially burdening' the employer party in that case, and was not objectively fair on the facts. The Court limited the back pay to 12 months, which the Court considered "just and equitable in the circumstances."[54]

[53] I refer in closing to the judgment in *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd*[55] where back pay was limited to 6 months, and *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others*[56] where back pay was limited to 1 month, as illustration how the relevant discretion was exercised.

[54] Therefore, and as the determination of retrospectivity and back pay in respect of any award of reinstatement made in terms of section 193(1) entails the exercise of a discretion by the arbitrator, it had to be accepted that a review Court should not too readily interfere with such determinations made by arbitrators, pursuant to

[54] See para 45 of the judgment.
[55] (2010) 31 ILJ 387 (LC).
[56] (2010) 31 ILJ 1425 (LC).

exercising such a discretion. In *Kemp t/a Centralmed v Rawlins,*[57] the Court dealt with the exercise of a discretion in deciding the issue of the quantum of compensation awarded, which in my view would equally apply to the issue of deciding the extent of restrospectivity and back pay. The Court in *Kemp* held that in principle, the issue of compensation can be decided by the Court in its own judgment, which principle would also clearly apply to an arbitrator deciding on compensation. The Court in *Kemp* further said, which, as I have said, would equally apply to the issue of the exercise of the discretion relating to the retrospectivity of reinstatement and back pay:[58]

> 'From the above it is clear that… its decision can only be interfered with by a court of appeal on very limited grounds such as where the tribunal or court-
>
> (a) did not exercise a judicial discretion; or
>
> (b) exercised its discretion capriciously; or
>
> (c) exercised its discretion upon a wrong principle; or
>
> (d) has not brought its unbiased judgment to bear on the question; or
>
> (e) has not acted for substantial reason (see *Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335); or
>
> (f) has misconducted itself on the facts (Constitutional Court judgment in the *National Coalition for Gay and Lesbian Equality* case at para 11); or
>
> (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in *National Coalition for Gay and Lesbian Equality* at para 11).'

[57] (2009) 30 ILJ 2677 (LAC) at para 3; see also *Media Workers Association of SA and Others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) at 1397I-1398B.
[58] Id at para 21.

I do not consider the third respondent's determination of the restrospectivity of reinstatement and back pay to fall foul of any of the above considerations so as to justify the interference with the exercise of such discretion.

[55] Accordingly, the applicant has not satisfied any of the requirements in order to justify this Court's interference with the discretion exercised by the third respondent *in casu*, insofar as it concerns the issue of relief. In fact, the approach of the applicant seems to be that the arbitrator had no alternative other than to make the reinstatement and back pay retrospective to date of dismissal of the individual applicant. As is clearly set out above, this is simply not the case, and the third respondent always had a discretion. The third respondent was clearly alive to the fact that he had such a discretion and in exercising this discretion considered the fact that there was no *mala fides* or reprehensible conduct on the part of the first respondent, even when the dismissal was found to be unfair. The third respondent understood and accepted that in truth the matter only concerned the issue of the application of a collective agreement, and the parties' interpretation as to its application and the dismissal of the individual applicant was unfair for this reason alone. It would in fact be appropriate to describe the first respondent's conduct as *bona fide* but unfortunately wrong. It would be an entirely reasonable outcome for the third respondent to have limited the back pay in such a case, on the basis of what is just and equitable to both parties, which is exactly what the third respondent did. Therefore, and in my view, the applicant's review application has no prospects of success on the merits thereof, even should this be considered. For this reason as well, the condonation application must fail and with it, the review application.

Conclusion

[56] Based on what has been set out above, I conclude that the applicant's condonation application cannot succeed. The applicant has failed to demonstrate good cause as required by law. Added to this, the award had actually been

acquiesced in and the principle of peremption prevents it now being challenged. On the merits or the review, the applicant's case has no merit as well. The review application must be dismissed.

[57] In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I exercise this discretion in favour of the first respondent, as the applicant has, in essence, failed to provide any explanation why it did not bring its review application timeously and simply did not take the Court into its confidence. Considering the individual applicant has since become deceased, I however do not believe it appropriate or fair to burden his estate with the costs of this matter and considering that NUMSA is an actual party to the proceedings, I would only make the costs order applicable against it. This matter should never have come to Court and NUMSA ought to have known this. It would, therefore, be appropriate in this instance that NUMSA as an applicant party pay the costs of the failed review application.

Order

[58] I, accordingly, make the following order:

58.1 The applicant's condonation application is dismissed;

58.2 The applicant's review application is dismissed;

58.3 The applicant union, National Union of Metalworkers of SA (NUMSA), is ordered to pay the costs of the application.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Mr Cartwright of David Cartwright Attorneys
For the First Respondent:	Advocate E Tolmay
Instructed by:	Webber Wentzel Attorneys